IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: White v. White Estate, 2007 NSSC 254

Date: August 24, 2007
Docket: SFSNOTH32791
Registry: Sydney, Nova Scotia

Between:

Patrick Bernard White
Applicant

v.

Estate of Murdock White
Respondent

Judge: The Honourable Justice Darryl W. Wilson

Heard: January 29th & 30th, 2007

Written Submissions: February 21, 2007

Written Decision: August 24, 2007

Counsel: Gregory MacDonald, Q.C., Counsel for the Applicant
Darlene MacRury, Counsel for the Respondent

BY THE COURT:

[1] The Plaintiff, Patrick Bernard White's, action pursuant to the **Testator's Family Maintenance Act** alleges that his father, Murdock White, died without having made adequate provisions in his Will for Bernard's proper maintenance and support.

[2] The estate of the late Murdock White contests the claim and requests costs.

BACKGROUND

[3] The Testator, Murdock White, died December 3, 2003, at the Aberdeen Hospital in New Glasgow. He was visiting his daughter, Helen Frost of Westville, Pictou County, when he became ill. At the time of his death, the Testator resided in the family home at 3487 Warren Avenue, New Waterford, Cape Breton County.

[4] The Testator, a retired Devco miner, was 83 years of age at the time of his death and had been predeceased by his spouse, Annie Christine White,

who died on July 30, 1992. The Whites were predeceased by a son, John Joseph White, who died January 31, 1951, at the age of 6 and the Testator was predeceased by an adult son, Frederick Leo White, who died January 4, 1998, at the age of 51.

[5] The Testator is survived by eight children, namely: Mary Catherine Chiasson, Massachusetts, USA, 61; Terrance Murdock White, New Waterford, 57; Ann Marie Copan, New Waterford, 55; Eileen White, New Waterford, 53; the Plaintiff, Patrick Bernard White, New Glasgow, 52; Evelyn Frost, Westville, 50; Peter Wayne White, Scotchtown, Cape Breton, 47; and Joseph Archibald White, New Waterford, 45.

[6] The Plaintiff is the only child of the Testator who filed a claim alleging the Testator did not make an adequate provision for his maintenance and support. Diane Copan was a witness on his behalf. Eileen White, the main Beneficiary, testified against the claim. Other family members did not give evidence.

[7] The Testator developed silicosis from his employment as a coal miner and was forced to retire in 1970 with five school-aged children still residing at home. The family witnesses testified that they enjoyed a wonderful family life growing up in their parents' home in New Waterford. A large family and limited financial resources prevented most of the family from pursuing post-secondary education. Eileen, who became a teacher and Bernie, who became a nurse, were the only siblings to pursue post-secondary studies. Fred resided at home until he was married in 1977 at the age of thirty (30). He paid room and board and assisted his parents and siblings, financially. As the family became independent, there were many family gatherings at the parents' home during Christmas and holidays and siblings visited one another at their residences.

[8] Eileen White, the estate's main Beneficiary, graduated from high school in 1971. She began University studies at Xavier College in Sydney for one (1) year and completed three (3) years of study at St. F.X. in Antigonish where she obtained a Bachelor of Education degree in 1975. She resided at home during her years of studies at Xavier and on summer vacations. She financed her education through employment and student loans. Her parents provided

care packages when she was at St. F.X. She was employed as a teacher for the Halifax-Dartmouth School Board from 1975 to 1994 when she went on long-term disability leave as a result of an accident at work. While residing in Halifax she made frequent trips home to visit her parents and spent extended vacation and holiday time with her parents. She resided with them for one year while participating in a teacher exchange program. She helped her parents and younger families financially.

[9] Her visits home increased after the death of her mother. Again, in the winter of 1995 she spent two (2) weeks of each month residing with her father in New Waterford, at which time she provided assistance with personal care and light household maintenance. She resided with her common-law spouse, Doug Petrie, in Dartmouth the other two (2) weeks. She has been residing in a common-law relationship with Mr. Petrie since 1981 and they do not have any children. She moved from Halifax to reside permanently with her father in New Waterford in September, 2002. Mr. Petrie moved to New Waterford in January, 2003. Eileen White's income is $32,000.00 yearly, from long-term disability and Canada Pension disability benefits. Mr. Petrie's income is $45,000.00 a year.

