SUPREME COURT OF NOVA SCOTIA
Citation: *David v. Beals Estate*, 2015 NSSC 288

Date: 20151022
Docket: Halifax No. 433776
Registry: Halifax

Between:

Julia Marie David, Shenner May Williams, Sydney Willis, Greta Beals, Leonard Dion Beals, Gwendolyn Beals, Garfield Beals Jr., Lavinia Thompson, Murphy Beals, Gerald Beals, Myles Nelson Beals, Cheryl Francis, Ranosker Beals, Phillip Fraser, Elma Fraser, Saunderson Fraser, Clay Fraser, Laverne Beals, Wade Beals, Derrek Beals, Wanda Beals, Denise Beals, and Caunise Smith

Applicants

v.

Myles Dominic Beals in his capacity as Executor of The Estate of the Late Garfield Beals

Respondent

Decision

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	May 11 and 12, 2015, in Halifax, Nova Scotia
Final Written Submissions:	April 14, 2015
Counsel:	Rebecca L. Hiltz LeBlanc, for the Applicants Peter L. Coulthard, for the Respondent

By the Court:

[1] This is an application under s. 3(1) of the *Testator's Family Maintenance Act*, R.S.N.S. 1989, c. 465 (the "*Act*"), to vary the terms of the last will and testament of Garfield Beals dated November 6, 2001 (the "Will").

Background

[2] Garfield Beals died on September 3, 2012. He was predeceased by his wife, Gertrude Beals, and two of his twelve children.

[3] Gertrude Beals died intestate in March 2001. At the time of her death, she and her husband lived at 63 Williston Lane, North Preston, Nova Scotia (the "Home"). Her interest in the Home and a GIC worth $25,000 were her only major assets. Her GIC was eventually distributed amongst her children. They each received $1,500 after taxes. I am prepared to infer that Garfield Beals received nothing from the GIC. Gertrude Beals' interest in the Home passed to her husband, and he continued to live there until his death.

[4] Garfield Beals had twelve natural-born children. As mentioned, Garfield Beals was predeceased by two of his children, namely Vaughan Beals and Evangeline Fraser. Eight of the children comprise the applicants in this proceeding: Julia Marie David, Shenner May Williams, Greta Beals, Leonard Dion Beals, Garfield Beals Jr., Murphy Beals, Gerald Beals, and Myles Nelson Beals.

[5] A Notice of Discontinuance dated May 12, 2015, was filed on behalf of Sydney Willis, Gwendolyn Beals, Cheryl Francis, Lavinia Thompson, Ranosker Beals, Philip Fraser, Elma Fraser, Saunderson Fraser, Clay Fraser, Laverne Beals, Wade Beals, Derrek Beals, Wanda Beals, Denise Beals and Caunise Smith. They are no longer parties in this proceeding.

[6] The respondent is Myles Dominic Beals ("Mr. Beals"), a grandchild of Garfield and Gertrude Beals. He is 44 years-old (his date of birth is May 26, 1971). He lived in the Home with his grandparents from the time he was born. Mr. Beals is the sole beneficiary under the Will. Mr. Beals' mother, Margaret Cummings, is a natural-born child of Garfield Beals but does not seek relief under the *Act*.

[7] While Garfield and Gertrude Beals were living together as a couple, they did not need much assistance in terms of domestic or personal assistance. They were largely self-sufficient. Mr. Beals says that he did, however, perform all of the work around the Home such as repairs, yard work, snow clearing, and errands.

[8] Shortly after Gertrude Beals passed away in March 2001, that is, within approximately two weeks of her death, a family meeting was held at the Home. All of Gertrude and Garfield's living children, with the exception of Leonard Beals, were present. Some of the grandchildren, including Mr. Beals and Blaine Calvin Beals, were also in attendance.

[9] Mr. Beals says that during the meeting, Garfield Beals stated his intention to leave the Home to Mr. Beals and Blaine Beals. Mr. Beals says that at that time, Blaine Beals indicated that he did not want any interest in the Home, as he already had a home of his own, and the Home should be left entirely to Mr. Beals.

[10] After Gertrude Beals passed away, Mr. Beals continued to live in the Home with Garfield Beals. Over the years, Garfield Beals' need for assistance increased, and Mr. Beals acted accordingly. Mr. Beals was (and continues to be) employed with the Canadian Corps of Commissionaires, a private security company. At the time, he was working shift work from 3:00 p.m. until 11:00 p.m. Mr. Beals says that he was available to his grandfather throughout the day and he provided whatever assistance was needed such as running errands and taking him to medical and other appointments. Mr. Beals also continued to perform all repairs, yard work, and snow clearing at the Home.

[11] Each of the applicants say at paragraph 29 of their affidavit, "I routinely assisted in taking care of my father's personal needs, including domestic responsibilities and medical appointments." Mr. Beals disagrees with this assertion. He says that the children's assistance with their father's personal care was largely limited to the following:

(a) Lavinia Thompson (who is no longer an applicant) came to the Home on a daily basis to cook meals for her father;

(b) Vaughan Beals (now deceased) came to the Home most evenings to stay with his father while Mr. Beals was at work, and he would leave at around 9:00 p.m. when his father went to bed; and

(c) When Mr. Beals' hours of work changed from evenings to overnights (11:00 p.m. to 7:00 a.m.), some of the children participated in a

> rotating schedule to spend the night with their father. Prior to this, Garfield Beals' needs had increased such that he could not be left alone throughout the night. Some of the applicants were reluctant to participate in the schedule, and the task often fell to the grandchildren.

