

CANADA / JUDGMENT

Boughton v. Widner Estate

2021 BCSC 325

COURT

Supreme Court of British Columbia

DECIDED

26 February 2021

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2021 BCSC 325 Boughton v. Widner Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boughton v. Widner Estate,

2021 BCSC 325

Date: 20210226

Docket: S172539

Registry: Victoria

Between:

Sara Bella Boughton, Antonio David Widner,

and Gina Rose Widner

Plaintiffs

And

Sabrina Joan Widner also known as Sabrina Joan Cameron,

Administrator of the Estate of Michael Gregory Widner

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph 129 where changes were made on March 5, 2021

Corrected Judgment: The text of the judgment was corrected at page 20 where changes were made on April 12, 2021

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiffs:

G. Rhone

Counsel for the Defendants:

J. Stamm

Place and Dates of Trial:

Victoria, B.C.

April 1-3, 2019

August 10-14 & 17, 2020

Place and Date of Judgment:

Victoria, B.C.

February 26, 2021

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Introduction

- [1] Michael Widner (the "Deceased" or "Mike") died unexpectedly on or about March 9, 2017, the victim of a homicide. He left a complicated legacy.

- [2] At the time of his death, the Deceased was married to the defendant Sabrina Widner. They had two children, born in 2005 and 2006. I will refer to Ms. Widner and her children as the "Widner household". Between 2004 and 2012, the Widner household lived on Tugwell Road in Sooke. In 2012, they moved to a house on Eaglecrest in Sooke.
- [3] At the time of his death, the Deceased was also in a long-term relationship with the adult plaintiff Sara Boughton. Counsel filed an agreed statement of facts, in which the parties acknowledged that it was a marriage-like relationship of at least two years.
- [4] Ms. Boughton and the Deceased had two children, born in 2014 and 2015. Ms. Boughton's children are the infant plaintiffs in this litigation. I will refer to Ms. Boughton and her children as the "Boughton household". The Boughton household lived at several different rental properties between 2009 and the Deceased's death.
- [5] Ms. Boughton knew that the Deceased was married but believed his statements to her that he would eventually obtain a divorce and marry her.
- [6] Ms. Widner had no knowledge of her husband's relationship with Ms. Boughton and was not separated from him at the time of his passing.
- [7] The Deceased was able to maintain two separate households because he told Ms. Widner he was working part of the week on the other side of Vancouver Island from the Widner household, when he was actually spending time with Ms. Boughton. The Deceased kept up a regular schedule, alternating between the two households.
- [8] The Deceased worked at various enterprises and appears to have been paid in cash. He contributed cash to the Widner household, although for the most part the evidence is not clear how much or how often. The Deceased paid for all of the expenses associated to the Boughton household, which Ms. Boughton estimated to be approximately \$8,000 per month.
- [9] Ms. Boughton was suspicious that the Deceased derived some of his income from illegal means. Ms. Widner claims that she was not aware that her husband was involved in any illegal activities. With her concurrence, he had set up a legal marijuana grow operation in a workshop on the Tugwell property, which was registered in her name.
- [10] The Deceased collected the rent arising from the grow operation and gave it to Ms. Widner. He also collected rent from his mother Reta Acorn, who lived in a house on the Tugwell property. All the rent was paid in cash. Ms. Widner used the rent money for household expenses and to pay the mortgage on Eaglecrest, the property the family lived in after moving out of Tugwell.
- [11] Ms. Boughton maintains that the Deceased told her many times over the course of their relationship that he paid for several properties which were registered in his wife's name. Ms. Boughton says that he wanted to sell them so he could divorce Ms. Widner and finance a home for his life with Ms. Boughton and their children.

- [12] The Deceased did not leave a will. Ms. Widner did not apply for administration of his estate, because the only things the Deceased had in his name, to her knowledge, were a car and a boat along with some clothing and tools. Ms. Widner sold the car and boat to pay for funeral expenses.
- [13] The plaintiffs maintain that the Deceased's estate consists of half of the value of the property held in Ms. Widner's name and assert an interest in it, by way of a resulting trust or a constructive trust based on unjust enrichment of the defendant at the expense of the Deceased's estate or, in the alternative, at the expense of the plaintiffs. The plaintiffs seek the following orders:
- a. a declaration that Sara Boughton is a spouse of the Deceased, as that term is defined in the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA];
 - b. a declaration that the two minor plaintiffs are the children of the Deceased and are each entitled to a share of his estate as his descendants;
 - c. a declaration of trust, to the benefit of the estate of the Deceased, over:
 - i. real property registered in the name of the defendant at xxxx Tugwell Road, Sooke, BC (the "Tugwell rental");
 - ii. real property registered in the name of the defendant at xxxx Tugwell Road, Sooke, BC (the "Tugwell house");
 - iii. the proceeds from the sale of real property previously registered in the name of the defendant at xxxx Eaglecrest Drive, Sooke, BC ("Eaglecrest");
 - d. a determination that the estate of the Deceased consists of:
 - i. the beneficial interest in the properties and proceeds of sale referred to above;
 - ii. a boat (or the proceeds of its sale);
 - iii. a VW Golf motor vehicle (or the proceeds of its sale);
 - iv. tools (or the proceeds of their sale);
 - v. equipment (or the proceeds of its sale); and
 - vi. such other assets as may be so found by the court;
 - e. the appointment of an administrator of the estate of the Deceased;
 - f. an accounting of all estate assets received by the defendant, including all property, profits, rents, proceeds of sale, interest, monies and income;
 - g. an inquiry, assessment or accounting, pursuant to Rule 18-1, into the value of the Deceased's estate, including all profits, rents, interest, monies, proceeds and income earned from the estate properties, real or personal;

- h. that the estate be divided in accordance with the WESA, in particular 24(1) and (6), and that the preferential spousal share be divided equally between the plaintiff and the defendant, and the descendants' shares to be divided equally between the four descendants;
- i. interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79; and
- j. costs.

[14] Ms. Widner's position is that while the Deceased made some contributions to the Widner household she was largely responsible for the acquisition of the Tugwell and Eaglecrest properties and should retain them, as they have always been in her name. Ms. Widner's counsel, Mr. Stamm, emphasizes that his client was not separated from the Deceased when he died so there was no event that might have crystallized his separate interest in the properties at stake.

[15] Mr. Stamm also takes the position that the WESA does not give Ms. Boughton any legal status as a spouse vis-à-vis the Deceased's estate, because to do so would condone polygamy. Depending on the outcome of this trial, Mr. Stamm intends to challenge the validity of the spousal provisions of the WESA to the extent that they conflict with the criminal law proscribing polygamy.

[16] The main pillar of the plaintiffs' case is comprised of statements the Deceased allegedly made, primarily to Ms. Boughton, about his contributions to property registered in Ms. Widner's name. I will refer to these statements as I discuss the evidence of the witnesses for the plaintiffs and deal with its admissibility later in these reasons.

The plaintiffs' case

Sara Boughton

[17] Ms. Boughton met the Deceased in October 2009, four years after she graduated from high school. She said they immediately fell in love and moved in together within a month. The Deceased told Ms. Boughton that he was going through a divorce and it would be finalized in three months. After three months, Ms. Boughton found out that the Deceased was "just separated" from his wife and that there were children involved.

[18] Ms. Boughton said that the Deceased told her he was unhappy and regretted marrying his wife. He wanted to move on from his marriage but still wanted to be a good father to his children. The Deceased said he wanted to spend his life with Ms. Boughton, sell one of his properties and have his children live with them. He also told Ms. Boughton that his wife knew he had a girlfriend.

[19] Ms. Boughton stopped working at the request of the Deceased. He wanted her to take care of their household and spend all her time with him when he was not with his children in Sooke. The Deceased proposed to Ms. Boughton on October 7, 2011 and bought her a ring. She said they planned to be together forever and called each other soul mates.

- [20] Ms. Boughton and the Deceased lived in several rental homes in the course of their relationship: a condo at Bear Mountain, a house on Langhome in Colwood, a house on Chilco in Westshore and latterly a house in Shawnigan Lake, which they moved into in 2013. The Deceased always paid the rent and household expenses.
- [21] Ms. Boughton said the Deceased told her that all of his properties were listed for sale and as soon as one sold, they could own a home together, have children and move on with their lives. Ms. Boughton said the Deceased told her he owned two properties on Tugwell, one on Eaglecrest, an office on Helmcken and a lot on Campbell Lake. She had a vague recollection that he also claimed to own a condo and perhaps another property in East Sooke, although she was not sure about that.
- [22] Ms. Boughton said the Deceased showed her the Tugwell properties online and said he wanted to keep one of them. He said that Eaglecrest was listed for sale, along with the office and the cabin on Campbell Lake. Ms. Boughton knew of the purchase of Eaglecrest in 2012. She did not think the Deceased's expressed intention to her that he wanted to sell Eaglecrest, as he wanted to sell his other properties, was difficult to reconcile with the fact that he had only recently purchased it. Ms. Boughton never saw any paperwork associated with the property or any financing documents.
- [23] Ms. Boughton agreed that at examination for discovery she said that the properties were all listed for sale for their entire relationship. The Deceased wanted them to sell so he would be done with going back and forth to Sooke. This was the same story he told her for eight years, from the start of their relationship to his untimely death.
- [24] At one point, the Deceased told Ms. Boughton that he had sold the office on Helmcken. He showed her the listing online. She thought it sold for about \$180,000 but does not know what happened to the money. Ms. Boughton agreed that the Deceased did not buy a house for them with the money from the sale of the office, despite his promises to buy them a home when one of his properties sold.
- [25] Ms. Boughton understood that the two properties on Tugwell and the home on Eaglecrest were in Ms. Widner's name because the Deceased wanted to "protect himself" against any issue that could arise. She understood that he was the actual owner of the properties and the only person contributing to anything. Ms. Boughton said the Deceased told her that his wife did not contribute to the properties.
- [26] The Deceased told Ms. Boughton that his wife threatened that she would be difficult about dividing the property and would prevent him from seeing his children. He said that his wife would hold things he had done over him, although he never specified what those things were, and that he was afraid that he would lose the houses that he had worked for.
- [27] Between what the Deceased told Ms. Boughton about his wife and what she heard from others, Ms. Boughton believed that Ms. Widner was a mean and vindictive person.