[10] The Testator remained in the family home after his wife's death in 1992. Although limited physically by his lung condition, he could drive his vehicle, visit friends and family, go to concerts and attend to his banking and bills, provided he used his machine. Local family members assisted him with meals, house cleaning, laundry and companionship.

[11] Cathy, who lived in Massachusetts, resided with her father for four (4) or five (5) months during the winters of 1993, 1994 and 1995. A new personal relationship and re-occurring fibro myalgia made it impossible for Cathy to spend significant periods of time with her father. During the winter of 1995, Eileen, after going on long-term disability, began residing with her father two (2) weeks a month, during the winter of 1995. Diane and her family resided with him from June to December, 1996. Helen Frost and her husband Art would make frequent trips from their home in Westville to spend time with the Testator.

[12] The Testator's care required more attention from 2000 onward. During 2000 and 2001, Diane resided with him for the two (2) weeks a month when

Eileen returned to her home in Halifax. In June, 2001, Joseph and his family sold their own home and on the Testator's invitation, moved into his home. Eileen continued to stay two (2) weeks a month with her father, despite Joe's and his family's presence in the home. According to Eileen, her father wanted her visits to continue and told Joe that Eileen being able to visit two (2) weeks a month was a condition of him moving into the home. Eileen was concerned about her father's medical condition. Joe had said that he was not good around doctors and hospitals. Eileen had a lot of insight into her father's medical condition and went with him on many occasions to the hospital.

[13] This arrangement led to conflict. Some family members believed that Eileen was trying to control all aspects of her father's care and be the dominant person in his life. Joe and his wife were upset that Eileen caused difficulties when she was in the home. Her visits were reduced to one (1) week a month in the home and the other week was spent with friends. Joe and his family became upset that she advised friends of the conflict. By January, 2002, Joe told his father he did not want Eileen staying in the home. The Testator made arrangements for Eileen to stay with his sister, Pauline MacKinnon, for the two weeks she visited him in New Waterford. Either the

Testator visited Eileen at Pauline MacKinnon's residence or she visited him in his home if Joe and his family were not present. Eileen was upset that Joe involved other family members including Wayne, Diane and Terrance, to a degree, in the conflict. He was aware they did not want her at the residence but she knew her father wanted her there and relied on her for his medical needs. Her father was caught in the conflict and was upset by it. During a visit to her father's residence in March, 2002, there was a confrontation between Eileen and Joe's wife, Carol, which resulted in Carol being charged and convicted of assaulting Eileen. The Testator, who witnessed the incident, was required to give evidence in court. The Testator never asked either Eileen or Joe to leave his home. However, the conflict became so great that he moved out of his own home in March, 2002 and stayed at his sister's residence with Eileen until Joe and his family finally left the residence in July, 2002. After renovations were made to the home, he and Eileen moved back to the family home. There was an attempt by Joe, Diane and Wayne to meet with their father to discuss their conflict but this resulted in more division within the family.

[14] It was then that Eileen decided to move permanently from Halifax to New Waterford and her common-law spouse moved back to New Waterford in January, 2003. According to Eileen, the Testator decided to transfer title to the family home to her when she told him she would moving to New Waterford permanently in September, 2002. He told her that she had done more for the family than anyone else. She had resisted prior attempts by her father to transfer title to the property, but agreed on this occasion. The assessed value of the home for municipal tax purposes was $23,000.00.

[15] The Testator's initial Will was executed on January 14, 2002. The Will appointed his solicitor, Sweeney Hinchey, as Executor. It provided that the family home be sold and the proceeds divided equally among all siblings; the balance of funds in the New Waterford Credit Union account be given to Eileen White, and the balance of funds in the Bank of Nova Scotia account be divided equally among the remaining children; that the residue be divided equally among all siblings. On the advice of Counsel, the Testator executed a Power of Attorney. The Testator named Eileen White as his attorney.

[16] In October, 2002, the Testator revoked his first Will and executed a second Will. This Will, again, appointed Sweeney Hinchey as Executor. It provided for two (2) small cash gifts of $200.00 each; divided the balance in the Bank of Nova Scotia account unequally with 1/4 to Cathy Chiasson, 1/4 to Helen Frost and 1/10 to each of Terry, Bernie, Wayne, Joe and Diane. The residue of the estate including all funds in the Credit Union account were bequeathed to Eileen White.