[12] The evidence demonstrates that although Mr. Beals lived with his grandfather, he was a frequent guest at his girlfriend's place. Until December 2011, Mr. Beals' girlfriend, Denise Downey, rented an apartment. Mr. Beals testified that he was "back and forth" between the Home and Ms. Downey's apartment. He would leave some personal belongings at her place. In December 2011, Ms. Downey purchased a house, and the same pattern continued. Mr. Beals was a frequent guest at Ms. Downey's house. I am, however, prepared to find that both before and after Ms. Downey purchased her house, the majority of Mr. Beals' time was spent at the Home with his grandfather, and this continued until Garfield Beals passed away.

[13] When Garfield Beals passed away, Mr. Beals moved in with Ms. Downey. They have since become common-law spouses. Mr. Beals contributes to expenses such as the mortgage. I find that Mr. Beals owns no real property of his own.

[14] The Will named Mr. Beals and Blaine Beals as co-executors and co-trustees. Blaine Beals was subsequently removed and one of the applicants, Julia Marie David ("Ms. David"), replaced him.

[15] The Will directed that the trustees pay Garfield Beals' funeral expenses, administration fees and any outstanding taxes. The trustees were vested with the power of sale. Finally, the Will directed the trustees to deliver all of Garfield Beals' property both real and personal to his grandson, Mr. Beals, for his own use absolutely.

[16] According to the applicants' affidavits, Garfield Beals had indicated to each of them that they "would be provided for upon his death" (paragraph 17). None of the applicants were aware that their father had prepared the Will, or that the Will named Mr. Beals as the beneficiary.

[17] At the time of his passing, Garfield Beals' only major assets were the Home and a life insurance policy. The Home has an assessed value of $46,000.

[18] The sole beneficiary of the insurance policy was one of the applicants, Ms. David. Ms. David states in her supplemental affidavit sworn March 20, 2015, that

she paid the premiums on this policy. Mr. Beals does not dispute this evidence. On her father's death, she received approximately $13,000 under the policy. Ms. David says that nearly all of the insurance proceeds were used to pay funeral expenses and the remaining $3,200 was paid to Mr. Beals to assist with expenses related to Garfield Beals' estate. There is some disagreement on these points.

[19] Garfield Beals had a sum of money in a bank account which Mr. Beals says he has been using to cover the other expenses of the estate.

Issue

[20] The issue on this application is whether the applicants are entitled to relief under s. 3(1) of the *Act*.

Law

[21] The *Act* provides at s. 3(1):

> 3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

[22] Thus, relief under the *Act* is only available to "dependants" of the testator. The applicants must therefore show that they are "dependants" within the meaning of the *Act*.

[23] The *Act* defines a "dependant" as "the widow or widower or the child of a testator" (s. 2(b)). "Child" is defined to include "a child … of which the testator is the natural parent" (s. 2(a)(iii)). The applicants do not need to show actual dependency (*McIntyre v. McNeil Estate*, 2010 NSSC 135, [2010] N.S.J. No. 218 at para. 19 [*McIntyre*]).

[24] Once the applicants have shown they are "dependants", they then have the onus of showing on a balance of probabilities that the testator did not make adequate provision for their proper maintenance and support (*McIntyre*, *supra* at para. 8).

[25] I must bear in mind that the *Act* does not give this Court an unfettered discretion to interfere with a testator's intentions. As noted in *Redmond v. Redmond Estate (Re)* (1996), 155 N.S.R. (2d) 61, [1996] N.S.J. No. 443 (S.C.), "The starting point on an application such as this must be that the testator has a basic right to dispose of his own property in such manner as he may choose to do so" (para. 23). And in *Walker v. Walker Estate* (1998), 168 N.S.R. (2d) 231, [1998] N.S.J. No. 235 at para. 40 [*Walker*], Goodfellow J. quoted with approval the following statement of the New Brunswick Court of Appeal:

> [27] The common law right to dispose of one's assets by will is deeply rooted and must only be avoided where there is a clear case made by the claimant. Although a liberal interpretation must be favoured, some attention must be given to the fact that the freedom of testamentary disposition has not been abolished …

[26] More recently, in *McIntyre, supra* at para. 6, Forgeron J. stated:

> At common law, a testator has the right to dispose of his/her property in any way he/she so chooses. Courts must, therefore, be cautious about rewriting the will of a testator: *Walker v. Walker Estate* (1998), 168 N.S.R. (2d) 231 (S.C.) per Goodfellow J. Although the *Testators' Family Maintenance Act* places a limit on the right of testamentary disposition, interference is to be avoided except when a clear case has been made out by the claimant …

[27] The Supreme Court of Canada in *Tataryn et al v. Tataryn Estate*, [1994] 2 S.C.R. 807, [1994] S.C.J. No. 65, similarly stated at para. 33:

> 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.

[28] Thus, it is clear that an individual's testamentary freedom—their right to dispose of their property in any way they choose—is an important right that should not be interfered with lightly. However, as the *Act* recognizes, there are limits.

[29] The *Act*'s purpose was considered by this Court in *Walker*, *supra* at para. 25:

> The mischief sought to be remedied by the legislation is stated in *Re Allen, Allen v. Manchester* [1922] N.Z.L.R. 218, at page 220, adopted by our Court of Appeal in *Garrett v. Zwicker* at page 127, Salmond, J., stated at page 220:
>
> > The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.

[30] Thus, one may lose their right to complete testamentary freedom when they fail to meet their basic legal and moral obligations to their spouse and children. The *Act* aims to address such transgressions. It provides a limited avenue for relief where a testator has failed to make proper and adequate provision for their spouse and children. Where an applicant shows a "clear case" of inadequate provision, I can order that the applicant be provided for out of the testator's estate, notwithstanding the terms of a will.

