

CANADA / JUDGMENT

Coad v. Lariviere

2022 BCCA 222

COURT

British Columbia Court of Appeal

DECIDED

24 June 2022

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2022 BCCA 222 Coad v. Lariviere

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Coad v. Lariviere,

2022 BCCA 222

Date: 20220624

Dockets: CA46477; CA46478

CA46479

Docket: CA46477

In the Matter of the Estate of Barbara Louise Lariviere, Deceased

Between:

Sasha Jan Coad

Appellant

(Applicant)

And

Kenneth Lariviere and Olga Kathleen Phillips by her litigation guardian,

Dianne Kathleen Phillips

Respondents

(Respondents)

- and -

Docket: CA46478

Between:

Sasha Jan Coad

Appellant

(Petitioner)

And

Kenneth Lariviere and Olga Kathleen Phillips by her litigation guardian,

Dianne Kathleen Phillips

Respondents

(Respondents)

- and -

Docket: CA46479

Between:

Sasha Jan Coad

Appellant

(Respondent)

And

Kenneth Lariviere and Olga Kathleen Phillips by her litigation guardian,

Dianne Kathleen Phillips

Respondents

(Petitioners)

Corrected Judgment: The cover page of the judgment was corrected on

October 28, 2022.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated

October 3, 2019 (Lariviere v. Coad, 2019 BCSC 1691, Vancouver Dockets S186225, S186247, S1710059 and Chilliwack Dockets P17770 and P17711).

The Appellant, appearing in person:

S.J. Coad

No one appearing on behalf of the Respondent, Kenneth Lariviere

Counsel for the Respondent, Dianne

Kathleen Phillips, in her Capacity as the

Administrator of the Estate of

Barbara Louise Lariviere:

D.A. Hunter

C.D. Rodocker

Place and Date of Hearing:

Vancouver, British Columbia

November 9, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 24, 2022

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Justice Griffin

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Summary:

Appeal by a spouse from an order that the deceased died intestate and without a spouse, leaving her mother as the sole beneficiary of the estate. Held: Appeal allowed. The appellant lived in a marriage-like relationship with the deceased in the three years before her death. The judge erred by adopting a checklist approach to determining whether they were in a marriage-like relationship, including by unduly focusing on their lack of conjugal relations and the deceased's close relationship with one of her ex-husbands. The appellant's other grounds of appeal, that he was denied a fair trial and that the judge made factual errors, were either not established or not necessary to address.

Reasons for Judgment of the Honourable Madam Justice Bennett:

Introduction

- [1] Barbara Lariviere died on December 25, 2016. She left behind several documents that could have indicated her testamentary intent. Sasha Coad was living in the same home as Ms. Lariviere when she died. He claimed to be in a marriage-like relationship with her at the time of her death.
- [2] Ms. Lariviere held one significant asset, which was a property located at 3241 West 2nd Avenue, Vancouver (the "Property"). The Property was valued between \$1.6 million and \$2 million but was encumbered by two mortgages with a total indebtedness of \$1 million, both of which were in default. The first mortgagee commenced foreclosure proceedings and had obtained an order nisi by the time of trial.
- [3] Grieving her were the two men who are the main parties to this litigation, Mr. Coad and Kenneth Lariviere, Ms. Lariviere's ex-husband; as well as her mother, Mrs. Olga Phillips; her sister, Dr. Dianne Phillips; and her brother, John Phillips. For ease of reference, I will refer to Ms. Lariviere's family members as the "Mother", the "Sister", and the "Brother". I intend no disrespect in doing so.
- [4] Mr. Lariviere and Mr. Coad obtained conflicting desk orders: Mr. Lariviere received a grant of administration with respect to a will dated August 11, 2001, while Mr. Coad received a grant of administration based on an intestacy and his status as a spouse.

- [5] A number of applications and petitions were filed. The circumstances of the various steps the parties took in the litigation are complex, and they are set out below. In sum, Mr. Coad submitted that Ms. Lariviere died intestate and that they were in a marriage-like relationship. That result would have permitted him to administer her estate and be her sole beneficiary. The others claimed he was not in a marriage-like relationship with Ms. Lariviere.
- [6] In reasons indexed at 2019 BCSC 1691, the trial judge concluded that Ms. Lariviere died intestate, but that Mr. Coad was not in a marriage-like relationship with Ms. Lariviere. He concluded that the Mother was Ms. Lariviere's sole beneficiary, however, she unfortunately passed away during the trial. The judge appointed the Sister as administrator on November 27, 2019.
- [7] Mr. Lariviere died shortly after the trial. No one has stepped into his shoes in the litigation. The parties to this appeal were Mr. Coad, the Sister and MD Trust, as the executor for the Mother's estate.
- [8] Mr. Coad appeals the decision of the trial judge.
- [9] I would allow the appeal. In my view the judge erred in concluding that Mr. Coad was not in a marriage-like relationship with Ms. Lariviere. I would set aside the trial judge's order with respect to that conclusion. It is neither necessary nor desirable to remit the case back to trial. In my view, the evidence supports the conclusion that Mr. Coad and Ms. Lariviere were in a marriage-like relationship, and he is entitled to inherit her estate: Wills, Estates and Succession Act, S.B.C. 2009, c. 13, s. 20 [WESA]. The only asset has been sold, so I would not interfere with the order appointing the Sister as the estate administrator, as there is little left to do in terms of winding up the estate.