[17] Sweeney Hinchey wanted a record of the Testator's state of mind at the time of the preparation of his second Will, since the Testator had cited family conflict as a reason for changing his Will. Mr. Hinchey did not discuss the value of individual assets with the Testator and, therefore, had no idea of the estate value when the second Will was prepared. Mr. Hinchey's notes are as follows:

> **The handwritten notes of Mr. Hinchey from October 2, 2002, confirm the following:**
>
> **Summary of words of Murdock White who signing Will "They all turned against me except Eileen. Won't have changed Will but they treated me badly (other children) cursed me - hurt me and hurt me bad" ... "Bungalow - gave to Terrence and he sold it and did not tell me about it" ... "Did not pay - son in house. They made me angry".**
>
> **Absolutely positive no question about his competency to sign, know exactly what he was doing - talked with him for 30 minutes or so (alone).**

> **Eileen brought him here but when signing the Will she left, not only the Office but building and she was gone until 15 - 20 minutes after Will was signed.**

[18] The Executor's accounting indicated the value of assets at the time of death was $138,552.00, including $87,058.00 at the New Waterford Credit Union and $47,068.00 at the Bank of Nova Scotia. Adjustments to this amount included $8,435.00 in receipts and $6,286.00 in disbursements. The Plaintiff, along with siblings Terrance, Wayne, Joseph and Diane, received $4,706.78 as their 1/10 share of the balance in the Bank of Nova Scotia savings account. Cathy Chiasson and Helen Frost each received $11,767.00 as their share of the balance in this account. The balance available for distribution to Eileen White will be $96,837.00 less probate fees on closing and the Executor's commission. If the Testator did not make changes to his first Will, the siblings (other than Eileen White) would each have received $6,742.00. Also, each sibling, including Cathy Chiasson and Helen Frost, did not receive a 1/8 share of the net value of the matrimonial home since it was deeded to Eileen White prior to the Testator's death.

[19] Eileen White also received as a named beneficiary life insurance proceeds of $1,650.00 from AIG Insurance and $4001.81 from Great West

Life. In accordance with the policy of the Workmen's Compensation Board regarding miners with black lung disease, Eileen received a payment of $4,600.00, since she was the Testator's primary caregiver at the time of death.

[20] The Testator's income consisted of Workmen's Compensation, Old Age Pension and Canada Pension benefits. In 2001, the Workmen's Compensation Board provided a medical benefit allowance of $1,206.00. Joe applied for this allowance when he moved into his father's residence. According to Eileen White, these funds, although forwarded to the Testator, were paid to her brother Joe while he resided with his father in 2001 and 2002.

[21] The Testator looked after his own banking until his death. Eileen White did not act on the Power of Attorney. The Testator withdrew funds regularly from his bank account. He withdrew $11,000.00 in 2000; $13,400.00 in 2001; $12,400.00 in 2002; and $19,000.00 in 2003 from the Credit Union account. The cash withdrawals from the Bank of Nova Scotia account were not as regular as the Credit Union account. The Bank of Nova Scotia statements

from January, 2000 to July of 2002 and May 2003 to December 2003 were provided. Bank Statements from August, 2002 to May, 2003, were not provided. Therefore, it was difficult to determine the extent of cash withdrawals from the Bank of Nova Scotia.

[22] The regular Workmen's Compensation benefit of $1,196.00 was deposited directly to his Bank of Nova Scotia account, monthly. The additional medical benefit allowance was paid by cheque and forwarded directly to the Testator. Bank statements do not indicate that these funds were deposited in either the Credit Union or the Bank of Nova Scotia account. Therefore, it is unclear what the Testator did with the proceeds from these cheques once Joe and his family stopped providing care in July, 2002. Eileen White indicated the Testator gave her some money when he cashed the cheques but she did not know what he did with the rest of the money from July, 2002, to his death in December, 2003.

[23] The withdrawal of $19,000.00 in cash in 2003 was explained in part by the Testator's $3,000.00 contribution to the cost of constructing a new garage in his back yard, which was also paid in part by Eileen White and Doug Petrie.

[24] Eileen White states that her father always did his own banking and she did not discuss financial issues with him. According to her, she provided companionship and personal care at a time when he needed both.