[31] As to the meaning of "adequacy", Moir J. in *Welsh v. McKee-Daly*, 2014 NSSC 356, [2014] N.S.J. No. 507 [*Welsh*], stated:

> 42 The British Columbia statute was at issue in *Tataryn*. In light of *Zwicker*, no difference in principle turns on British Columbia's requirement for "adequate, just and equitable" maintenance and support compared with our simple "adequate".
>
> 43 The discussion in Zwicker makes it clear that the simple reference to adequacy does not mean barely adequate. It captures moral obligations of the same kind as in "just and equitable".
>
> 44 The broad interpretation of adequacy is evident in other Nova Scotia decisions. See for example, *Harvey v. Powell Estate*, [1988] N.S.J. 299 (Nathanson J.); *Redmond v. Redmond Estate*, [1996] N.S.J. 443 (Tidman J.), and; *McIntyre v. McNeil Estate*, [2010] N.S.J. 218 (Forgeron J.). In my opinion, the holdings in *Tataryn* apply to the Nova Scotia *Testators' Family Maintenance Act*.
>
> [Emphasis added]

[32] In light of *Welsh* and the cases cited therein, "adequate" means not only barely adequate, but just and equitable. I must determine whether the testator's dependants have been justly and equitably provided for.

[33] Moir J. considered a number of cases and then set out at para. 54 the following helpful summary of principles:

> To summarize the principles governing the adequacy of provisions in a will:
>
> - The question is whether the testator has chosen provisions that fall within the range of options that are appropriate in the circumstances.
>
> - One examines whether the provisions are consistent with legal obligations the testator bore during life.
>
> - Legal norms prevail over moral norms, so one examines secondly the testator's moral obligations.
>
> - The court interferes with testamentary freedom only if the testator chose an option that falls below his or her obligations as defined by legal and moral norms.
>
> - Assets automatically transferred on death are relevant to this inquiry, although they are not available for a remedy under the statute.
>
> If the provisions in the will are inadequate, the court makes an order that "achieves the justice the testator failed to achieve."

[34] I agree with and adopt this summary. Thus, I am permitted to interfere with a testator's freedom only where they have disposed of their estate in a matter that offends their basic legal and moral obligations.

[35] Although the applicant does not need to show actual dependency, the extent of a testator's moral obligations to the applicant is determined with reference to the applicant's needs and the size of the estate. MacKeigan C.J.N.S. in *Zwicker Estate v. Garrett* (1976), 15 N.S.R. (2d) 118, [1976] N.S.J. No. 20 (S.C. (A.D.)) [*Garrett*], stated at para. 35:

> The dependent claimant need not, however, show need in the sense of actual want in order to qualify for consideration under the Act, and need not show actual dependency upon the testator. The need is relative, relative to the extent of the estate and the strength of other claims. I agree, as did Dickson, J.A., in *Barr v. Barr, supra* (25 D.L.R. (3d) at p. 411), with Gresson, P., of the New Zealand

Court of Appeal in *Re Harrison (Deceased), Thomson v. Harrison*, [1962] N.Z.L.R. at p. 13:

> "It is rather unfortunate that there has crept into the cases over the years a disposition sometimes to consider first the 'need' of the applicant and then to turn to a consideration of the extent of the estate and other claims there might be upon the testator. These considerations do not admit of separate consideration; they are interrelated. The 'need' of an applicant, or rather his or her needs -- the plural form is I think preferable -- cannot be considered in vacuo. What has to be assessed are the merits of the claim having regard to the applicant's circumstances as at the date of the death of the testator; relations between the testator and the applicant in the past; and the extent of his estate and the strength of other claims."

[Emphasis added]

[36] And in *Walker, supra* at para. 39:

> There is obviously no clear legal standard by which to judge the moral duties, as McLaughlin, J., observed. A thorough review of the cases shows only that each case turns on its particular facts. McLaughlin, J., suggests that in general, "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 (i.e. independent adults) should be made.

[37] In *Garrett, supra*, MacKeigan C.J.N.S. for the Court stated at paras. 36-37:

> 36 To justify interference with a will a court must thus find a failure to provide "proper maintenance and support", i.e., both a need for maintenance, relative to the size of the estate, and a moral claim, which may be of varying strength.
>
> 37 All "dependents" of a testator do not necessarily have moral claims of equal strength. A testator is entitled, for example, to discriminate among his children, giving one more than another, for good reason or no apparent reason, so long as he commits no "manifest wrong" in failing to give one the minimum that is "proper maintenance and support" in the circumstances …
>
> [Emphasis added]

[38] And further, at paras. 41-43:

> 41 After quoting the foregoing, Dickson, J.A., in *Barr v. Barr* at p. 410 pointed out that "the dominant theme running through the cases ... is one of ethnics, even more than economics" and "that heavy emphasis is placed upon the moral aspects of the problem". He went on:

> 'The Court was never intended to rewrite the will of a testator and in discharging its difficult task of correcting a breach of morality on a testator's part the Court must not, except in plain and definite cases, restrain a man's right to dispose of his estate as he pleases."
>
> 42 The task before this Court is to determine whether the testator failed to make "adequate provision in his will for the proper maintenance and support" of his adult daughter, the respondent Mrs. Garrett, so as to warrant interference by the Court. The question to be asked is moral, not economic. In ignoring the respondent in his will, was the testator in all the circumstances guilty of a "breach of morality", or a "manifest breach of moral duty"?
>
> 43 The question must be answered by weighing and balancing the nature and extent of the claimant's need, the size of the estate, the strength of the claimant's moral claim, and the significance of the testator's attempt to fulfil his primary obligation to his wife.
>
> [Emphasis added]

[39] To assist with the analysis, the *Act* delineates various factors for consideration:

> 5 (1) Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application including, without limiting the generality of the foregoing,
>
> (a) whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act;
>
> (b) whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support;
>
> (c) the relations of the dependant and the testator at the time of his death;
>
> (d) the financial circumstances of the dependant;
>
> (e) the claims which any other dependant has upon the estate;
>
> (f) any provision which the testator while living has made for the dependant and for any other dependant;
>
> (g) any services rendered by the dependant to the testator;

> (h) any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.
>
> …
>
> (3) Upon the hearing of an application under subsection (1) of Section 3, the judge may receive any evidence the judge considers relevant of the testators reasons, as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a dependant, including any statement in writing signed by the testator.