Background

- [10] Ms. Lariviere and Mr. Lariviere married in May 1976 and divorced in the 1980s. Ms. Lariviere had a brief marriage in the 1980s with a second husband, however, he was neither a beneficiary nor a party to the litigation.
- [11] Ms. Lariviere and Mr. Coad met in 1989. Mr. Coad claims that he and Ms. Lariviere lived together in a marriage-like relationship for three years, beginning in the spring of 1990.
- [12] At some point around 1998, Ms. Lariviere rented out the Property, and she moved into Mr. Coad's apartment in what Mr. Coad says was again a marriage-like relationship. Mr. Lariviere moved in with them in 2002, where the three of them lived together until 2006. The judge had concluded that Mr. and Ms. Lariviere moved in with Mr. Coad in 2001, but that appears to be a factual error.

- [13] On August 1, 2001, Ms. Lariviere signed a testamentary document in which Mr. Lariviere was the primary beneficiary (the "2001 Document"). Mr. Lariviere testified that he was given the original of this document during a dinner with Ms. Lariviere in 2001. Although there were deficiencies in this document, the trial judge held that it reflected Ms. Lariviere's testamentary intent at that time, and was capable of being cured.
- [14] On July 1, 2005, Ms. Lariviere created a new testamentary document (the "2005 Document"). That document revoked all previous testamentary documents, appointed Mr. Coad as the executor, and resulted in both Mr. Coad and Mr. Lariviere being significant beneficiaries. The document was dated only as "2005", and it was Mr. Coad who inserted the day and month into it.
- [15] However, in April 2006, Ms. Lariviere revoked the 2005 Document, as witnessed by Mr. Lariviere and affixed to the 2005 Document (the "2006 Revocation").
- [16] On April 30, 2006, Ms. Lariviere was involved in a serious motor vehicle collision and was hospitalized until her release at some point in May 2006. Mr. Coad indicated that this was ten days later, although this was not specified in the judge's reasons.
- [17] While Ms. Lariviere was hospitalized, Mr. Coad asked her not to move back in with him and Mr. Lariviere. The judge found that if there was a marriage-like relationship between Mr. Coad and Ms. Lariviere, Mr. Coad terminated it when he asked Ms. Lariviere not to return following her discharge from the hospital.
- [18] Mr. Coad attempted to get Ms. Lariviere into a women's shelter and detox facility. She did not go to the women's shelter; instead, she lived for "a week or two" with a friend in East Vancouver.
- [19] On May 18, 2006, Ms. Lariviere created yet another testamentary document which, while similar to the 2005 Document, appointed the Brother as the executor and divided the remainder between Mr. Lariviere and Mr. Coad (the "2006 Document").
- [20] Following that "week or two" living with her friend, Ms. Lariviere and Mr. Lariviere moved into the Ivanhoe Hotel in the Downtown Eastside, where they lived for 13 months.
- [21] After those 13 months, Ms. Lariviere moved into temporary accommodations and then back into the Property after her tenant left, around September 2007.
- [22] Mr. Coad moved into the Property in 2013. The judge found that Mr. Coad initially maintained his own quarters on the lower floor before moving upstairs and sharing Ms. Lariviere's bed and bedroom.
- [23] Mr. Lariviere visited Ms. Lariviere at the Property between 2013 and 2016. He would stay overnight in Ms. Lariviere's bed while Mr. Coad would leave the Property and stay elsewhere.

- [24] The trial judge found that Ms. Lariviere did not have a marriage-like relationship with Mr. Coad, based on his assessment of the evidence and the lack of documentary support.