[25] The Plaintiff graduated from high school in 1972. The Plaintiff obtained work in January, 1973, as an Orderly at a Residential Care Facility. In September, 1973, he enrolled in a Certified Nursing Assistant Program at the New Waterford Consolidated Hospital. Upon completion in 1974, he worked at the New Waterford Consolidated Hospital. During this time, he lived at his parents' home on Warren Avenue in New Waterford. In 1978, he began studies at the University College of Cape Breton on a part-time basis, towards a Bachelor of Arts Degree. He boarded in Sydney during this time and visited his parents' home on weekends. In 1979, he began studies toward an RN Diploma at the St. Rita's Hospital School of Nursing, graduating in 1981. During this period, he resided at his parents' home and worked as a Certified Nursing Assistant when time permitted. After graduation, he was employed at St. Rita's Hospital for approximately one year and then relocated to Ontario for a year, returning to Cape Breton in 1983. He resided with his parents in

New Waterford and worked at St. Rita's Hospital. The Plaintiff was married in 1984. A shortage of RN positions at St. Rita's caused the Petitioner to relocate to Pictou County, where he obtained full-time employment at the Aberdeen Hospital. The Plaintiff worked in the hospital as a staff nurse until May, 2003, and then in the community as a psychiatric nurse, although he was still employed by the Aberdeen Hospital.

[26] The Plaintiff earns $58,000.00 per year. His wife is not employed outside the home. He has three (3) years of payments remaining on his mortgage. He owns a 1997 Hyundai Accent and a 2002 Hyundai Elantra. He has one daughter, Shannon, who is pursuing studies at St. F.X. University. She has taken out a student loan to assist with the financing of her education.

[27] The Plaintiff stated that he helped his parents financially when he resided with them. He paid a telephone bill and bought groceries on occasion. He purchased a table and chair set, dishes, a spinning wheel and a 26-inch television for use in the home. The spinning wheel was returned to him after his mother's death. One Christmas he purchased some jewellery, which his father gave to his mother. He re-paid a $500.00 loan, which the

family had taken out to replace windows in the home. He did not pay room and board on a regular basis. He did not have any substantial personal debt at the time of his marriage.

[28] After the Plaintiff relocated to New Glasgow in 1984, he maintained regular contact with his parents through phone calls. His wife's family also resides in New Waterford and there were frequent visits from New Glasgow to New Waterford during holidays and vacations, especially when their daughter was younger. Although overnight visits took place at his wife's family's residence, the Plaintiff would visit his parents' home regularly, and on occasion stayed overnight at his parents' home. The Testator enjoyed a wonderful relationship with the Plaintiff's daughter. After the death of his mother, the Plaintiff obtained an oxygen supply which enabled his father to visit his daughter Cathy in Boston. The Plaintiff continued contact with his father after his mother's death through phone calls and visits to the home when he was in New Waterford. The Testator also would visit the Plaintiff in his home in New Glasgow, usually accompanied by Eileen White.

[29] The relationship between the Plaintiff and his father ended suddenly in July in 2001. Since at least 2002, an estrangement existed between the Plaintiff and his sister, Helen Frost, who resided in Westfall, near New Glasgow. They did not speak to one another and it was difficult for them to be in each other's company. Both the Plaintiff and Ms. Frost would call their father's home before a visit to see who was at home.

[30] In early July, 2001, the Plaintiff enjoyed a visit with his father and Eileen White at his father's home. He returned the next day, planning to take his father on an outing. He noticed some vehicles parked at the home and upon greeting his father, was told we had a big party here last night and all the family were present. This comment upset the Plaintiff since he was family and was not present at the party. The Plaintiff uttered a curse, turned away from his father, and did not speak to him again. Eileen White reported that her father told her Bernie thought he had a party for Helen.

[31] Diane Copan does not recall a party at her father's house in July, 2001. Eileen White stated that Helen Frost and her husband were celebrating their Wedding Anniversary on the day in question and visited the Testator that

night. Her brother, Joe, who had just completed the building of a baby barn, was celebrating with a few drinks at his father's home that night. Eileen had Joe call the Plaintiff asking him to return to the home to explain that there was no party, but the Plaintiff never responded to their calls.

[32] The Testator attempted to reconcile with his son. In December, 2001, he telephoned the Plaintiff on his birthday as was his usual practice. The Plaintiff did not accept his calls or return the calls. The Testator sent the Plaintiff a Christmas card with a monetary gift for Christmas, 2001. The Plaintiff returned the card "unopened", which devastated the Testator, according to Eileen White. The Testator had a number of hospital admissions during 2002 and 2003, but the Plaintiff did not visit him or contact him. The Plaintiff spoke to an aunt, who was encouraging a reconciliation, but this did not take place.