[40] These factors are not exhaustive. Rather, I am directed to "consider all matters that should be fairly taken into account".

[41] Goodfellow J. in *Walker, supra* at para. 49, explained:

> S.3(1) of the Act clearly confers discretionary authority in the judge taking into consideration all relevant circumstances to order whatever provision the judge deems adequate to be made out of the estate for the proper maintenance and support of the dependant.

[42] As to the meaning of discretion, Goodfellow J. stated at para. 50:

> Guidance as to the meaning of the judicial exercise of a discretionary power was recently given by our Court of Appeal in *Clark v. O'Brien* [1995] N.S.J. 458, C.A. 115107, approving of:
>
> > In *Sharp v. Wakefield et al.* [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (page 191):
> >
> > > An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case(1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.
>
> Bateman, J.A., went on to say in paragraph 37:

> In other words, the discretion must be exercised within a rational framework.

[43] Forgeron J. in *McIntyre*, *supra* at para. 23, similarly stated:

> A discretionary power is one which must be exercised according to rules of reason and justice, and not according to private opinion. It must be exercised within a rational framework …

[44] Applying these principles, I will now go on to consider whether the applicants have met their burden of establishing that they are entitled to relief under the *Act*.

Discussion

[45] The testator's children are clearly dependants as defined in ss. 2(a)(iii) and 2(b) of the *Act*. The testator's children are Garfield Beals' natural-born children.

[46] Garfield Beals made no provision for the applicants in the Will. I must determine whether this was adequate, just and equitable in the circumstances, while affording the appropriate amount of deference to Garfield Beals' testamentary freedom.

[47] Because the applicants were adult children of the testator, Garfield Beals had no legal obligation to provide for them. Any obligation to provide for his children was a moral one. The extent of his moral obligation must be determined with reference to the needs of the applicants and the size of the estate. These considerations are interrelated. The strength of the applicants' moral claim will also be relevant. Further, the *Act* requires me to "inquire into and consider" several factors, including whether the applicant's conduct or character should disentitle him to an order under the *Act* (s. 5(1)(a)); whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support (s. 5(1)(b)); the relations between the applicant and the testator at the time of the testator's death (s. 5(1)(c)); the financial circumstances of the applicant (s. 5(1)(d)); the claims of the other dependants upon the estate (s. 5(1)(e)); any provision made by the testator during his lifetime for any of the dependants (s. 5(1)(f)); any services rendered by the dependant to the testator (s. 5(1)(g)); and any sum of money or any property provided by the dependant for the testator (s. 5(1)(h)). The *Act* says I may also consider evidence of the testator's reasons (s. 5(3)).

[48] The size of the estate is not in dispute. The parties agree that the estate is entirely comprised of the Home, valued at $46,000. This is not a large sum, particularly when one considers the number of applicants seeking a share. The applicants say the Home holds great personal value to them and their family (paragraph 22 of the applicants' affidavits). I am not sure what weight I should attach to "personal value", particularly when the only practical result of granting this application would be for the Home to be sold and the proceeds divided (more on this later).

[49] I will consider the applicants' needs and their financial circumstances (s. 5(1)(d)) together. For the most part, I have little to no evidence in this regard. Each of the applicants say at paragraph 31 of their affidavit, "I am currently of modest means". Only one of the applicants was cross-examined on this topic. On cross-examination, Myles Nelson Beals testified that he resides in his own home with an assessed value of $230,000 and subject to a mortgage with an original amount of $116,000 (he did not know the current balance). I have no further information respecting the applicants' assets and debts. I have no idea whether the other applicants' homes are owned or rented. I have no evidence about their employment statuses, and their financial responsibilities to others, such as spouses or children. This puts me in a difficult position, because the financial circumstances of the applicants is an important factor in such applications: *Wilson v. Watson*, 2006 BCSC 53, [2006] B.C.J. No. 48 at paras. 6 & 7 [*Wilson*]; *Garrett*, *supra* at paras. 23, 35 & 43). If I am to consider the applicants' financial circumstances relative to the size of the estate, I require at least some basic level of detail. Ms. Hiltz LeBlanc, counsel for the applicants, argues that saying the applicants are "of modest means" is enough. I disagree. "Modest means" can mean different things to different people.

[50] In the result, I cannot say whether, relative to the size of the estate and relative to Mr. Beals' financial circumstances, the applicants' financial circumstances help or hurt their application.

[51] I do not have any evidence of the applicants' conduct or character that would disentitle them to relief under the *Act* (s. 5(1)(a)). I find that this is not a factor, one way or the other.

[52] I do not have any evidence to suggest that any of the applicants is likely to become possessed of or entitled to any other provision for maintenance or support (s. 5(1)(b)). Again, this factor is irrelevant in the circumstances.

[53] I have limited evidence of the applicants' relationships with their father at the time of his death (s. 5(1)(c)). The applicants each say they had a loving, happy and close relationship with their father, and they visited him regularly (paragraphs 27-28 of the applicants' affidavits). Mr. Beals does not dispute this evidence, and I find that the applicants had good relationships with their father.

[54] I find that during his lifetime, Garfield Beals did not give any of the applicants any extraordinary sums of money or other financial assistance (s. 5(1)(f)), with one exception. Following Gertrude Beals' death, each of the applicants received an equal share of a $25,000 GIC. As previously stated, I am prepared to infer from the evidence that Garfield Beals received nothing from the GIC. This was notwithstanding his presumed entitlement to one third of his wife's estate under s. 4 of the *Intestate Succession Act*, R.S.N.S. 1989, c. 236. I find that Garfield Beals' choosing to not enforce his right to share in the residue of Gertrude Beals' estate is akin to an *inter vivos* gift to his children, in the amount of one third of $25,000, or approximately $8,000 (before tax).