- [28] Ms. Boughton described the Deceased's schedule as of 2013, when they lived in Shawnigan Lake. He would arrive on Monday morning and leave around four in the afternoon, then return to Shawnigan Lake and be with her between nine and midnight. He kept the same schedule on Tuesday. On Wednesday, he would stay overnight in Shawnigan and then stay all of Thursday, Friday and Saturday. He went to Sooke on Sunday morning, returned to Shawnigan later on Sunday, then went back to Sooke to stay overnight on Sunday night.
- [29] Ms. Boughton estimated that the household budget at Shawnigan Lake was roughly \$8,000 per month. Rent accounted for about \$3,000 of that amount, in addition to which there were utility costs, car insurance and so on.
- [30] Ms. Boughton understood that when Mike was not with her, he was spending time with his children or working in Sooke. The Deceased told her there were lots of arguments with his wife. He would ask her for a divorce and she would tell him he would not see his children and threaten him about being a criminal.
- [31] Ms. Boughton had not given up on the Deceased completing his divorce by the time they moved to Shawnigan Lake, four years into their relationship, although she was frustrated that the divorce had not happened. It never occurred to her to suspect that the Deceased was still intimate with his wife, although at examination for discovery Ms. Boughton said she did not believe the Deceased's claims that he slept on the couch when he visited his wife in Sooke. She had suspicions but always gave him the benefit of the doubt because they had children together and she loved him.
- [32] Ms. Boughton had a son in 2014 and a daughter the following year. Ms. Boughton said the Deceased embraced fatherhood and was present at the birth of both of their children. He is listed as their father on their birth certificates. Ms. Boughton tendered photographs of the Deceased with her the day before their son was born and of him engaged in parenting activities with their son and daughter.
- [33] Ms. Boughton met the Deceased's older children when they were about five or six but did not have much interaction with them. Ms. Boughton and the Deceased decided not to tell them about the relationship until they were older.
- [34] Ms. Boughton met the Deceased's father Chris Widner and Chris's wife Cindy. She also met the Deceased's mother Reta Acorn. Ms. Boughton and the Deceased socialized with his parents and introduced their children to them.
- [35] Ms. Boughton did not meet the Deceased's half-sister Kylee, because she was a child and she knew Sabrina and it would complicate things for Kylee to know about Ms. Boughton and her children. Ms. Boughton did not meet the Deceased's siblings Chris or Tammy.

- [36] The Deceased told Ms. Boughton that he had a marijuana grow operation in Sooke at a house he owned which was registered in his wife's name. The Deceased asked Ms. Boughton about setting up one in their home in Shawnigan Lake. She refused. She did not want any of that going on, particularly once her children were born.
- [37] Ms. Boughton said that in addition to the marijuana grow operation in Sooke, the Deceased operated a small moving company, a waste water management company and an ICBC salvage and rebuild shop. She said he made good money but does not know how much. They did not have financial difficulties, although she agreed that at one point she thought the Deceased was struggling and seemed to be spread a bit thin financially. The Deceased told Ms. Boughton that he paid all the bills for the Widner household.
- [38] Ms. Boughton cannot pinpoint exactly when she grew suspicious that some of the Deceased's income was from unlawful sources, although it was likely when the police raided their home in or around 2012. She never asked the Deceased about money because she did not want to get involved with his business.
- [39] Some of the people the Deceased worked with in Sooke came to their home in Shawnigan Lake. Ms. Boughton would leave the house because she did not want to be a part of what was going on. Ms. Boughton recalled one person in particular, a man named Rick. Ms. Boughton does not know Rick's last name, but on the totality of the evidence I infer this must have been Rick Alexander, who was involved with the Deceased in operating the marijuana grow operation in the workshop on the Tugwell property.
- [40] Ms. Boughton filed her taxes as a single person. She relied on a friend at a tax preparation company to do them for her and did not look "super hard" at her filings. She collected the child tax benefit for her children after catching up on her tax filings which she had let lapse for a few years. The Deceased told her he had not filed taxes since 2002.
- [41] Ms. Boughton went to Mexico with the Deceased twice. They took trips to Vancouver and other places in British Columbia together and visited her parents and his parents. Ms. Boughton accompanied the Deceased when he went to Alberta for a waste water management course.
- [42] Ms. Boughton agreed that she was a bit upset that the Deceased had lied to her about having his divorce finalized in three months, but accepted the situation. She also acknowledged that the Deceased concealed his membership in the Hells Angels from her. Ms. Boughton said she was shocked and upset when she found out and did not think his involvement with the Hells Angels was a wise decision. She does not know what he did as a member or exactly when he joined, but she became aware of his involvement after her daughter's birth in 2015. Ms. Boughton went to several parties with the Deceased at Hells Angels clubhouses. She returned his prospect vest to the Hells Angels after his death.
- [43] Despite the fact that the Deceased lied about his marital status and covered up his involvement in the Hells Angels, Ms. Boughton trusted him about everything else.

Chris Widner, father of the Deceased

- [44] Mr. Widner separated from Reta Acorn when the Deceased was nine years of age. He did not see his four children as much as he wanted to when they were young. Once the Deceased was an adult, Mr. Widner spoke to him fairly frequently and saw him about once per month.
- [45] Mr. Widner first became aware that the Deceased had two families in approximately 2014. Mike met him on the Malahat, riding his Harley-Davidson motorcycle, then took him to Shawnigan Lake and introduced him to Ms. Boughton and a new baby. Mr. Widner was shocked. He asked his son what was going on. Mike just chuckled and said not to worry.
- [46] Mr. Widner told his wife Cindy about Ms. Boughton and the baby but kept it a secret from their other children. Mr. Widner felt his son's relationships were none of his business. He told his son to deal with the situation, because it was difficult to lead two lives, but the Deceased would get angry with him and it was never dealt with.
- [47] Mr. Widner and his wife spent time with Ms. Widner and Mike and their children as well as with Ms. Boughton and Mike and their children. Mike never told his father about relationship problems with Ms. Widner, except that right near "the end" Mr. Widner said he was present when his son asked Ms. Widner for a divorce.
- [48] Mr. Widner was not certain when his son got a Harley, but did not see him in possession of one at the Widner household.
- [49] Mr. Widner knew his son was involved with the Hells Angels well before he met Ms. Boughton. Bob Greene, a prominent member of the Hells Angels, had attended his son's wedding to Ms. Widner in Mexico in 2008. Mr. Widner did not talk to his son about the dangers of involvement with the Hells Angels, but warned him to be careful and watch his back. He was not certain if the subject of the Hells Angels was discussed in Ms. Widner's presence.
- [50] The last time Mr. Widner saw his son was in late 2016. He was in Arizona in March 2017 when he received the news that his son had died. Ms. Widner called him and asked him about Mike's girlfriend. Mr. Widner confirmed to her that there were children of that relationship.

Reta Acorn, the Deceased's mother

- [51] Ms. Acorn had four children with her former husband Chris Widner: Mike, Tammy, Steven and Chris.
- [52] Ms. Acorn knew that Mike had a small, discreet marijuana grow operation in a house he rented in Victoria with three others. He met Ms. Widner in about 1999. Mike told his mother that Ms. Widner knew about his marijuana grow operation.

- [53] Ms. Acorn believed that her son purchased the Tugwell property with money from drug dealing. He used the same source of funds to improve Tugwell and later purchase the Eaglecrest house. Ms. Acorn said her son was afraid of civil forfeiture so he put everything in Ms. Widner's name, although she conceded that she never saw any purchase or financing documents for the properties.
- [54] Ms. Acorn said Ms. Widner never made enough money to buy the properties. All the money came from drug dealing. She was adamant that neither her brother Jerry nor her daughter Tammy had loaned or given money to Mike to buy Eaglecrest or Tugwell.
- [55] As I will discuss later in these reasons, Ms. Widner testified that some of the funds used to pay down the mortgage on the Tugwell property came from Mike's Uncle Jerry and his sister Tammy.
- [56] Ms. Acorn's youngest son Steve died in a car accident in or around 2007. Mike built her a house on the Tugwell property, which he had subdivided. She moved there in 2008 and stayed there until Mike's death. Ms. Widner evicted her shortly after Mike's memorial service.
- [57] Ms. Acorn paid \$600/month cash to Ms. Widner for rent. Ms. Acorn's common law partner (in her family's view) or roommate (in Ms. Acorn's view) delivered the rent money in cash to Mike. Ms. Acorn denied that she characterized her partner as a roommate so she would not lose her disability benefits.
- [58] Ms. Acorn said there was a licensed marijuana grow operation in the workshop on the Tugwell property and later, after her son and his family moved to Eaglecrest, an illegal one in the house. She also said there were coke deals going on with Ms. Widner involved. Ms. Acorn claimed that her son and Ms. Widner dealt with Bob Greene to obtain the cocaine, although the only time she ever saw him was at her son's wedding in Mexico in 2008. Ms. Acorn conceded that she was never present for any drug deals.
- [59] The licensed marijuana grow operation in the Tugwell workshop was intended for three different patients, including Ms. Acorn. She said 99 of the plants were hers and she would get a pound or two from the harvest. The rest was diverted to whatever Rick Alexander decided to do with it. Ms. Acorn agreed that her son profited from the illegal diversion of marijuana from plants permitted under her medical licence. She went along with it because she needed the marijuana.
- [60] In addition to putting his money into real estate, Ms. Acorn said Mike used people's accounts to "wash it", although the source of her knowledge of this is unclear. He said the police were always following him. He did not put anything in his mother's name because she owed the Canada Revenue Agency too much money.

- [61] Ms. Acorn said her son gave a lot of money to Ms. Widner, "handfuls of it", in large bills. He bought her the office on Helmcken for her jewellery business. He borrowed \$200,000 to build his mother's house but scrimped on some of the things, such as a furnace for the house, to save money to buy the office.
- [62] Ms. Acorn said her son's relationship with Ms. Widner was "not great but okay" before they got married. She claimed that her son told her Ms. Widner had cheated on him shortly before they married in 2008 and it really upset him. He only went through with the wedding because everyone had already paid for their tickets to Mexico.
- [63] Ms. Acorn claimed that Ms. Widner was abusive towards Mike, physically and verbally. Ms. Acorn counselled him to leave her, but he said she threatened to keep the children from him and would say he was a drug dealer. Ms. Acorn also said her son told her that Ms. Widner would not divorce him without liquidating all their assets.
- [64] Ms. Acorn became aware of her son's relationship with Ms. Boughton in about 2009. She believed that the funds from the grow operation were used to support Mike's two households. Ms. Acorn did not try to talk her son out of his relationship with Ms. Boughton. She asked him to really think it over and said he should not start a relationship before the other was finished, but he said it was what he wanted to do. Ms. Acorn did not think it was any of her business to tell Ms. Widner about Ms. Boughton.
- [65] Ms. Acorn believed her son had every intention of marrying Ms. Boughton and building a house in Sooke on the water for them, with a dock for his boat and a house nearby for Ms. Acorn so she could be close and watch the children grow up.
- [66] Ms. Acorn never discussed any plans with her son concerning his estate, should he pass away. She just knew he would want all of his children treated the same.
- [67] Ms. Acorn swore an affidavit in 2018 for a summary trial in this matter. She did not mention her son's career as a high level cocaine dealer in the affidavit, explaining that she never really thought of putting it in. She referred to "drugs" in the affidavit, not cocaine specifically, because "drugs are drugs to me". Nor did she mention in her affidavit that Mike told her Ms. Widner would not divorce him without liquidating all the assets.
- [68] In the affidavit, Ms. Acorn also claimed that her son had paid for Ms. Widner to travel to Europe twice. At trial, however, Ms. Acorn admitted that she had no idea if Mike paid for the trips. Ms. Widner testified that her trips to Europe were working vacations, arranged and paid for by her friend, who is an artist.
- [69] Ms. Acorn agreed there were other things she had not mentioned in her affidavit that she raised at trial, but insisted she was telling the truth at trial. She denied having malice towards Ms. Widner, notwithstanding that Ms. Widner had evicted her from the rental home at Tugwell and alienated her from her two older grandchildren.