[33] The Plaintiff was visiting his sister Cathy in Massachusetts when his father took ill and was hospitalized in December, 2003. The Plaintiff made several phone calls to the hospital to inquire about his father's health, but never spoke to his father or visited him in the hospital after his return from

Massachusetts. The Plaintiff said that he contacted some family members for their views on what he should do. The Plaintiff decided that it was best not to visit his father in the hospital or attend his wake and funeral because of conflict within the family and his own health concerns, which included high blood pressure.

[34] The Plaintiff contacted Mr. Hinchey seeking a copy of the Will in early December, 2003 and received his bequest in late December, 2003.

[35] The Plaintiff did not involve himself with the dispute between his father, Eileen White and the other family members in the summer of 2002. He stated that after July, 2001, he decided to pay attention to his own family and not the concerns of his father and siblings.

[36] **THE LAW**

The relevant provisions of the **Testators' Family Maintenance Act**, supra, are as follows:

2 In this <u>Act</u>, ...
(b) "dependent" means the widow or widower or the child of a testator; ...

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. ...

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 dis-entitle the dependant to the benefit of an order under this <u>Act</u>;

(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. ...

> **<u>Evidence of testators reasons</u>**
> **(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. ...**
>
> **10 The cost of any provision for proper maintenance and support ordered under this <u>Act</u> shall, unless the judge otherwise determines, be borne rateably by the whole estate of the testator or, in cases where the jurisdiction of the judge does not extend to the whole estate, then by that part to which the jurisdiction of the judge extends, and the judge may relieve any part of the testators estate from the incidence of the order. ...**

[37] Chief Justice MacKeigan for the Court of Appeal in **<u>Garrett v. Zwicker</u> (1976), 15 N.S.R. (2d) 118** in reviewing the Court's jurisdiction said:

> **13 Our Act, like the similar Acts in most provinces, adopts the principles and most of the language of the New Zealand Family Protection Act of 1908, as do statutes in the Australian states. Canadian Courts have viewed with respect Australasian decisions on the subject, especially those of New Zealand Courts (see, for example, the exhaustive reviews by Williams, C.J.K.B. in *ReLawther*...by Egbert, J., in *In re Willan Estate*...and by Mannie Brown in Dependents' Relief Acts", (1940) 18 Can. Bar Rev., pp. 261-291, (449-483). They have considered themselves bound by the judgments of the Privy Council in *Allardice v. Allardice* ... (and, particularly, the New Zealand decisions therein approved) and in *Bosch v. Perpetual Trustee Co. Ltd. ...*I have benefited especially from the thorough review of these cases by Chief Justice Ilsley in *Re Cole* (1958), 12 D.L.R. (2d) 406. All these cases explain what is involved in the basic concept of "adequate provision ... for the proper maintenance and support" of a dependent ... [Chief Justice MacKeigan proceeded to make the usual quotes from *Allardice, Bosch,* and *Walker* and to review several Canadian cases; he continued:]**

35 ... The cases hereinbefore discussed have implicitly, and often explicitly, applied the classic statement of Chief Justice Stout in *Allardice v. Allardice* that:

> **The first inquiry in every case must be what is the need of maintenance, and the second what property has the testator left.**

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* ... (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.**

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 maybe 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 childrne, 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: see Bull, J.A. in *Re Woods* (1965), 56 D.L.R. (2d) 369 (B.C.C.A.), at pp. 376-7, approved by Martland, J., in 1966, 59 D.L.R. (2d) at p. 362. On the other hand, I question whether today's moral and social standards permit a court to discriminate in favour of adult daughters and against adult sons to the extent the courts did in *Allardice v. Allardice*.

38 The legal and moral duty to support a wife, infant children or disabled adult children is obviously much stronger than the moral duty to give marginal support to a normal adult child, male or female. ...

...