[55] There was no evidence introduced showing that any of the applicants provided Garfield Beals with money or property (s. 5(1)(h)), again with one exception. The uncontested evidence shows that on Garfield Beals' death, one of the applicants, Ms. David, received $13,000 under a life insurance policy. Ms. David says that she paid the premiums on this policy. Ms. David also says that nearly all of this amount was used to pay her father's funeral expenses, and the remaining $3,200 was paid to Mr. Beals to assist with other expenses of the estate. Mr. Beals disputes this assertion.

[56] The applicants say that the executors ought to have paid the funeral expenses out of the estate as directed by the Will. However, a challenge to the executors' administration of the estate has not been advanced. This is an application for dependants' relief. That said, to the extent that Ms. David is a dependant seeking relief, the fact that she has spent money for the benefit of the estate is relevant, and I will keep this fact in mind.

[57] The extent of "services" provided by the applicants to Garfield Beals during his lifetime (s. 5(1)(g)) is in dispute. The applicants each say at paragraph 29 of their affidavit, "I routinely assisted in taking care of my father's personal needs, including domestic responsibilities and medical appointments." We have no further details about the level of assistance provided by each of the applicants and the frequency of that assistance.

[58] Mr. Beals says that none of the applicants played a significant role in Garfield Beals' care. One of the applicants lives out of the Province. Some did not assist their father at all, despite living close by. When Mr. Beals' work schedule changes, some agreed to spend nights with their father on a rotating schedule, but Mr. Beals says that many of them only did so begrudgingly, or tried to pass off their responsibilities to the grandchildren.

[59] As is often the case in such matters, I suspect the truth lies somewhere in the middle. I am inclined to believe that the applicants provided their father with varying degrees of assistance from time to time. However, on weighing the level of detail and corroboration provided by each of the parties, I find that Mr. Beals' version of events is probably closest to the truth. I find that Mr. Beals' assistance to his grandfather went above and beyond. He provided Garfield Beals with constant help with personal care, household chores, and transportation to appointments. I am assisted by the affidavit of Dr. William Lee. Dr. Lee was Garfield Beals' family physician. Dr. Lee stated in an affidavit that to his knowledge and observation, Mr. Beals was the only one to bring Garfield Beals to his medical appointments, at least in the last two to three years before his death. I accept Dr. Lee's evidence and I find that the lion's share of the responsibility for Garfield Beals' care was borne by Mr. Beals.

[60] I next consider Mr. Beals' competing claim (s. 5(1)(e)). Although he is not a "dependant" within the meaning of the *Act*, he has a competing claim based on his status as sole beneficiary under the Will. The evidence respecting Mr. Beals' financial circumstances is once again limited. We know he works full-time for the Canadian Corps of Commissionaires, a private security company. Mr. Beals testified that he has no benefits, but he does not consider himself to be in a position of financial hardship. He considers himself to be of "normal" means. He is able to pay his share of his and Ms. Downey's living expenses. On the other hand, Mr. Beals owns no real property.

[61] Mr. Beals' relationship with grandfather was obviously a close and loving one, but the fact remains that he was not Garfield Beals' natural-born child. What impact does this have on Mr. Beals' position? Counsel for the applicants says it makes a big impact. Ms. Hiltz LeBlanc relies on *Buchanan Estate (Re)*, [1975] N.S.J. No. 29, and *Jefferson v. Johnson*, [2000] N.S.J. No. 196 (C.A.). With respect, I find that these cases do not assist the applicants.

[62] Ms. Hiltz LeBlanc says that based on these authorities, the *in loco parentis* relationship that may have existed between Garfield Beals and Mr. Beals cannot give rise to a claim of equal standing to that held by Garfield Beals' natural-born children. I find that the cited cases stand for the proposition that a claim for relief under the *Act* cannot be based on an *in loco parentis* relationship. In other words, a person who is not a child of the testator cannot bring a claim for relief based on the fact that the testator stood *in loco parentis* to them. The *Act*'s definition of "dependant" is not so broad. However, Mr. Beals is not making a claim under the *Act*, he is responding to one. His entitlement to any share in Garfield Beals' estate does not stem from the *Act*, but from the Will. He therefore does not need to bring himself within the parameters for standing under the *Act*. In this regard, the fact that he is not a natural-born child of the testator makes no difference.

[63] That said, I understand Ms. Hiltz LeBlanc to take the position that a person who has standing under the *Act* by virtue of their status as a dependant must have a stronger claim to an estate than someone who does not have standing. No authority has been cited that directly supports this assertion, and I have located case law to the contrary.

[64] For example, in *Rafuse Estate, Re* (1990), 97 N.S.R. (2d) 46, [1990] N.S.J. No. 540 (S.C. (T.D.)) [*Rafuse*], Freeman L.J.S.C. denied the adult children's application for relief, finding that the sole beneficiary under the will had a "superior moral claim". The sole beneficiary under the will was the testator's mother. She had cared for the testator through a long and difficult terminal illness, and the effect of the will was to return to her real property that she had conveyed to her son years before. Freeman L.J.S.C. found as follows:

> 25 If the children are to succeed in their claim, only two routes appear to be open to them. The first is that if they are struggling and in need of assistance—and I would so find—it would be proper to grant them an award "if the means of the testator were great". Because of the minimal value of the estate, the fact it consists only of real property, and the encroachments to be made by estate expenses, I would decline to exercise my discretion in their favour on that basis.
>
> …
>
> 29 From his viewpoint at the time of making his Will, or at the time of his death, it would have appeared that he had only one asset of substance, the property. It had been part of his mother's property when she let him have it in 1967. The $ 2,000 he paid her would have been more reflective of market values then than now, but even then it suggests a preferential transaction entered into by