- [70] Ms. Acorn had no idea if Ms. Widner was aware of the Deceased's involvement with the Hells Angels. Ms. Acorn was concerned his affiliation was a risk to all of his children and tried to talk to him about a different "career path".
- [71] Ms. Acorn said that Mike told her, shortly before he went missing, that he was about to be paid for the marijuana grow operation and expected to receive between \$250,000 and \$300,000. She wanted to report her son missing right away when she could not reach him on the phone but Ms. Widner refused. By that time, in March 2017, Ms. Acorn's relationship with Ms. Widner was very strained.
- [72] Ms. Acorn continues to press the police to solve her son's murder. She has some theories about who is responsible, including Ms. Widner in collaboration with Rick Alexander.

The Defendant's Evidence

Sabrina Widner

- [73] Ms. Widner was born in Edmonton in 1981 and grew up in Victoria. She went into foster care at the age of 13, when her mother kicked her out of the house. She started living independently when she was 17.
- [74] When Ms. Widner was 18 she met the Deceased. In 2000, she moved to Sooke to live with him, then they moved back to Victoria to be closer to her job at Price's Alarms. Ms. Widner's twin sister Samantha Agbay moved in with them.
- [75] Ms. Widner always wanted a home of her own and she started saving for a house. Her sister and the Deceased paid most of the rent so she was able to save money for a down payment.

The acquisition of the Tugwell property

- [76] In 2004, after saving for over two years, Ms. Widner began looking to purchase a home. Victoria was expensive but she discovered that the farther she went out from the city, the more she could afford. She purchased the Tugwell house on June 8, 2004 and registered it in her name with a \$220,000 mortgage. Ms. Widner's sister Samantha had to co-sign the mortgage. Ms. Widner said the Deceased made no direct contribution to the purchase.
- [77] The mortgage payments on the Tugwell house were \$1,000 per month, which was less than rent on the apartment in Victoria.
- [78] Shortly after moving to the Tugwell house, Ms. Widner became pregnant with her daughter, who was born in March 2005. The Deceased proposed to her on her birthday, April 27, 2005. A few months later Ms. Widner became pregnant with her son. She was off work on maternity leave until the summer of 2006.
- [79] Ms. Widner made several large payments against the mortgage on Tugwell, starting in December 2004 with a \$44,000 payment, which was the maximum allowable under the pre-payment terms of the mortgage.

- [80] One year later Ms. Widner made another lump sum payment of \$44,000. In September 2006, there was a further lump sum payment of \$44,000. In February 2007 there was a \$44,000 lump sum payment and on March 2, 2007 the mortgage was retired with a payment of \$22,069.10.
- [81] Ms. Widner said one of the payments against the mortgage was a gift from Mike's Uncle Jerry and that Mike's sister Tammy had also given them some money. She could not recall where the other payments came from, but thought she had been able to save money.
- [82] Between 2004 and 2007, the timeframe of the extra payments on the mortgage, Ms. Widner was working at Price's Alarms or on maternity leave. Her salary at Price's Alarms was approximately \$25,000 per year when she was working fulltime.
- [83] Ms. Widner's line 150 income in 2007 was \$9,496, comprised of \$3,703 employment income and \$5,793 in net rental income. In 2008, it was \$24,156, comprised of \$21,123 income from employment and the balance in net rental income. In 2009, Ms. Widner's net income was \$24,524, comprised of \$2,130 in employment income and \$22,395 in net rental income.
- [84] The source of the rental income before 2008 was not particularly clear on the evidence.
- [85] Ms. Widner said the Deceased worked at a variety of enterprises, including fishing charters, cutting and delivering wood, and working with bailiffs to buy closed businesses and then selling the contents. She claimed to be unaware of any illegal activity on his part.
- [86] Ms. Widner could not recall the Deceased's exact contributions to the household, nor was she pressed for specifics about the family budget. She said they both worked and paid the bills. They did not lead a lavish lifestyle. The Deceased would give her money for groceries or other household expenses. She denied Ms. Acorn's assertion that the Deceased would routinely give her handfuls of big bills, but agreed that he gave her cash.
- [87] Ms. Widner said the Deceased did not have a bank account and could not pay his bills on time. Paperwork was "not his thing". They did not have joint accounts either.
- [88] For the 2011 tax year, the Deceased claimed a total income of \$1,500. For 2012, he claimed an income of \$300. In 2013, he claimed an income of zero.
- [89] Ms. Widner said that as early as 2010, but definitely by 2012, the Deceased was frequently working out of town. He took a waste water management course in 2012 and, to Ms. Widner's knowledge, stayed part of the week with his friend Seth near Courtenay to work on septic projects.
- [90] As it turned out, the Deceased took Ms. Boughton to Alberta in 2012 for the waste water management course and was living with her, not Seth, when he was away from the Widner household.

Conversion of the barn at Tugwell to a workshop

- [91] Almost immediately after purchasing the Tugwell property, Ms. Widner set about converting the barn into a workshop. It was her first experience with a contractor and he did not apply for permits. This resulted in a variety of problems, including stop work orders.
- [92] Ms. Widner agreed that the Deceased may have contributed to the \$50,000 cost to convert the barn into a workshop. His brother Steven lived in it for a time.

Subdivision of Tugwell property and construction of a second home

- [93] One of the reasons Ms. Widner had purchased the Tugwell property was because it was large enough to subdivide. She started the subdivision application in early 2007 while she was on maternity leave, but had to be back at work to get a construction mortgage to build on the subdivided parcel. Her plan was to sell it and repeat the process with another property in order to make money.
- [94] Since Ms. Widner had substantially reduced the original mortgage on the Tugwell property, she had no difficulty obtaining a \$220,000 mortgage to build on the subdivided land, secured against the Tugwell property. The monthly payments were \$1,057.53. In 2014, the mortgage was renewed for a five-year term with a balance of \$187,686.07.
- [95] Ms. Widner's plans to sell the house on the subdivided parcel were derailed when Mike's brother Steve died in a car accident. Mike's mother was devastated and she was also ill. Mike wanted her to move to Sooke so they did not have to go to Courtenay to check on her.
- [96] The Deceased struggled with the loss of his brother and Ms. Widner was empathetic. If he needed time away, she did not question it. This is undoubtedly why he was successful in leading a double life.
- [97] Ms. Acorn came to live in the house built on the subdivided parcel of Tugwell in 2008. She paid \$600/month, which was less than fair market rental. Mike made up the difference, although it is not entirely clear how much that was. After Ms. Acorn moved out, Ms. Widner was able to charge \$2,000/month in rent, so I infer the Deceased must have been paying roughly an additional \$1,000 each month to supplement his mother's below market payments.

The civil wedding ceremony and the destination wedding in Mexico

- [98] Ms. Widner and the Deceased had a civil marriage ceremony in their home on October 23, 2008, then they had a destination wedding at a resort in Mexico and invited friends and family. They did not expect a large gathering because the resort was expensive; however, a lot of people attended, including Bob Greene and his wife.

- [99] Ms. Widner did not know Bob Greene nor did she invite him. He seemed to have a connection to one of Mike's friends. Ms. Widner said there was nothing odd about Greene's attendance at the wedding. She found out he was a high-ranking member of the Hells Angels when she learned of his murder several years later.
- [100] After the wedding, Ms. Widner continued working at Price's Alarms until possibly into 2009, then she opened Coastal Storm Gallery with a friend. Ms. Widner dealt with a local artist, purchased jewellery from her to sell at malls and trade shows and in an online store, and returned whatever did not sell. After Ms. Widner's friend moved away, that venture fizzled out. She started up again several years later with her sister Samantha.

The acquisition of Eaglecrest

- [101] In or around 2011, Ms. Widner became involved with the Eaglecrest property through Craig, a friend of a friend. He was building a house on the property but did not have the \$100,000 required to finish it. He offered a 25% return to Ms. Widner for financing the project. She obtained the financing but determined that he was mismanaging the project.
- [102] Ms. Widner said she used the Deceased as a sounding board for risk/reward issues with Eaglecrest and felt they were making decisions on the project together, although she does not recall that he contributed any money to it.
- [103] Ms. Widner began closely supervising the work on Eaglecrest to mitigate her liability. She would meet Craig at lumberyards to pay the bills directly, organize for things to be shipped to her and generally bypass his involvement.
- [104] Ultimately, Eaglecrest was listed for sale at over \$1 million, but it did not sell. Craig was hospitalized and could not make the mortgage payments. Ms. Widner assumed the existing debt on the property, a mortgage of about \$525,000, and obtained the title to it in the summer of 2012. Monthly payments on the mortgage were \$1,998.35.

The marijuana grow operation at Tugwell

- [105] Around the time Ms. Widner took on the Eaglecrest project, the Deceased was approached about renting out the workshop at Tugwell for a legal medical marijuana grow operation to be operated by Brent Cornell. Ms. Widner and the Deceased went to a lawyer and obtained legal advice about the grow operations. Ms. Widner signed a Health Canada authorization form declaring that she was aware and consented to growing marijuana on her property.
- [106] Ms. Widner said the rent from the workshop and main house at Tugwell was \$3,000 per month in cash, which Mike collected, in addition to the \$600 paid by Ms. Acorn for the rental house on the property and whatever additional funds the Decased contributed to top the rent up to market value. Ms. Widner used \$2,000 of the rent money to pay the mortgage on Eaglecrest and the balance for other living expenses.