40 This necessary differentiation between types of dependents and the requirement to consider a claim in the light of other claims and the size of the estate were classically expressed by Fullagar, J., in *Re Sinnott*, [1948] V.L.R. 279 at pp. 280-1 (quoted by Dickson, J.A., in *Barr v. Barr*...at pp. 409-410, and described by Dixon, C.J. in *Pontifical Society for the Propagation of the Faith v. Scales* (1962), 107 C.L.R. 9, at p. 19, as "perhaps the soundest and most illuminating of all the discussions of the statutory provisions"):

> **No special principle is to be applied in the case of an adult son. But the approach of the Court must be different. In the case of a widow or an infant child, the Court is dealing with one who is *prima facie* dependent on the testator and *prima facie* has a claim to be maintained and supported. But an adult son is, I think, *prima facie* able to "maintain and support" himself, and *some special need or some special claim must, generally speaking, be shown to justify intervention by the Court under the Act*. (It is perhaps necessary to add that in using the word "adult" and the word "infant" I am not thinking of a hard and fast boundary line fixed conclusively on the attainment of 21 years.)**
>
> **The discretion given by the Act is obviously intended to be very wide. *The size of the estate is always important, and there will commonly be needs and claims other than those of the applicant to be considered.* But it is always, I think, primarily a matter of estimating need and moral claim. Often need and moral claim will co-exist. Sometimes there may be a strong moral claim on the testator's consideration but no need. In such cases I think that, as a general rule, the Court should not interfere, though no rigid rule can be laid down. Sometimes the moral claim may be slight, an dyet the need so dire that the Court will hold that a wise and just testator would have made some provision, or, in other words, that wisdom and justice can connote a degree of generosity without degenerating into fondness and foolishness. (Emphasis added)**

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 ethics, 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.**

[38] The Court of Appeal's views were confirmed in Corkum v. Corkum Estate (1976), 18 N.S.R. (2d) 501 (CA).

[39] In **Kuhn v. Kuhn Estate (1992), 112 N.S.R. (2d) 38 (TD)**, Justice Roscoe, as she then was, discussed the application of Sections 3 and 5 of the **Act** in stating the following:

> **[26] In Mitchell v. Mitchell Estate (1970), 3 N.S.R. (2d) 455 (T.D.), Bissett J. quotes the following passage from Allen v. Manchester, [1922] N.Z.L.R. 218:**
>
> > **"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."**
>
> **[27] Although the approach of the courts has been one of determining whether or not there was a moral duty not to dis-entitle a child and not an overly economic approach to the question, the relative means and needs of the children must be one of the relevant considerations. In this case, each of the three sons was questioned with respect to their assets and income. ...**
>
> **[31] It is necessary then, having regard to the relative need of Alfred, as compared to his brothers, and the size of the estate, to consider the factors listed in s. 5(1) of the Act. The first of these involves a consideration of the applicant's character and conduct. The defendants submit that the conduct of Alfred during the rift is such that he should**

be dis-entitled to an order under the Act. No cases were cited by either counsel where there was a similar factual situation. The closest situation is that found in Harvey v. Powell Estate (1988), 30 E.T.R. 143, 86 N.S.R. (2d) 191, 218 A.P.R. 191 (T.D.), cited by the plaintiff, where Nathanson J. says, at p. 199 [N.S.R.]:

> **"My review of the relevant circumstances existing at the date of death of John Richard Powell leads me to conclude that the two dependants claiming under the Act had a long, close relationship with their father which deteriorated somewhat only after he remarried. By the date of his death, the level of their aid to him, performed no doubt out of filial love and duty, was lower than it had been previously. Against that background I find that John Richard Powell failed to make adequate provision for their proper maintenance and support in his will and, further, that although they are not in financial need some provision ought to be made out of the assets of his estate. I find that an adequate provision for such purpose would be an amount equal to ten per cent (10%) of the net value of the estate for each of them." ...**

[42] Section 5(3) of the Act allows a consideration of the testator's reasons, as far as ascertainable, for making the dispositions made in the will or for not making provision for a specific dependant. In this case, the solicitor who prepared Mr. Kuhn's last three wills testified that he knew Mr. Kuhn had a third son who was not being provided for by the will, and when he inquired as to the reasons, Mr. Kuhn stated "I have my reasons." The solicitor did not pursue the matter. The solicitor kept no notes of his instructions or discussions with Mr. Kuhn for any of the three wills. In view of s. 5(3) of the Act, I think it is incumbent upon solicitors, who take instructions for wills, to keep a record of their instructions and to advise a testator who plans to disinherit a spouse or child of the effects of the Testators' Family Maintenance Act. ...