> his mother not because she wanted to break up her property but because she wanted to help her son and his family. He would have seen a duty to return the property to his mother when his need for it was over. The asset would have appeared indivisible; attempting to charge it with a duty to make a payment to the children would predictably have resulted in a sale to strangers. He had no relationship with his children; he owed them no gratitude. The overwhelming influence in his life was the debt of gratitude he owed his mother, and he would have seen only one way to attempt to pay it.
>
> 30 In her affidavit Mrs. Rafuse says: "My son knew that I rely on Old Age Security and the supplement for my income and felt that he was returning to me that which I had given to him."
>
> 31 He had wronged his children, but that must have seemed far in the past and circumstances had changed. He was without means of redressing that wrong without creating a fresh wrong against his mother.
>
> …
>
> 33 A just and wise father in Mr. Rafuse's position at the time of making the Will would have recognized he had no means of providing a benefit for the children, however much he may have wished to, because of the "relative urgency" of his moral duty to return to his mother his only real asset, the property she had conveyed to him and, during the last five or more years of his life, enabled him to retain. I will not exercise my discretion under the Act to disturb a Will which I find to be just under all of the relevant circumstances.
>
> 34 The plaintiffs would have recovered if the testator had had a larger estate or assets not impressed with the superior moral claim of the defendant. I dismiss their claim but I will not award costs against them.

[65] The result in *Rafuse* demonstrates that one who qualifies as a "dependant" under the *Act* does not necessarily have a stronger moral claim over everyone else, particularly where that other person is the sole beneficiary under the will, and the testator appears to have had good reasons for designating them as such.

[66] *Rafuse* also demonstrates that where the estate is small, it may be "just and wise" for the testator to forego benefiting his children in favour of benefiting someone with a superior moral claim. This relates to the idea that it will be more difficult to make out a claim that will "materially disturb the [t]estator's wish to leave the bulk of his estate to [someone else]": *Hart v. Richard* (1993), 124 N.S.R. (2d) 333, [1993] N.S.J. No. 367 at para. 71 (S.C.) [*Hart*].

[67] The *Hart* case is instructive. The testator's estate was valued at nearly $1 million. He left $5,000 to three of his children, and $15,000 to his fourth child. The balance was bequeathed to his common-law spouse. The children brought an application under the *Act*. Saunders J. (as he then was) awarded each of them sums ranging from $40,000 to $60,000. Saunders J. reasoned:

> It is hardly just that after leaving an estate of $1 Million, the Testator gave half of one percent to each of the three applicants, about one percent to another child and a sister, and ninety-seven percent to his common law wife (para. 73).

[68] Saunders J. further found that the award would not interfere with the style of living to which the testator's common-law spouse had become accustomed, and would not materially disturb the testator's wish to leave the bulk of his estate to her (paras. 70-71).

[69] Wilson J. in *Wilson*, *supra*, in deciding a claim by an independent adult child, set out the "modern approach" to assessing claims under the *Act*. Among other things, Wilson J. noted at para. 7:

> 6. The moral claim of independent adult children is more tenuous than the moral claim of spouses or dependent adult children. But if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made.
>
> 7. Examples of circumstances which bring forth a moral duty on the part of a testator to recognize in his Will the claims of adult children are: a disability on the part of an adult child; an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; the present financial circumstances of the child; the probable future difficulties of the child; the size of the state and other legitimate claims.
>
> [Emphasis added]

[70] The applicants rely on *Kuhn v. Kuhn Estate* (1992), 112 N.S.R. (2d) 38, [1992] N.S.J. No. 74 (S.C. (T.D.)) [*Kuhn*]. In that case, the applicant was a 60 year-old independent adult child that had been disinherited by his father. The testator had divided his estate between his other two sons. During his life the testator had given a house to the applicant, but the testator and his son later became estranged. The will was made during the period of estrangement. Although the

testator and his son reconciled four years before the testator's death, the will had not been varied. Roscoe J. awarded the son 20% of the value of his father's estate. The estate was valued at $234,665.00.

[71] Roscoe J. explicitly stated, "the size of the estate is a very important factor". In *Kuhn*, the sizeable estate made it possible to grant the applicant a substantial sum ($46,933.00) without materially disturbing the testator's wish to leave the bulk of his estate to his two other sons. Between them, the other sons would still receive 80% of the value of the estate, or $187,732.00. On that basis, the *Kuhn* case is distinguishable from cases involving smaller estates.

[72] The *Garrett* case is a good example. MacKeigan C.J.N.S. applied similar reasoning to an estate valued at $43,000. The testator had left his entire estate to his wife. The testator's daughter brought an application for relief. The lower court granted the application, and awarded the daughter $15,000 out of her father's estate. Although MacKeigan C.J.N.S. agreed that the daughter had a good claim, he reduced the award from $15,000 to $6,000, reasoning as follows:

> 44 The basic fact is that the testator, although he loved his daughter and knew her situation in life, chose to give his wife his entire estate of $43,000.00. The daughter is not suffering from actual want but undoubtedly is in poor circumstances, with no security, and finds the battle of life a struggle. To her case Chief Justice Stout's words apply, that "if the fight was a great struggle, and some aid might help, and the means of the testator were great, the Court might, in my opinion, properly give aid".
>
> 45 The estate is certainly not great or substantial. We must assume, in the absence of evidence to the contrary, which the respondent had the burden of presenting and did not present that the widow has no material property of her own or any other source of income. The net estate after paying the costs of the present litigation will probably drop below $40,000.00, of which $33,000.00 constitutes real property.
>
> 46 Although not great, the estate should, however, produce a fair income for the widow if she does not have to sacrifice the real property, as she would be compelled to do if the award of $15,000.00 given to the daughter by the judgment appealed from were to stand. A sketchy financial statement for the deceased's business for the seven and one-half months ending August 10, 1973, filed by the appellant, suggests that Mr. Zwicker received from his real property gross rentals at the rate of about $7,500.00 per year, paid expenses (heat, electricity, taxes, insurance) of perhaps $2,800.00 per year, and thus had a net rental revenue of about $4,700.00 per year.