- [107] Ms. Widner said that the only hint the Deceased was involved in illegal activity occurred when the police pulled him over and seized his mother's medical marijuana and the rent money from him. The incident was reported in the newspaper and Ms. Widner was embarrassed. They argued about it frequently and she pressed him about the truth of his explanation for the source of the drugs and money but he stuck to his story that the police seized rent money and his mother's medical marijuana.
- [108] Ms. Widner was not aware that any of Mike's friends were involved in criminal activity except Adam Smith, who was charged with trafficking in cocaine and possession of a firearm. She banned him from their home but eventually helped him obtain a car and get back on his feet when he fell on hard times after serving his jail sentence.
- [109] Ms. Widner said that Dallas Julien had some involvement in building the shop at Tugwell and he helped her with some of the construction at Eaglecrest. She was aware of media reports that Mr. Julien and his wife had leased some property that became the Devils Army clubhouse in Langford, the implication being that the Devils Army was a criminal organization. Ms. Widner said Mr. Julien was embarrassed about the incident.
- [110] Ms. Widner was not aware of a connection between Mike and the Devils Army clubhouse. She claimed that she was not aware that the major source of his income was from illegal drug sales until Ms. Boughton testified. Ms. Widner maintained that the Deceased denied any criminal activity when she confronted him after the police seized cash and other items from his vehicle.
- [111] Ms. Widner denied that Mike paid for the properties and put them in her name to protect them from risk. She agreed that his contributions to the household enabled her to save some money to pay down the mortgage and that other payments against the mortgage came from Mike's uncle and sister.

Discussions about divorce

- [112] Ms. Widner was hospitalized in 2014 with a serious health issue. It gave her time to think about her life. When she was discharged, she raised the subject of divorce with the Deceased. She wanted him to be different, less stressed and happier, and told him that she deserved better.
- [113] Ms. Widner said her husband was extremely upset about a divorce and things did change for the better. He was happier, he was more present in the marriage and he started taking the children to school. Ms. Widner said they did not discuss divorce in front of Chris Widner as he described.

The disappearance of the Deceased

- [114] The last significant event before Mike's death was a belated birthday dinner for Ms. Widner's father, Dan Cameron. Her sisters and their husbands and some friends attended. Sunday family dinners had been a regular occurrence in the Widner household since the move to Sooke in 2004.
- [115] A few days before March 9, 2017, Ms. Acorn called Ms. Widner to alert her that Mike was supposed to have seen her or called her and had failed to do so. Ms. Widner brushed it off at first and thought he was just ignoring his mother. She told Ms. Acorn he would be home on Sunday morning as usual. Ms. Acorn contacted the police, who then spoke to Ms. Widner.
- [116] Ms. Widner told police that Mike might be in Black Creek, where she believed he lived part of the time with his friend Seth. Then she said the questions from police got strange: did he own a Harley, did he have any ties to the Hells Angels? Ms. Widner said no and that she expected him home on Sunday morning as usual. The police wanted to be there for his expected return and she agreed.
- [117] Ms. Widner became very worried and posted on Facebook, asking for information about her husband. Ms. Widner's sister Shannon had a connection to a psychic, who mentioned "Shawn" and a girlfriend. Ms. Widner was confused about the reference to a girlfriend and asked her sister to call the psychic back. The psychic confirmed she was talking about Mike's girlfriend.
- [118] Armed with the information from the psychic, Ms. Widner called Ms. Acorn to ask what was going on. Ms. Acorn intimated that she should know all about it and suggested she call Chris Widner. Ms. Widner called her father-in-law, who was wintering in Arizona, and asked him for the truth. He told her there was a girlfriend and children.
- [119] Ms. Widner packed up and went to her sister Samantha's home with her children. Within a day or two the police advised her that they had found a body in Port Renfrew and were certain it was Mike. The news began carrying reports about the killing of a Hells Angels prospect with criminal ties. Ms. Widner said she was caught completely off guard by this.
- [120] Once it was confirmed that Mike was dead, Ms. Widner began planning a funeral. Mike's friends asked her to meet with some of his other friends who she did not know. She met a man called Shawn in a parking lot with another individual. They talked to her about Mike's affiliation with the Hells Angels and how he was going through the "program" and they wanted to "vest" his casket. If she allowed them to do that, the Hells Angels would pay for the funeral. Ms. Widner told them she would do her own thing but they could attend the service.
- [121] Ms. Widner arranged a service at a facility at Bear Mountain. In order to pay for it, she sold Mike's boat for \$10,000 and his 1991 Volkswagen for \$1,000. The boat was worth about \$35,000 five years before his death, but it had been parked in the driveway for several years and the soft fittings had been sun damaged. The trailer was also seized up. Ms. Widner sold

the car to Adam Smith. She has not disposed of the Deceased's other belongings, such as woodworking equipment she had bought him and things he had obtained through a bailiff's seizure of a business.

Ms. Widner's search for assets in the Deceased's name

- [122] Ms. Widner began hearing rumours about Mike having other property in Sooke and had a friend do a title search in his name, with no results. She went to most of the major banks to search for insurance policies and bank accounts.
- [123] Ms. Widner learned about an account in the Deceased's name when she received a letter from TD Bank in the fall of 2019. Ms. Widner had one of her children open a TD account so she could go to a branch and seek information about the Deceased's account.
- [124] The deposit account history Ms. Widner obtained from TD showed that the account was opened in the Deceased's name on January 9, 2017 with a deposit of \$43,237. That same day \$43,000 was withdrawn. On January 10, 2017, a purchase was made at a Wal-Mart in the amount of \$161.54. On March 15, nearly a week after Mike died, someone withdrew \$50 from the account using an ATM. On March 27, someone paid \$22.77 at "Black Swan Liqu", likely a pub or liquor store, leaving \$2.69 in the account.
- [125] Ms. Widner said her husband never owned a Harley. He had a motorcycle when their daughter was born but a psychic told them he would die on a motorcycle so they sold it. She learned that the Deceased had two motorcycles at Ms. Boughton's house and had purchased several others for the Hells Angels. She determined that he had a Chevy Malibu which a bailiff in Duncan was looking to seize. She found out Ms. Boughton was driving it and told the bailiff.
- [126] Ms. Widner began to get tickets for toll bridges in the Deceased's name in relation to a utility trailer. People told her it was at a Hells Angels clubhouse and she understood the trailer was eventually sold.

Ms. Widner's relationship with Ms. Acorn

- [127] Ms. Widner denies Ms. Acorn's allegations against her about drug dealing, involvement in the illegal aspect of the marijuana grow operation at Tugwell and involvement in her husband's death. She believes Ms. Acorn is angry that she did not contact the police sooner about Mike's disappearance. Ms. Widner said if Ms. Acorn had told her about Mike's girlfriend she would have been concerned about his whereabouts a lot sooner.
- [128] Ms. Widner also believes that Ms. Acorn is angry about being evicted. Ms. Widner could not afford to keep renting to Ms. Acorn at a subsidized rate. She inspected the property and found it was badly run down. Ultimately, Ms. Acorn moved out. Ms. Widner and her father worked for several months on the property before she could rent it to new tenants.

- [129] Ms. Widner denies alienating her children from Ms. Acorn. She said Ms. Acorn did not interact with them, she just sat around her house. Ms. Widner is admittedly not fond of Ms. Acorn and could not understand why the Deceased was so close to her.

Ms. Widner and Rick Alexander

- [130] Ms. Widner received a call from "Rick" after Mike's death to explain to her that he had abandoned the house and the shop on Tugwell and turned off the power because Ms. Acorn had threatened to have him "whacked".
- [131] Ms. Widner said she never met Rick Alexander and did not know his last name until she attended Ms. Boughton's examination for discovery in 2017. She agreed that the last name had been on a search warrant she found at the marijuana grow operation at the Tugwell workshop after Mike's body was found, but she had not retained the information. Ms. Widner understood that the Rick Alexander she spoke to was the son of Rick Alexander, who had ties to the Devils Army. It appears that Ms. Acorn also dealt with the younger Alexander.
- [132] Ms. Widner also found a letter from Rick in the shop which made it clear that he had been involved with Mike in the grow operation. The letter appears to have been written in a type of code which Ms. Widner said she did not understand. It also contained several different calculations. It referred to "M take 20 right away", which Ms. Widner assumed meant Mike would get \$20,000.
- [133] The contents of the letter also stated that, from Rick's perspective, Mike kept Rick and Ms. Widner apart so Ms. Widner would not find out about "Sara", but that Mike loved Ms. Widner and their children too much to leave her.
- [134] The letter also mentioned a "vehicle partnership". Ms. Widner heard rumours that the vehicle was actually a plane. She asked Rick about it but he said the plane was garbage, with mechanical issues, and none of Mike's other friends knew anything about it. Rick also invited her to lunch to talk more but she did not take him up on the offer. She agreed that he told her to stop asking questions.
- [135] Ms. Widner could not recall if the phone conversation with Rick occurred before she found the letter in the shop, but her question to Rick about the airplane during their phone conversation leads me to conclude that she found the letter in the shop before speaking with him on the phone, since the letter refers to a vehicle, not an airplane.
- [136] Ms. Widner found some accounting records in the Tugwell house when it was abandoned by Rick. They were not in her handwriting and she was doubtful that they were in Mike's handwriting. In any event, she said he was not a good recordkeeper so she very much doubted he kept the records.

Ms. Widner's income between 2010 and 2017

- [137] From 2010 through 2017, Ms. Widner's line 150 income was derived from net rental income. In 2010 it was \$15,641. In 2011, it was \$25,236. In 2012, it was \$31,534. In 2013, it was \$38,580. In 2014, it was \$38,166. In 2015, it was \$31,254. In 2016, it was \$27,866.
- [138] In 2017, Ms. Widner declared a loss of \$18,660 due to rental expenses due to the need to clean up and repair both houses on Tugwell to ready them for new tenants.
- [139] Ms. Widner currently derives some income from Coastal Storm Gallery, sells art through Facebook Marketplace and rents out the two houses on the Tugwell property.
- [140] Ms. Widner sold Eaglecrest for approximately \$793,000. The mortgage on it at the time was \$453,022.35. There is nothing in the banking records indicating any large or extra payments against the mortgage. After the payout of the mortgage, real estate commissions and other fees, the net amount from the sale of Eaglecrest was \$316,724.42. It is held in trust pending the outcome of this litigation.
- [141] Ms. Widner filed tax returns for the Deceased for 2015, 2016 and 2017. She declared his income as zero.