[49] Although the result in Baim v. Shaner was an equal division between the testator's two children, the trend in Nova Scotia, where there are competing claims by adult children, is to order a smaller percentage set aside for the applicant. A review of the cases cited by counsel indicates that, in cases of competing claims of adult children, the smallest award made was 10 per cent of the net value of the estate, which was in MacDonald and Wall v. MacDonald Estate (1980), 39 N.S.R. (2d) 573, 71 A.P.R. 573; 6 E.T.R. 302 (T.D.). In Harvey v. Powell Estate, supra, each of the claimants received a 10 per cent interest in the net value of the estate. The highest percentage appears to be in Schofield Estate v. Schofield (1988), 84 N.S.R. (2d) 404, 213 A.P.R. 404 (C.A.), where the estate was relatively small but an award of 18 per cent to each of two applicants was made."

[40] In **Redmond v. Redmond Estate (1996), 155 N.S.R. (2d) 61 (SC)**, Justice Tidman at Paragraph 26 summarizes the general principles applying to applications made pursuant to the **Testators' Family Maintenance Act** as follows:

> **"[26] From those excerpts and upon a review of the other cases cited by counsel, the following general principles emerge.**
>
> **1) A man with testamentary capacity has the right to leave his estate to whomever he wishes;**
>
> **2) The courts will interfere with that right only if inadequate provision is made for his dependants' maintenance and support;**
>
> **3) What is "adequate" provision is ultimately a moral question;**
>
> **4) The answer to 3 is considered from the point of view of a judicious father seeking to discharge both his marital and parental duty."**

[41] **SUBMISSIONS**

Counsel for the Plaintiff submits that the Plaintiff is entitled to the benefit of an Order under the **Act** for the following reasons:

(a) The ratio of the Plaintiff's bequest ($4,706.78) to the net value of the estate (approximately $136,000.00) is about 3% and must be looked at as the Plaintiff being disinherited;

(b) The Testator's Solicitor, Mr. Hinchey, did not review with the Testator, the potential claims by persons the Testator wished to exclude or for whom he intends to make modest provision only, and did not review the nature and value of the estate assets. The Testator's daughters, Cathy and Helen, were on good terms with their father and did not hurt him as reported in Mr. Hinchey's notes. In light of the comments of Roscoe, J. In **Kuhn v. Kuhn Estate** (supra), the notes taken by Mr. Hinchey are insufficient evidence to establish the Testator's true reason for the disposition of his property;

(c) There is nothing in the character or context of the Testator which would have dis-entitled him to the benefit of an Order. The Plaintiff was a loving and responsible son and member of the White family for forty-seven (47) years. He was not involved in the family conflict that led to changes in the Testator's Will and his two and one-half (2 ½) years estrangement from his father, when compared with forty-seven (47) years of a close and loving

relationship, do not rise to a level of conduct which would dis-entitle him to an Order under the **Act**;

(d) The Plaintiff is a person with modest means while doing his best to support his family on an income as a registered nurse. His daughter needs some financial assistance in order to complete her University studies;

(e) There are no other dependent children making a claim on the estate;

(f) The Plaintiff postponed his career after high school to stay at home and provide assistance for his parents. In addition, he made financial contributions to the home before his marriage;

(g) The Testator made additional provisions for the support of the main beneficiary, Eileen White, outside the Will, which should be considered in determining whether the Testator made adequate provisions for the Plaintiff's maintenance and support.

[42] Counsel for the Plaintiff submits that the Court, in its' discretion, should issue a Judgment for an appropriate percentage of the net value of the estate of Murdock White, that would constitute adequate provision for the Plaintiff's maintenance and support.

[43] Counsel for the Respondent submits that taking into account all of the considerations in Section 5(1) of the **Act**, the Testator made adequate provision for the support and maintenance of the Plaintiff:

(a) Counsel for the Respondent submits that the Plaintiff did not prove financial need. The Plaintiff did not provide any money or services to the Testator such that the Testator owed the Plaintiff a significant benefit from the estate;

(b) The Plaintiff provided nothing to the Testator that the other dependent children did not provide and, in fact, the Plaintiff benefited from being able to stay with his parents for many years after high school, which assisted him in obtaining an education with limited debt;

(c) The Plaintiff did little to provide care or services to the Testator after the death of the mother;

(d) The Plaintiff rejected the father's efforts to reconcile and took no interest in the future family concerns;

[44] Counsel for the Respondent submits that the Testator recognized a moral duty to his son and provided for him in his Will in accordance with his discretion as to what he should receive.

[45] **CONCLUSION**

At the time the Testator's first Will was executed in January, 2002, it is clear the Testator intended to benefit Eileen White more than his other adult children. Whatever other family members thought of Eileen White's motives and conduct in spending two (2) weeks a month residing with her father, the Testator accepted her assistance and grew to depend upon the security, care and companionship she provided during the last eight (8) years of his life.