> 47 I assume that the testator thought he had no alternative but to leave his entire estate to his wife to maintain and support her. He undoubtedly loved his daughter, knew her circumstances, and would have liked to help her; but thought he could not do so without imperilling his wife's minimum security.
>
> 48 In so doing I think he erred. Having regard to the nature of his estate, he could and should have given his daughter something, a sum large enough to give her some material aid and yet not large enough to threaten the real property which must be his widow's main support. In my opinion, $6,000.00 would be a proper amount.
>
> [Emphasis added]

[73] To summarize, I find that the case authorities do not demonstrate that a "dependant" will always have a stronger moral claim over all others. Quite the contrary. Furthermore, it might be quite reasonable for a testator to forego disposition to his adult children where the size of the estate does not permit every potential claim to be met.

[74] Thus, I find that the strength of Mr. Beals' claim is not compromised by the fact that he is not a "dependant" within the meaning of the *Act*. His claim is based on his status as beneficiary under the Will. In consideration of Mr. Beals' relationship with his grandfather and the assistance he provided over the years, Mr. Beals' moral claim is a strong one, relative to the applicants' moral claim.

[75] Finally, I will address the evidence of Garfield Beals' intentions with respect to his estate (s. 5(3)). The applicants each say, "Over the years, my father indicated to me that I and my siblings would be provided for upon his death" (paragraph 17 of the applicants' affidavits).

[76] On the other hand, we have Mr. Beals' evidence that, at the family meeting held approximately two weeks after Gertrude Beals' death, Garfield Beals told Mr. Beals and his cousin, Blaine Beals, that he wanted to leave the Home to them (paragraph 17 of the Affidavit of Myles Dominic Beals).

[77] Both of these statements are hearsay. I must consider whether they are admissible based on the principled exception.

[78] The seminal case on hearsay is *R. v. Khelawon*, 2006 SCC 57, [2006] S.C.J. No. 57. In *Canadian National Railway Co. v. Halifax (Regional Municipality)*, 2012 NSSC 300, [2012] N.S.J. No. 435 at paras. 6 & 8, I considered *Khelawon* and stated:

> The "essential defining features" of hearsay are ... "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant." (*Khelawon* at para. 35) It must be emphasized that it is "only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises." (*Khelawon* at para. 36) …
>
> … [B]y putting one's mind, at the outset, to the second defining feature of hearsay -- the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci, J. in *R. v. Starr*, [2000] 2 S.C.R. 144, identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer, C.J. in U. (F.J.), [1995] 3 S.C.R. 764, expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested".

[79] A hearsay statement is *prima facie* inadmissible. However, courts have recognized that a rigid approach which would exclude all hearsay evidence would create inefficiency in our judicial system. Therefore, we admit hearsay in circumstances where the usual concerns about hearsay are refuted. Although in the past, courts created pigeon-holed exceptions to the rule against hearsay, the Supreme Court of Canada in *R. v. Khan*, [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81, and subsequently modified in *R. v. Smith*, [1992] 2 S.C.R. 915, [1992] S.C.J. No. 74, and clarified in *Khelawon, supra*, adopted a new principled approach to hearsay evidence.

[80] This principled approach focuses on the usual concerns presented by hearsay evidence: necessity and reliability. It admits hearsay evidence where these concerns are not an issue. In doing so, the approach balances the conflicting issues of admitting evidence without cross-examination, and meeting society's interest in a trial process based on all of the available evidence: *Khelawon, supra* at paras. 61-100.

[81] The precise meaning of necessity is not easy to articulate and it seems to be largely contextual. Hearsay evidence will generally be necessary when it is not otherwise available and it is necessary to prove a fact in issue (*Smith, supra* at para. 34). The most obvious example of necessity is when the original declarant has died and is not available to testify (*Smith, supra* at para. 36). I find that the two impugned statements are necessary because Garfield Beals is deceased and aside from the Will, we have no evidence of Garfield Beals' intentions with respect to his estate.

[82] In *MacNeil v. MacNeil*, 2014 NSSC 171, [2014] N.S.J. No. 269 at paras. 44-46, Edwards J. explored the meaning of reliability:

> 44 In *R. v. Khelawon*, 2006 SCC 57, the Court considered whether certain statements were sufficiently necessary and reliable to be admitted under the principled exception to the hearsay rule. The Court discussed factors to be considered when determining whether a hearsay statement is sufficiently reliable to be admissible. At paragraph 4, Charron, J. stated as follows:
>
> > [4] . . . all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.
>
> 45 At paragraphs 61-63, the Court went on to state as follows:
>
> > [61] Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways: . . .
> >
> > [62] One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:
> >
> > > There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [-- 1420, p. 154]
> >
> > [63] Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the

> evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination . . .
>
> 46 In *R v. Hart*, 1999 NSCA 45, Cromwell, J.A. (as he then was), set out a (non-exhaustive) list of factors to consider when assessing whether reliability of a hearsay statement under the principled approach. At page 22 of the decision, Justice Cromwell stated as follows:
>
> > . . . reliability has been considered as relating to the circumstances in which the statement was made which tend to assure its trustworthiness. Without attempting an exhaustive list of such circumstances, relevant considerations include whether the statement was made on oath, whether it is made in the presence of the trier of fact (*R. v. B.(K.G.)*, *supra*), whether the maker had any motive to falsity, whether the story is one that the witness could imagine if the events had not occurred (*R. v. Khan*, *supra*), and whether, in all the known circumstances, the statement could reasonably have been expected to have changed significantly had the declarant testified and been cross-examined (*R. v. Smith*, [1992] 2 S.C.R. 915).