Tara Threlfall

- [142] Ms. Threlfall's children went to school with the Widner children. Ms. Threlfall said the Deceased was a caring and attentive father. The couple seemed close when they were at their children's activities and she saw nothing to indicate the relationship was over.

Kylee Widner

- [143] Kylee is the Deceased's half sister. Kylee has known Sabrina virtually her entire life. She went to Sabrina and Mike's home in Sooke frequently for family dinners or to go to her niece and nephew's activities. Kylee never saw anything to indicate their relationship had ended or was in the process of ending. She learned about Sara Boughton after Mike died and she is angry at her parents for not telling her about the situation.
- [144] Kylee does not recall seeing Mike with a Harley, displaying any Hells Angels affiliation or participating in any illegal activity. She was not aware of a marijuana grow operation on the Sooke property and was quite surprised when she learned about it. She last saw Mike on February 26, 2017 when she went to their house for dinner. Kylee remains in contact with Sabrina and sees her and her children as often as she can.

Shannon Wirth

- [145] Ms. Wirth is Sabrina's older sister. Ms. Wirth and her family went frequently to Sabrina's homes in Sooke for Sunday dinners. She regarded Mike as a normal, loving brother-in-law. Ms. Wirth attended the couple's wedding in Mexico. She recognized the name Bob Greene and thought he was at the wedding as well as a baby shower at the Tugwell property.
- [146] Ms. Wirth never saw Mike with a Harley and had no idea he was connected to the Hells Angels. The last time she saw him was a couple of weeks before he passed away, at the Eaglecrest house, at a birthday dinner for their father.

Dorothy Graham

- [147] Ms. Graham dated Sabrina's father Dan Cameron. She saw Sabrina and Mike frequently for family dinners at their home. She last saw Mike at a belated birthday party for Dan at Sabrina and Mike's home.
- [148] Ms. Graham never saw Mike with a Harley. She was aware of a legal marijuana grow operation. She found out about Mike's other relationship on the Sunday they found his body.

Samantha Agbay

- [149] Samantha is Sabrina's twin sister. She met Mike, Sabrina's boyfriend, in about 1999. Samantha lived with Mike and Sabrina for a year or so around 2001-2002 before the couple moved to the Tugwell log house. Samantha and Sabrina were both employed at Price's Alarms. Samantha co-signed Sabrina's mortgage on Tugwell. She did not know what Mike was doing for work at the time of the purchase but had no indication he was engaged in illegal activity.
- [150] After Mike and Sabrina moved to Tugwell, Samantha saw them regularly. She eventually became involved with Sabrina's trade show business.
- [151] Samantha said that Mike took his brother Steve's death very hard. He was distraught and did not know how to handle the grief.
- [152] Samantha and Sabrina bought a cabin in the Campbell River area together at some point in the early 2000s, although the timing of the purchase was not clear. They sold it shortly after Mike's death and Samantha gave her share of the money to Sabrina. The sisters purchased it with cash. Samantha does not know where Sabrina got the money to purchase the cabin and did not ask her.
- [153] Samantha thought her sister and brother-in-law seemed like a normal couple. Samantha never saw Mike with a Harley and had no idea he was involved with the Hells Angels until after his death.

[154] The last time Samantha saw Mike was the Sunday before he went missing at the birthday dinner for Dan.

[155] Samantha was not aware of the medical marijuana grow operation and was not aware that Mike was involved in drug trafficking of any sort. She knows Adam Smith and has heard rumours that he was convicted of trafficking in cocaine.

Ofelia Agbay

[156] Mrs. Agbay is Samantha's mother-in-law. She was acquainted with Mike and Sabrina and was unaware of any separation or their involvement with any illegal activity.

Credibility and reliability

[157] Ms. Boughton had some difficulties with testifying, as she was frequently overcome with emotion. She was also at times flippant and immature in response to questions on cross-examination; however, I am satisfied she came to court to tell the truth.

[158] There were some differences between what Ms. Boughton said at examination for discovery and what she said at trial. She was also not precise with dates and other details, but not for want of trying.

[159] Overall, I am satisfied that Ms. Boughton's evidence about her relationship with the Deceased, the parentage of her children and what the Deceased said to her about his marriage and his claims about his interest in properties registered in his wife's name was reliable.

[160] Whether or not I admit the Deceased's statements to Ms. Boughton for the truth of their contents is a separate consideration which I will resolve later in these reasons.

[161] Chris Widner was generally a credible and reliable witness, although his decision to keep his son's second family a secret from Ms. Widner is morally questionable.

[162] Reta Acorn was neither a credible nor a reliable witness. She presented as antagonistic, although I understand that part of her attitude was rooted in the fact that she was required to testify on her son Mike's birthday. Ms. Acorn demonstrated considerable animus against Ms. Widner and only slightly less so against Ms. Boughton. She agreed that several weeks prior to trial she had referred to them both, in a conversation with counsel for Ms. Widner, as "greedy bitches".

[163] There were differences of significance between what Ms. Acorn said in her affidavits sworn for a summary trial of the matter and what she testified to at trial. For example, at trial Ms. Acorn said her son was a high level cocaine dealer, but in her affidavit she did not refer to cocaine. Nor did she mention in her affidavit the fact that Mike told her that Ms. Widner would not divorce him without liquidating all the assets, although she claimed that at trial. Ms. Acorn also assisted her son in profiting from the illegal diversion of marijuana from her medical permit, which detracts from my assessment of her veracity.

- [164] As to reliability, Ms. Acorn was not careful in her evidence. She tended to make broad sweeping statements about things without being able - or willing - to say how she learned of them. One example of this was her assertion that Sabrina was involved in cocaine dealing and Bob Greene was the supplier, but she conceded she was not present for any drug deals and only saw Greene at her son's wedding.
- [165] Sabrina Widner was focussed and businesslike for the majority of her time on the witness stand. She grew emotional when describing the events surrounding her husband's disappearance, particularly concerning the impact on her children, but I do not find this was contrived to generate sympathy, just as I find that Ms. Boughton's emotional state was not contrived. Both women found themselves in an extremely difficult situation after the Deceased's passing, but I accept that the shock value of his relationship and children with Ms. Boughton was significant to Ms. Widner.
- [166] Ms. Widner was contradicted on a few points which I regard as relatively minor. The areas where I have difficulty with Ms. Widner's credibility concern the Deceased's contributions to the Widner household and the source of his income.
- [167] Ms. Widner took pains to portray herself as the economic generator in the Widner household. I accept that she clearly has a head for business and was able to leverage her interest in the Tugwell property to build the rental house and eventually acquire Eaglecrest, but I do not accept she paid down the original Tugwell mortgage without substantial help from the Deceased.
- [168] Ms. Widner's evidence that two of the \$44,000 payments on the original Tugwell mortgage came from family members of the Deceased was uncontradicted, except by Ms. Acorn, whose evidence I do not accept. But that does not account for two other payments totalling \$88,000 and one payment of \$22,000 made against the original Tugwell mortgage in a timeframe when Ms. Widner was earning at most \$25,000 per year.
- [169] With all due respect to Ms. Widner's financial acumen, it was not possible for her to save far more than she was earning in order to retire the original Tugwell mortgage. The only conclusion on the evidence is that the Deceased was providing her with the money to do so. Given his tax filings, inconsistent employment, cash contributions to the household and aversion to paper trails concerning his finances, I find his income was from illegal sources. Ms. Widner either knew or ought to have known this.
- [170] All of the defendant's other witnesses presented as credible and reliable. Their evidence was largely restricted to collateral points concerning whether or not, to their knowledge, there had been a separation, or whether they had seen the Deceased on a Harley or knew of his involvement with the Hells Angels.

Is Ms. Boughton a "spouse" for the purposes of the WESA?

[171] The WESA states in Part 2 "Fundamental Rules", Division 1 "Meaning of Spouse, Effect of Adoption and Construction of Instruments":

When a person is a spouse under this Act

2 (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and

- (a) they were married to each other, or
 - (b) they had lived with each other in a marriage-like relationship for at least 2 years.
- (2) Two persons cease being spouses of each other for the purposes of this Act if,
- (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or
 - (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

(2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,

- (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
 - (b) they continue to live together for one or more periods, totalling at least 90 days.
- (3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

[Emphasis added.]

[172] Ms. Widner and the Deceased were not separated when he died, so there is no "event" under the Family Law Act to cause his interest in the property in her name to arise. Ms. Boughton and the Deceased were still in a relationship when he died and the parties have admitted it was a marriage-like relationship of over two years.

[173] Part 3 of the WESA is entitled "When a Person Dies Without a Will", Division I "Distribution of Estate Where There Is No Will" and governs what occurs on an intestacy:

Two or more spouses

22 (1) If 2 or more persons are entitled to a spousal share of an intestate estate, they share the spousal share in the portions to which they agree, or if they cannot agree, as determined by the court.

- (2) If 2 or more persons are entitled to apply or have priority as a spouse under this Act in respect of an intestate estate, they may agree on who is to apply or who is to have priority, but if they do not, the court may make the decision.

- [174] The WESA clearly provides for more than one spousal share in the estate of an intestate. The question is whether it provides for the division of an estate as between two individuals who were in concurrent, subsisting spousal relationships with the Deceased at the time of death.
- [175] The plaintiffs maintain the WESA clearly provides for circumstances like the one before me where there are two individuals who qualify as spouses upon the death of a Deceased. The defendant says to permit such an interpretation of the section would be to sanction polygamy.
- [176] To understand the evolution of s. 22 of the WESA and resolve this question, it is necessary to look at the jurisprudence surrounding prior legislation, which is summarized in *Austin v. Goerz*, 2007 BCCA 586 [Austin].
- [177] In *Austin*, the Deceased had separated from his wife and entered into another relationship before his death. The appeal engaged considerations such as whether the Deceased lacked capacity to marry and whether his relationship outside of marriage provided his partner with any right of recovery against his estate. The Court examined the evolution of the relevant legislation at the time in cases of intestacy, the Estate Administration Act:
- [21] What is specifically in issue in this appeal is a definition provision in the Estate Administration Act. However, as the expression "marriage-like relationship" appears in numerous other British Columbia statutes dealing with the rights and obligations of unmarried couples, I do not think the present exercise in statutory interpretation can be undertaken without regard to them. In most instances, including the Estate Administration Act, the appearance of the expression "marriage-like relationship" was brought about by the passage of two pieces of legislation, which had the effect of standardizing the definitions of "spouse" and "common law spouse." These are the Definition of Spouse Amendment Act, 1999, S.B.C. 1999, c. 29, and the Definition of Spouse Amendment Act, 2000, S.B.C. 2000, c. 24. Both were proclaimed in force at the same time, partly on July 28, 2000, and partly on November 1, 2000: see B.C. Reg. 280/2000.