[46] Counsel for the Plaintiff submitted the Court should consider the lack of accounting of the large sums of cash withdrawn by the Testator from his accounts during the last years of his life, presumably in assessing whether there should be a re-distribution of Eileen White's share of the estate to the Plaintiff. It should be noted that the Testator always had large sums of cash on hand and this was a concern of family members. The Testator was responsible for his own banking. The account balance in both the Bank of Nova Scotia account and the New Waterford Credit Union account increased from January, 2002, to December, 2003. The Bank of Nova Scotia balance increased from approximately $40,000.00 to $47,068.00 and the New Waterford Credit Union balance increased from $74,000.00 to $87,056.00.

[47] I find the Testator's transfer of ownership of the family home to Eileen White was reasonable in the circumstances. The value of the home was minimal. There was no evidence other family members in the local area wanted or needed the residence. The father was estranged from some of his children at that time. Eileen White made a commitment to her father by relocating her residence from Halifax to New Waterford on a full-time basis at a time when he needed companionship and personal attention.

[48] The second Will executed by the Testator in October, 2002, reduced the bequest of the Plaintiff and four (4) other adult children, while increasing the bequest to Cathy and Helen. Since the family home was no longer part of the estate, Eileen White did not benefit greatly by receiving the entire residue of the estate. A review of the Executor's accounting indicates that disbursements would likely absorb the value of the estate residue leaving only the balance in the New Waterford Credit Union account for distribution to Eileen White. In fact, there may have to be some encroachment on this account because part of the residue included the value of household contents and motor vehicle. Therefore, the second Will prepared by the Testator was essentially a redistribution of the balance in the Bank of Nova Scotia account among the Testator's children estranged from him and the two (2) adult children who maintained good relations with him.

[49] I have reviewed the factors set out in Sections 5(1) and 5(3) of the **Act:**

(a) The Plaintiff's rejection of his father's affection in July, 2001 and his resistance to any efforts by his father and family members for a

reconciliation are valid and rational reasons for the Testator's bequest to the Plaintiff. I find there was no reasonable basis or justification for the Plaintiff's conduct and behaviour towards his father from 2001 onward;

(b) Although maintaining a modest lifestyle, I find the Plaintiff's standard of living exceeded that of the Testator. He is employed and has very little debt. While everyone can always use some assistance, I find the Plaintiff has not established a financial need;

(c) I find any financial contributions made by the Plaintiff to the Testator occurred more than twenty (20) years ago. These contributions were gifts that did not go beyond normal financial expectations placed on children in similar circumstances or were contributions provided at a time when he received free room and board. There is no evidence to indicate the Plaintiff contributed to the financial welfare of the Testator;

(d) Although the Plaintiff kept in touch with his father through phone calls and visits, there was no indication he provided services to his father after the death of his mother in 1992;

(e) The Plaintiff had the opportunity to reconcile with his father at the time of his death, but chose not to have any contact with him;

(f) There was no evidence of any express or implied expectation on the Plaintiff's part arising from the value of the Testator's estate or any treatment during the Testator's life;

(g) The Plaintiff's claim seems to be based on the fact that he did not receive a fair amount from the estate in comparison with his sister, Eileen White. While the Plaintiff is the only one who filed a claim pursuant to this **Act**, other family members were given bequests and have a valid claim on the estate. Although not mentioned by counsel for the Plaintiff, the Court presumes the Plaintiff is asking any amount awarded to him be taken from Eileen White's share of the estate. Section 10 of the **Act** says the cost of any provision for proper maintenance or support ordered under this **Act,** unless otherwise determined, be borne rateably by the whole estate of the Testator which, in this case, means encroachment on the amount given to other family members unless otherwise determined;

(h) The Testator has the right to dispose of his property in such a manner as he may chose, subject to interference by the Court if an inadequate provision is made for his proper maintenance and support.

[50] I have considered the size of the Testator's estate and the bequest received by the Plaintiff. I have considered the factors set out in paragraphs 5(1) and 5(3) of the **Act** and I conclude that the Plaintiff did not establish on a balance of probabilities that the Testator died without having made adequate provision in his Will for his maintenance and support.

[51] **COSTS**

While my inclination is for each party to bear their own costs, I am prepared to hear submissions on this issue at the request of either party.

____

Wilson, J.