[83] Thus, hearsay evidence is reliable when the circumstances surrounding the statement are such as to make the statement likely to be true. Lamer J. in *Smith*, *supra* at para. 30, explained:

> … [T]he circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. … [W]here the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible.

[84] When determining reliability, courts are not limited to the circumstances surrounding the out-of-court statement. For example, corroborating evidence can be taken into account (*Khelawon*, *supra* at paras. 99-100).

[85] As Ms. Hiltz LeBlanc pointed out in oral argument, the *Evidence Act*, R.S.N.S. 1989, c. 154, s. 45, requires that evidence respecting "any dealing, transaction or agreement with the deceased" be corroborated by other material evidence:

> 45 On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of

> either or any of the parties to the action, matter or proceeding, provided that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence.

[86] There is nothing to establish the reliability of paragraph 17 of the applicants' affidavits. We have no evidence of the circumstances in which these statements were made and we have no corroborating evidence. The statements are inadmissible. On the other hand, I find that Mr. Beals' evidence of Garfield Beals' statement to his grandsons is reliable. The statement was apparently made in the formal setting of a family meeting regarding the handling of the testator's and his wife's estate. There is no reason to believe that Garfield Beals would be disingenuous in such circumstances, and in fact, it would be counterintuitive to think that he would be anything but austere. While the evidence is self-serving because it benefits Mr. Beals, there is also convincing corroborating evidence: the Will.

[87] Having found that the two essential elements of reliability and necessity are met, and that s. 45 of the *Evidence Act* is satisfied, I find that the statement is admissible.

[88] Mr. Beals goes on to say at paragraph 17 of his affidavit:

> Blaine then said, and I do verily believe, that he did not want any interest in the Beals' Home as he already had a home of his own, and therefore the Beals' home should be left to me [Mr. Beals].

[89] Ms. Hiltz LeBlanc says this is inadmissible hearsay. I disagree. The statement has not been tendered for the truth of its contents, but rather, for the fact the statement was made, i.e. to show what information was available to Garfield Beals when deciding how to allocate his estate. See for example *R. v. McDonald*, 2013 ONCA 442, [2013] O.J. No. 3227 at para. 59. Whether Blaine Beals wanted an interest in the Home is irrelevant. He is not a party to these proceedings.

[90] I find that the evidence of Garfield Beals' intentions with respect to his estate strengthens Mr. Beals' moral claim. The evidence shows that Mr. Beals had good

reason to leave his Home to his grandson, and that he had this plan in mind around the same time he executed his Will.

[91] Against this backdrop, I must decide whether Garfield Beals' provision for his children—or lack thereof—was adequate, just and equitable in the circumstances. I agree with the submission of Mr. Coulthard, counsel for Mr. Beals, that the fact Garfield Beals made no provision for the applicants does not compel the conclusion this was inadequate.

[92] I am guided by Moir J.'s summary of principles in *Welsh*, *supra* at para. 54, which included the following:

> - The question is whether the testator has chosen provisions that fall within the range of options that are appropriate in the circumstances.
>
> …
>
> - The court interferes with testamentary freedom only if the testator chose an option that falls below his or her obligations as defined by legal and moral norms.

[93] Garfield Beals' options were limited by the size and nature of his estate. Mr. Coulthard identified some of his options. Garfield Beals could have left the Home to all of his children, an option fraught with potential problems. He could have left the Home to one or some of his children, requiring him to pick favourites. Furthemore, choosing this option could have very well resulted in an application being made by the remaining children. He could have directed that the Home be sold and the proceeds divided among his children. The benefit to each child could have been equal, but it would have been a small benefit, and the Home would no longer be held by someone in the family. Or he could have left the Home to his grandchild—someone who had lived in the Home throughout his life, had assumed primary responsibility for maintaining it, and who had greatly assisted Garfield Beals over the years—thereby benefiting one person greatly, rather than benefiting many people very little. He chose the last option, and in consideration of the size of his estate, and Mr. Beals' strong moral claim, this fell within the range of what was appropriate. I therefore decline to use the *Act* to interfere with Garfield Beals' testamentary freedom.

[94] Finding otherwise would have the effect of not just modifying the Will, but rewriting it. The intended sole beneficiary would wind up with a small fraction of

what he otherwise would have received. He would be deprived of the whole benefit of the Home.

[95] The applicants do not specify what remedy they seek, other than an equal share of the estate. Do they wish to each have an interest in the Home, either as joint tenants or tenants in common? Or do they want the Home to be sold, and the proceeds divided equally amongst them?

[96] As set out above, the purpose of the *Act* is to remedy a testator's failure to make adequate, just and equitable provision for his dependants: *Walker*, *supra* at para. 25. Pursuant to s. 3(1), I am permitted to "order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant". I fail to see how awarding each of the applicants together with Mr. Beals an interest in the Home would achieve that end.

[97] Accordingly, the only practical solution would be for me to order sale and equal division of the proceeds among the applicants and Mr. Beals. This would be a flagrant disregard of Garfield Beals' intended disposition.

Constructive or Resulting Trust, *Quantum Meruit* and Unjust Enrichment

[98] For the foregoing reasons it is unnecessary for me to consider Mr. Beals' arguments respecting constructive or resulting trust, *quantum meruit* and unjust enrichment.

Conclusion

[99] The applicants seek an equal distribution of the estate as between them and Mr. Beals. For the reasons set out above, I dismiss the application with costs to the respondent.

LeBlanc, J.