Legislative Evolution

- [22] An examination of the evolution of a provision can shed light on legislative purpose and intent [citations omitted]. Accordingly, I will review the changes leading to the present version of the Estate Administration Act and several other statutes containing the expression "marriage-like relationship."

[23] The provisions of the Estate Administration Act relevant to this appeal can be traced back to the Destitute Orphans Act, S.B.C. 1877, c. 28. This statute provided that if a man died intestate, then a judge of the Supreme Court of British Columbia could order the payment of money out of his estate for the benefit of any surviving concubine or illegitimate children. No payment could exceed the greater of \$500.00 or ten percent of the net value of the estate. Section 1 read, in part:

Where any man shall die intestate in the Province of British Columbia, leaving him surviving a concubine who may at the time of his death be actually maintained by him or under his protection, or leaving him surviving any illegitimate child or children under the age of 16 years, reputed to be by him begotten on any woman, and at the time of his decease maintained by him or under his protection, or for the support, maintenance, or advancement of which child he shall have made any provision within the twelve months next before his decease

[24] The Destitute Orphans Act was incorporated into the Intestates Estate Act, R.S.B.C. 1897, c. 106. Although the name of the statute changed over time the provisions were carried forward and eventually became Part V of the Administration Act, R.S.B.C. 1960, c. 3.

[25] Part V of the 1960 Administration Act was repealed by An Act to Amend the Administration Act, S.B.C. 1972, c. 3. The expression "concubine" was replaced by "common law spouse" which was defined in s. 91, to mean:

[E]ither a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than two years immediately preceding his death.

[178] The Court compared past and present definitions of "common law spouse" in the Estate Administration Act and concluded that while capacity was necessary for a common law marriage, it was not necessary for a statutorily created marital equivalent absent specific inclusionary or exclusionary language and an application of the relevant principles of statutory interpretation [at para. 40]. Nothing in the history of the statutory recognition of common law relationships, as distinct from common law marriages, required capacity to marry [at para. 41].

[179] The Court continued:

[42] From 1877 until 1972, intestacy legislation made provision for payments to be made to a "concubine", being a woman who cohabited with a man to whom she was not married. That one or both of these persons lacked the capacity to marry was not relevant [citations omitted].

[43] Further, intestacy legislation has always recognized that concurrent claims can be made by both the lawfully married partner of the Deceased and by a person whose entitlement is advanced on the basis of a marital-equivalent relationship with the Deceased. By reason of s. 3 of the Destitute Orphans Act, notice of a claim by a "concubine" was required to be given to

a surviving "widow." This requirement was carried forward and appeared in 1972 in what was then s. 94 of the Administration Act, when the term "common law spouse" was first used in this statute. Since by reason of these amendments a Deceased "common law spouse" could now be a man or a woman, notice was required to be given to either the surviving "widow" or "widower." There would have been no need to maintain the notice provision if capacity to marry had been considered necessary for two persons to become common-law spouses, because it would have been impossible for a Deceased to have been both a husband or wife, and a common-law spouse.

[44] Presently, s. 85.1 of the Estate Administration Act, which was enacted by the Definition of Spouse Amendment Act, 1999, specifically recognizes there can be more than one spouse on intestacy:

For the purposes of section 85, if 2 or more persons are entitled as a spouse they share the spousal share in the estate in the portions determined by the court as the court considers just.

This provision would have been unnecessary if the Legislature had intended capacity to be a pre-requisite to a "marriage-like relationship." Indeed, s. 85.1 is a positive indication that the Legislature contemplated that a Deceased could leave behind both a lawfully married spouse and a common-law spouse.

[180] The WESA resulted from a project by the British Columbia Law Institute, commenced in 2003, known as the Succession Law Reform Project. The project culminated with the publication of the Institute's Report No. 45 in June 2006 entitled Wills, Estates and Succession: A Modern Legal Framework. The objective of the WESA was "to modernize the fragmented wills, estates, and succession laws, to streamline probate and estate litigation procedures and to consolidate the majority of the law into a single statute", per Dardi J. in *Lougheed Estate v. Wilson*, 2017 BCSC 1366 at para. 599.

[181] The very issue that is at the heart of this litigation - whether there can be two concurrent spouses under the WESA - was the subject of Legislative debate. I reproduce the entirety of the Hansard debate from the afternoon of September 23, 2009 (Vol. 3, No. 3) concerning s. 22 to illustrate the concerns expressed by the Opposition critic, Mr. Krog, and the responses of Mr. de Jong for the Government:

L. Krog: When you go back to the definition of "spouses" under the act, you have to be married or you have to have lived in a marriage-like relationship for at least two years.

I take it we're contemplating the situation where you may indeed have . I think it becomes a bit difficult, because if you separate for at least two years, in the case of a marriage, then you're not together. You're not a spouse. In a case of the marriage-like relationship, it can occur if one or both persons terminate the relationship. I'm just wondering whether we'd be able to get into this situation.

Hon. M. de Jong: The scenario that seems to emerge is a situation where someone has been legally married, has not yet dissolved that or triggered the formal dissolution of that and yet, at the time of passing -- at the time of their death -- also has a common-law spouse of two years who acquires entitlement.

So that's roughly the scenario we can think of that would render this applicable.

L. Krog: I'm just trying to get a grasp on the practical example of this in light of what the act says.

If you're married, and you've lived separate and apart for at least two years with just one of you having the intention to do so, then you're no longer a spouse. That's what section 2, the definition section, says.

In order to become a spouse, you have to have lived together in a marriage-like relationship for at least two years. So are we talking about a situation of bigamy, or are we missing an intersection here somewhere?

I think the Attorney General is getting my point on this, and I'm just trying to grasp and get my head around this concept when you would have this intersection where two spouses would in fact have a claim. Or does the Attorney General see it as legally possible that one can be -- what? -- spending six nights here and seven nights there and swapping back and forth?

I mean, this almost contemplates bigamy in some respects, the way I'm seeing it, but I'm sure the Attorney General can assist me.

Hon. M. de Jong: I think the best way I can try to answer this in terms of legislation that, by necessity, tries to account for every conceivable circumstance. The possibility that a relationship has commenced and satisfied the spousal definition prior to another relationship ending -- such that the person no longer qualifies under a different definition of spouse, as unlikely as it may be -- could occur. I'm not sure I embrace the description or the example the member gives, but maybe. So the challenge is to take account of circumstances, however unlikely but possible.

L. Krog: If the Attorney General will forgive me for putting it this way, you can have your cake and eat it too, arguably. You get to retain the status of marriage in the lawful, traditional sense and at the same time be in a common-law spousal relationship recognized by this statute at exactly the same time.

If the Attorney General can give me a better example. I can't see, given the timing -- the two years and the living separate and apart. I just want to hear an example that can explain to my very simple mind how this is ever going to function, given the way the act defines spouses.

Hon. M. de Jong: Two things. First of all, this notion of two or more entitled spouses is not new. It did exist in the previous act, so to that extent the drafters have not developed a new concept.

The hon. member began his question and submission with the old adage about having the cake and eating it too. Actually, the person having the cake is dead, in this example.

So a situation where, unknowingly, two relationships have existed, overlapping contemporaneously -- perhaps the two unknowingly, perhaps not -- and two people satisfy the definition was something that the Estate Administration Act considered and thought important enough to include in their provisions and the institute and the drafters of this document felt needed to be preserved. As distasteful or tawdry as it may seem, the possibility that an individual or two individuals might find themselves in this situation requires, we believe, the inclusion of the provision.

L. Krog: I hate to belabour this, but I'm trying to reconcile the language very specifically. If we go back to section 2, it says that they are "spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time ." The relevant time is the time of death of the Deceased person, and "(a) they were married to each other, or (b) they had lived in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for at least 2 years. (2) Two persons cease being spouses for the purposes of this Act if ."

In the case of marriage, they actually have to live "separate and apart for 2 years with one or both of them having the intention, formed before or during that time, to live separate and apart permanently" and "in the case of a marriage-like relationship, one or both persons terminate the relationship."

I'm not sure how you can live separate and apart and be in a marriage-like relationship. Somebody, it seems to me, has to lose the right here. I'm just trying to figure this out.

Hon. M. de Jong: This seems to be built around the legal proposition or interpretation that in order to live in a marriage-like relationship with A, you need not to have conclusively resolved or intended to terminate a marriage-like relationship with B. As implausible as that may sound, that apparently is the legal principle or legal argument that lies at the root of including the provision.

L. Krog: I guess my difficulty is -- and perhaps I'm being too moralistic in this sense -- that if your spouse essentially abandons you but doesn't say it's over, and you've been married to them for 30 or 40 years, you then have to face the prospect under this section . The Attorney General may make reference that it exists now, but this is new law, and we're reforming the law.

This supports the proposition that the person they go off and live with for a couple of years -- and that's all it takes, a couple of years -- has a claim on the estate that the loyal spouse, if you will, built up with the Deceased person over perhaps 30 or 40 years.

The Attorney General can correct me if I'm wrong, but that's my interpretation. We're essentially saying: "That's okay. As a society, we won't pass judgment on the relationships involved." But we will say to the loyal spouse -- if I may call them that -- that you helped build it all up, but your spouse, male or female partner, goes off and spends two years, and that's all it takes -- two years with somebody else.

Then the person they spent two years with, who may well know of the existence of the loyal spouse, is going to share in the estate. That's what this says, and if I'm wrong, the Attorney General can correct me.

Hon. M. de Jong: I think it's legitimate for us to walk through what some of these provisions are. In the example the member has given, one thinks through some of the other mechanisms at play and the entitlement of the loyal spouse on separation proceedings, divorce proceedings, to share in the matrimonial property, take an equal share in the matrimonial property.

In those circumstances, one presumes that the loyal spouse would be entitled, upon dissolution of the relationship, to half of the matrimonial property -- at least half of the matrimonial property, depending on the disposition of that. I'm not quarrelling at all with the member exploring the implications of some of the proceedings. In that circumstance, in that example, there are some other protections that exist for the loyal spouse, to use the member's term.

L. Krog: I appreciate that they do exist, but in the case of the loyal spouse, for instance, and referring to the case of marriage, the definition section makes specific reference to "an event occurs that causes an interest in family assets, as defined in Part 5 to arise."

"I don't want a section 57 declaration. I want this 30-year relationship to continue, so I haven't signed it, and I won't sign a separation agreement." In the meantime, my wife, my husband, my partner is off engaged in this new relationship.

What this act does is specifically recognizes, by definition, that potentially what would have been entirely mine if my spouse died, as the loyal remaining spouse, is now going to be shared with the new partner. That's exactly what this is. I just throw out to the Attorney General that . I'm not speaking for myself in terms of my own sense of morality, but I think it's important, as we debate this today, that British Columbians who are watching need to understand that this is what the law of British Columbia is saying -- and will be, assuming this act passes.

Hon. M. de Jong: The law as it will be, and the law as it is now and has been for some time -- and, of course, again, in the circumstance, the example, that the member has brought to the floor . In a similar situation, where the spouse who has moved from one relationship to the other chooses to stop by a law office or a notary and complete a testamentary instrument, the situation may be very different indeed.

I appreciate the fact that the member is taking seriously the fact that there will always be circumstances that these provisions apply to, and it's worth exploring what they are.

Section 22 approved.

[Emphasis added.]

[182] As Dardi J. observed in *Lougheed Estate v. Wilson*, *supra*:

- [603] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 49 the Supreme Court of Canada endorsed the notion that evidence of a statute's history, including excerpts from Hansard, is admissible as relevant to the background and purpose of the legislation, provided, of course, that the court approaches the evidence cautiously and remains mindful of its limited reliability and weight: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at p. 483-85; *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 50.
- [183] Accordingly, it appears to have been the considered intention of the Legislature to continue to provide for individuals in a marriage-like relationship with an individual who was still married to someone else at the time of death under the WESA.
- [184] Counsel for the defendant maintains that this cannot be the case, as it sanctions polygamy, in direct contravention of provisions of the Criminal Code. In *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, Bauman CJSC (as he then was) determined that the criminal law prohibits any kind of conjugal union with more than one person at the same time - multiple marriages. The section does not extend to conjugal relationships, common law cohabitation, or what in law we now define as "marriage-like relationships". The prohibition also does not extend to adultery: at paras. 984 - 1020.
- [185] In conclusion, it was admitted that the plaintiff Sara Boughton was in a marriage-like relationship with the Deceased when he passed away and, accordingly, she is entitled to a declaration that she is a spouse of the Deceased as that term is defined in the WESA.

Are the infant plaintiffs the descendants of the Deceased?

- [186] The defendant did not seriously contest that the Deceased was the father of Ms. Boughton's two children. Ms. Boughton said he was their father and he is listed as their father on their birth certificates. There were photographs in evidence of the Deceased with Ms. Boughton while she was pregnant and after the children arrived. The Deceased appeared to be a loving father to his two youngest children.
- [187] The infant plaintiffs are declared to be the children of the Deceased and entitled to a share of his estate as his descendants.

What does the Deceased's estate consist of?

- [188] The plaintiffs allege that the Deceased was almost entirely responsible for the acquisition of property which Ms. Widner either holds in her name (the Tugwell properties) or sold after his death (Eaglecrest), with the proceeds held in trust pending resolution of this litigation. The defendant's position is that while the Deceased made some contributions to the acquisition of the properties, she was the primary contributor.
- [189] I will first deal with the Deceased's statements to Ms. Boughton, tendered to support the assertion that he was the primary, if not sole, contributor to the acquisition of the properties in Ms. Widner's name.

The admissibility of the Deceased's statements

- [190] The essential issue is whether the Deceased's declarations are admissible for the truth of their contents.
- [191] The general rule is that hearsay evidence is not admissible for the truth of its contents. There are two exceptions to the general rule. First, hearsay may be admitted for the truth of its contents if it fits into an established exception to the hearsay rule. In *Harshenin v. Khadikin*, 2015 BCSC 1213, Dardi J. observed:
- [30] In some instances, the statements attributed to the Deceased are not relied on for the truth of their contents. In other cases, statements are admissible as an established exception to the hearsay rule which permits evidence to be given of statements made by Deceased persons as to their state of mind or emotional state: *Modonese v. Delac Estate*, 2011 BCSC 82 at paras. 82-85. In *R. v. P (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.), Doherty J. explained this principle as follows, at 341:
- Assuming relevance, evidence of utterances made by a Deceased (although the rule is not limited to Deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred.
- [31] The authorities establish that in order to benefit from this "traditional" exception to the rule against hearsay, the evidence must have some measure of trustworthiness: *R. v. Panghali*, 2010 BCSC 1114 at paras. 18-21.
- [192] See also *R. v. Mapara*, 2005 SCC 23 for a discussion of the established or traditional exceptions in the context of the co-conspirator's exception to the hearsay rule.
- [193] I am not satisfied that the Deceased's utterances fit into any established exception to the hearsay rule, nor did counsel for the plaintiffs press for such a determination. The utterances were made to Ms. Boughton at various times over a number of years. The circumstances in which they were made were insufficiently detailed to determine what principled exception might apply. Accordingly, the admissibility of the Deceased's utterances must be analyzed under the principled exception to the hearsay rule.
- [194] The principled approach to the admission of hearsay evolved through a number of decisions of the Supreme Court of Canada: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Starr*, 2000 SCC 40; *R. v. Khelawon*, 2006 SCC 57; and, most recently, *R. v. Bradshaw*, 2017 SCC 35.

[195] The admissibility of hearsay under the principled approach requires the proponent of the hearsay to establish necessity and reliability. A strict application of the principled approach requires the trier of fact to assess the two criteria on a threshold basis before assessing the statement's ultimate reliability having regard to the entirety of the evidence. Counsel agreed at the start of the trial that the threshold issues had been satisfied. My analysis will therefore focus on ultimate reliability.

Were the statements in issue made?

[196] There is a preliminary matter for determination, and that is whether the Deceased made the statements in question. I am satisfied that the Deceased did make the statements that Ms. Boughton relayed to the court in her testimony. As I expressed earlier in these reasons, I found Ms. Boughton was a credible witness.

[197] I am not satisfied that the Deceased made the statements that Ms. Acorn testified about, for reasons earlier expressed about her credibility and reliability.

Are the Deceased's statements to Ms. Boughton necessary?

[198] The declarant is dead and the necessity requirement is unquestionably satisfied.

Are the Deceased's statements reliable?

[199] In order to determine if the statements of the Deceased are admissible as reliable, they must be examined in the context of the case as a whole. To do so I have divided the statements into general categories.

[200] The first category consists of the statements that the Deceased made to Ms. Boughton at the start of their relationship in the fall of 2009. Ms. Boughton said the Deceased told her he was going through a divorce and it would be finalized in three months, and then later that he was "just separated" from his wife and that there were children involved.

[201] I find the Deceased made those statements to Ms. Boughton to persuade her to form a relationship with him, but the Deceased was neither separated from his wife nor going through a divorce at any time, let alone in the fall of 2009. The statements are untrue and unreliable.

[202] The second category of statements relate to the Deceased's desire to move on from his marriage, retain custody of his children with Ms. Widner and spend his life with Ms. Boughton. Those desires were tied in with selling one of "his" properties. He also told Ms. Boughton that his wife knew he had a girlfriend and would hold unspecified things over his head to make life difficult for him.

[203] The Deceased told Ms. Boughton from the time he met her until his death nearly eight years later, that he wanted to move on from his marriage. Ms. Widner said the only time divorce was discussed with the Deceased was when she raised it, in 2014, after having been ill in hospital.

- [204] Rather than seizing on Ms. Widner's request for a divorce in 2014 so he could move on with his relationship with Ms. Boughton, the Deceased effectively pulled up his socks and became a more attentive husband and father to Ms. Widner and their children. I find his statements to Ms. Boughton about moving on and obtaining a divorce from Ms. Widner were made for the purpose of keeping her in a relationship with him. I find that the Deceased was content to carry on with his double life until some external factor - such as Ms. Widner finding out about Ms. Boughton - intervened to force him to make a decision and choose between his two families.
- [205] The only evidence that the Deceased ever asked Ms. Widner for a divorce came from his father, Chris Widner. He said that he was present when his son asked Ms. Widner for a divorce. His recollection was thin on detail. Ms. Widner denied that this occurred. On balance, I accept Ms. Widner's denial.
- [206] As for the Deceased's statement that Ms. Widner would hold things he had done over his head and make things difficult, I am satisfied this was done to ensure Ms. Boughton did not take steps to alert Ms. Widner to her husband's second household. In a similar vein, Ms. Boughton's belief that Ms. Widner was an evil and vindictive person likely served to dissuade Ms. Boughton from interceding in the Deceased's alleged marital woes.
- [207] The Deceased told Ms. Boughton that he wanted to have a home with her but wanted to sell his properties first. He claimed all of his properties were listed for sale for most of the time he was with Ms. Boughton. The only one that seems to have sold was an office on Helmcken and its sale did not result in the Deceased making good on his promises to Ms. Boughton about purchasing a home for her.
- [208] Underlying the Deceased's statements about the properties was his assertion that he had paid for them all, that Ms. Widner had not contributed anything and they were only in her name to protect himself against any issue that could arise.
- [209] I am satisfied that the Deceased's assertions that he had paid for the properties were only partly true. As I discussed earlier in these reasons, Ms. Widner was able to pay off the original Tugwell mortgage through several large payments and I am satisfied that \$100,000 of those payments came from the Deceased. I am also satisfied the Deceased contributed towards the \$50,000 cost of converting the old barn on the Tugwell property into a functioning workshop.
- [210] I do not accept the Deceased's statement that Ms. Widner had not contributed anything to the acquisition of Tugwell or Eaglecrest as reliable. I accept Ms. Widner's evidence that she saved the down payment for the Tugwell property. Ms. Widner was employed when she purchased Tugwell. She chose the property because it could be subdivided. She did all the paperwork on the subdivision and obtained a construction mortgage to build the house on the subdivided parcel. I accept that her intention was to sell that house and use any profit made to leverage another purchase. The Deceased's desire to have his mother live there instead superseded Ms. Widner's plans.

- [211] Accordingly, I accept that the Deceased contributed to the acquisition and improvement of the Tugwell property. I am satisfied that he advanced money to Ms. Widner for the property to hide it because the money was from the illicit sale of marijuana which pre-dated the legal grow operation at Tugwell. I am satisfied Ms. Widner knew or ought to have known that the Deceased's cash flow was from illegal activities given his inconsistent employment prior to 2012 or so when he was purportedly deriving income from a waste water management business.
- [212] I am not satisfied that the Deceased made any direct cash contributions towards the acquisition of Eaglecrest. I say this because the mortgage documents concerning Eaglecrest do not show any payments other than regular mortgage payments which Ms. Widner made using the rent money from Tugwell. In addition, by the time Eaglecrest was acquired, the Deceased was also supporting the Boughton household, which I find must have cut into his cash flow.
- [213] Finally, I am not satisfied that the Deceased's statement that Ms. Widner knew about Ms. Boughton was reliable. I find it was simply not true and was likely relayed to Ms. Boughton to feed the notion that it was only a matter of time before the marriage would end. It was obvious that Ms. Widner was shocked about the revelation of her husband's other family.

Conclusion on statements of the Deceased

- [214] I am satisfied that the Deceased's statements to Ms. Boughton that he contributed to the acquisition of property in Ms. Widner's name were reliable to the extent of the contributions I infer he made to pay off the original Tugwell mortgage. I am not satisfied that his statements that he paid for all of the properties is reliable in light of the evidence that the purchase of Eaglecrest was financed by a mortgage in Ms. Widner's name. There was no evidence of large payments against that mortgage to retire it early as there was with Tugwell. The likely reason is that by the time Eaglecrest was purchased, the Deceased was supporting two households and simply did not have the cash flow available to him to make contributions to the Widner household beyond living expenses.
- [215] I am mindful of the fact that Tugwell generated rental income which the Widner household used for living expenses and to pay the Eaglecrest mortgage; however, this enabled the Deceased to directly finance the Boughton household. To find that the Deceased's estate, and by necessary implication the plaintiffs' potential for recovery, has a claim against the title on Eaglecrest would amount to a kind of double dipping by the plaintiffs.

What constitutes the Deceased's estate?

- [216] Ms. Widner testified that the Deceased had a car and boat in his name when he died, along with various chattels. I am satisfied that those are part of the Deceased's estate.
- [217] I am satisfied on a balance of probabilities that the Deceased contributed \$150,000 to pay down the original Tugwell mortgage and convert the barn into a workshop.

[218] The plaintiffs have pleaded the existence of a resulting trust over the Deceased's contributions to the properties in Ms. Widner's name and, in the alternative, a constructive trust based on unjust enrichment. As I have determined that the only ascertainable contribution by the Deceased to the acquisition of Tugwell was \$150,000, it is my view that the doctrine of unjust enrichment is best suited to the resolution of the plaintiffs' claims.

Unjust enrichment

[219] The plaintiffs' pleadings state:

9. In the alternative [to a resulting trust], the Plaintiffs are entitled to a declaration of constructive trust over the Trust Assets in favour of the Deceased's estate because the Defendant was unjustly enriched and the Deceased's estate correspondingly deprived without juristic reason.
10. In addition or in the alternative, the Plaintiff Boughton is entitled to a declaration of constructive trust over the Trust Assets and/or the Deceased's estate in favour of Boughton because the estate was unjustly enriched and Boughton correspondingly deprived without juristic reason.

[220] In *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834 [Pettkus] the Court identified three elements that must be satisfied for a finding of unjust enrichment:

- a) an enrichment of the defendant;
- b) a corresponding deprivation of the plaintiff; and
- c) an absence of any juristic reason for the enrichment.

[221] This three-part test has been consistently applied in the 40 years since it was articulated. More recently, in *Kerr v. Baranow*, 2011 SCC 10 [Kerr], Cromwell J. provided a helpful summary of the essential elements:

[36] The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

[37] The Court has taken a straightforward economic approach to the first two elements -- enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see Peter, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, 1986 CanLII 23 (SCC), [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (CanLII), [2004] 1 S.C.R. 629, at para. 31.

[38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must

be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (Peel, at pp. 788 and 790; Garland, at paras. 31 and 37).

- [39] Turning to the second element -- a corresponding deprivation -- the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (Peel, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (Pettkus, at p. 852; Rathwell, at p. 455).
- [40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see Pettkus, at p. 848; Rathwell, at p. 456; Sorochan, at p. 44; Peter, at p. 987; Peel, at pp. 784 and 788; Garland, at para. 30.
- [222] The plaintiffs' position is that Ms. Boughton has been deprived and the estate of the Deceased enriched with money derived from the Deceased's drug dealing which was in turn invested in real estate in Ms. Widner's name alone. On the promise of marriage, Ms. Boughton dedicated years of her life to the Deceased in a marriage-like relationship. She was a devoted spouse and the mother of his two youngest children. They were together until his untimely death. The Deceased did not have his affairs in order and Ms. Boughton and her children have been left destitute while Ms. Widner has been enriched.
- [223] The plaintiffs rely on *Nowell v. Town Estate*, 1997 CanLII 14545 (ONCA) as an illustration of an award for unjust enrichment made in analogous circumstances. The Deceased was married but had a longstanding relationship with the plaintiff. The trial judge dismissed the plaintiff's claim, but the Court of Appeal overturned the dismissal as it was based on a misapprehension of evidence. There was clear evidence of an enrichment to the Deceased and a corresponding financial deprivation to the plaintiff, with no juristic reason for the enrichment.
- [224] The plaintiff had been left destitute while the Deceased's assets were worth between \$20 million and \$50 million. There was evidence that the Deceased had made many assurances over the years that he would look after the plaintiff, which the Court of Appeal found to be cogent evidence of the nature of the relationship and had to be considered along with the other substantial body of evidence. Rather than order a new trial, the Court of Appeal awarded a monetary sum as compensation for unjust enrichment in the amount of \$300,000.

Unjust enrichment of the defendant at the expense of the Deceased's estate

- [225] The plaintiffs maintain that Ms. Widner was enriched by the Deceased's contributions to real estate acquisitions held in her name alone; that the Deceased's estate was thereby deprived; and that there was no juristic reason for the deprivation.
- [226] As I have explained, I am satisfied the Deceased contributed approximately \$150,000 towards the retirement of the original Tugwell mortgage and the conversion of the barn into a workshop. While I am satisfied that the money was derived from the sale of illicit drugs, illegality is not necessarily a bar to recovery via unjust enrichment: *Kim v. Choi*, 2020 BCCA 98. The Deceased's estate in turn was deprived of those funds because the property was registered in Ms. Widner's name alone.
- [227] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff (in this case, the Deceased's estate), making its retention "unjust" in the circumstances of the case: *Kerr v. Baranow*, 2011 SCC 10, at para. 40; *Moore v. Sweet*, 2018 SCC 52, at para. 54.
- [228] The Supreme Court of Canada developed the two-stage juristic reason test in *Garland v. Consumers' Gas Co.*, 2004 SCC 25. The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations: *Moore*, at para. 56; *Garland*, at para. 44; *Kerr*, at para. 41.
- [229] If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of a gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff: *Moore*, at para. 57.
- [230] If, however, the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage.
- [231] The second stage of the juristic reason analysis affords the defendant an opportunity to rebut the plaintiff's *prima facie* case by establishing that there is some residual reason to deny recovery. At this stage, various other considerations come into play, like the parties' reasonable expectations and moral and policy-based arguments -- including considerations relating to the way in which the parties organized their relationship: *Moore*, at para. 83; *Garland*, at paras. 45-46; *Kerr*, at paras. 44-45.

- [232] Mutual enrichments are to be considered principally at the defence and remedy stage of the unjust enrichment analysis: Kerr, at paras. 104, 109, 116. The assessment of mutual benefits can, and should, occur whether or not the defendants have made a formal counterclaim or pleaded an equitable set-off: Ibbotson v. Fung, 2013 BCCA 171 at para. 75.
- [233] In most cases a monetary remedy is the "default" restitutionary remedy for unjust enrichment: Moore, at para. 89; Kerr, at para. 47.
- [234] The submissions of counsel on the issue of unjust enrichment, particularly the juristic reason aspect, were limited and unhelpful. The circumstances in which the Deceased provided the funds to Ms. Widner are shrouded in mystery. While it would be simple to say they were in a common law relationship and there must have been a donative intent, and thus a juristic reason for the deprivation, Ms. Widner claimed that she saved the money herself for the payments against the original Tugwell mortgage.
- [235] As I said earlier in my reasons, this was simply not possible based on her income at the time. The Deceased must have been the source of the money and it must have been from illegal activity, given the absence of evidence that he had an income from legal sources.
- [236] Ms. Widner understandably resents her husband's duplicity in forming a relationship with Ms. Boughton, having children with her and supporting a separate, secret household, no doubt at the detriment of the Widner household. The large payments against the original Tugwell mortgage were not repeated in later years to pay down other sums borrowed in relation to the acquisition of Eaglecrest, no doubt because the Deceased was funding the Boughton household.
- [237] I find that there is no juristic reason for Ms. Widner to retain the entirety of the contributions, given the Deceased's moral obligations to provide for the Boughton household. As a result, the Deceased's estate is awarded \$150,000, plus interest pursuant to the Court Order Interest Act, from Ms. Widner. The parties are at liberty to address the date from which interest has accrued.
- [238] Pursuant to s. 22 of the WESA, the resulting amount is to be divided equally between the two surviving spouses, Ms. Widner and Ms. Boughton.

Unjust enrichment of the defendant at the expense of the plaintiffs

- [239] Given my conclusion that the Deceased's estate was enriched, it is not necessary to consider the plaintiffs' alternative pleadings.

Conclusion

- [240] In summary, the plaintiff Sara Boughton is a spouse of the Deceased and her two children are children of the Deceased. The Deceased's estate consists of his personal property as well as \$150,000 plus interest to be paid by the defendant Sabrina Widner. The plaintiff Sara Boughton and the defendant Sabrina Widner are each entitled to half of the Deceased's estate.
- [241] In light of my conclusion that the remedy for unjust enrichment be limited to a monetary amount, rather than a trust over all the property in Ms. Widner's name and the rental income associated with the properties, I leave it to counsel to determine whether or not an administrator is necessary or required for the distribution of the estate and conduct an inquiry pursuant to Rule 18-1 into the value of the Deceased's estate.
- [242] Success was divided and it is my preliminary view that the parties should bear their own costs, with the exception of costs thrown away occasioned by counsel for the plaintiffs' oversight in respect of filings concerning the litigation guardian for the two minor plaintiffs which caused an adjournment of the trial.
- [243] The challenge by Ms. Widner to the validity of the spousal provisions in the WESA is outstanding and remains to be scheduled, in consultation with counsel for the Attorney General of British Columbia.
- [244] Finally, the parties did not squarely address the issue of Ms. Boughton's standing vis-à-vis the Deceased's estate and whether she required leave under ss. 150 or 151 of the WESA. While it might have been preferable for the issue of Ms. Boughton's status as a spouse to have been adjudicated on prior to trial, the failure to do so is immaterial in light of my finding that she qualifies as a spouse.

"Duncan J."

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