After Ms. Lariviere's death: The competing desk orders

- [25] After Ms. Lariviere passed away on December 25, 2016, Mr. Locke, counsel for Mr. Coad, wrote a joint letter to Mr. Lariviere and members of Ms. Lariviere's family, advising that Mr. Coad intended to seek a grant of probate based on the 2005 Document on March 22, 2017. Mr. Lariviere immediately objected and, after Mr. Coad commenced his application, filed a notice of dispute.
- [26] In April 2017, Mr. Lariviere served Mr. Coad a notice of his intention to apply for a grant of probate based on the 2001 Document. Mr. Coad says this was the first time he was made aware of the 2001 Document, that he received the notice on April 21, 2017, and that the notice also included the 2006 Revocation.
- [27] On May 1, 2017, Mr. Coad filed a notice of dispute to Mr. Lariviere's application.
- [28] Having been provided with a copy of the 2006 Revocation, Mr. Locke sent a revised letter on May 16, 2017 to Mr. Lariviere and members of Ms. Lariviere's family to advise that Mr. Coad would be seeking a grant of administration without a will annexed. Mr. Lariviere denied having received this letter. Mr. Coad submits that there was no evidence as to whether this letter was received but, in any event, Mr. Lariviere acknowledged receiving a substantially identical letter on June 6, 2017.
- [29] Indeed, on June 6, 2017, Mr. Locke sent another letter to Mr. Lariviere to ask him to withdraw his notice of dispute but Mr. Lariviere did not agree. Instead, on June 13, 2017, Mr. Lariviere formally applied for the grant of probate. Approval of his application was delayed pending proof that the deficiencies in the document (i.e., the lack of witnesses' signatures) could be cured.
- [30] On June 19, 2017, Mr. Coad applied for a grant of administration without a will annexed. His affidavit of delivery indicates that he provided a formal notice only to the mortgagees of the Property. There appears to be no dispute that Mr. Coad did not provide notice to Mr. Lariviere or any of Ms. Lariviere's family. While Mr. Coad submitted that the reason Mr. Lariviere did not file a notice of dispute was because he did not know he had to, the judge accepted Mr. Lariviere's evidence that he was waiting to be served a formal notice before filing another notice of dispute. As a result, the judge found that Mr. Coad "effectively denied Mr. Lariviere the opportunity to file a notice of objection" (at para. 118).
- [31] On August 3, 2017, Mr. Coad withdrew his own notice of dispute. Mr. Coad submits that this was because he realized on July 26, 2017 that Mr. Lariviere's notices of dispute were never filed. He testified that his lawyer informed him that removing the notice of dispute was a procedural requirement.

- [32] On August 9, 2017, Mr. Coad received his grant of administration without will annexed.
- [33] On August 16, 2017, Mr. Lariviere re-filed his application for a grant of probate. This appears to have been in response to requests from registry staff for further information. On September 5, 2017, a master ordered that the 2001 Document was a valid will. Accordingly, Mr. Lariviere received his grant of probate on September 14, 2017.

Attempts to revoke the competing desk orders

- [34] At some point in October 2017, Mr. Coad and Mr. Lariviere learned of each other's competing desk orders. On October 13, 2017, Mr. Lariviere filed a caveat and a certificate of pending litigation ("CPL") against the Property. That impeded subsequent efforts to remortgage the property.
- [35] On October 27, 2017, Mr. Coad filed a notice of application and a petition to revoke Mr. Lariviere's grant of probate and discharge the caveat.
- [36] On November 3, 2017, Mr. Lariviere responded to Mr. Coad's petition and notice of application, contesting them on the basis that Mr. Coad was not a spouse. He was represented by Mr. Bohbot who, as discussed later, eventually withdrew as Mr. Lariviere's counsel and became counsel for the contingent beneficiary in the trial.
- [37] On November 8, 2017, the parties appeared before Master Taylor, who adjourned the application and referred the matter to trial. Mr. Coad and Mr. Lariviere were represented by Mr. Locke and Mr. Bohbot, respectively.
- [38] Shortly after that appearance, Mr. Coad discovered the 2006 Document stuck behind a cabinet drawer.
- [39] On December 8, 2017, Mr. Lariviere--as represented by Mr. Bohbot--applied for proof in solemn form of the 2001 Document, a grant of probate, and a CPL against the Property. On January 31, 2018, Mr. Lariviere made a nearly identical application--but this time, he was self-represented and also seeking revocation of Mr. Coad's grant of administration.
- [40] On February 2, 2018, Mr. Locke filed a notice of case planning conference, with Mr. Bohbot's agreement, and a case plan proposal. The case plan proposal stated:

The filing party seeks the Court's guidance on the issues that are to be before the Court and the order in which those issues should be presented. In particular:

- There are currently 4 alleged testamentary documents involved in this dispute: a 2001 letter, a 2005 will, a 2006 revocation of the 2005 will, and a subsequent 2006 will. The respondent party, Ken Lariviere, has taken the position that the 2001 letter is the deceased's last, valid will and has filed an application to have the court pronounce in favour of this document; however, the filing party submits that it is inappropriate to consider the validity of this document before first considering the validity of subsequent wills. There is no point in considering the validity of a testamentary instrument that has been validly revoked. A similar issue was recently considered

by Master Vos in *Biely Estate v. CNIB*, 2017 BCSC 788.

· The respondent party has put in issue the filing party's marital status to the deceased. While the filing party acknowledges that this is an issue the Court may need to consider at a later time (e.g., if there is found to be an intestacy or the filing party commences a wills variation claim), the filing party submits that his marital status is not relevant to a determination of the validity of the testamentary documents in issue. The filing party submits that this issue should not be put before the Court in the context of proof in solemn form proceedings.

[Emphasis in original.]

[41] On February 9, 2018, Mr. Lariviere's second notice of application for proof in solemn form was adjourned generally until after the case planning conference.

[42] Mr. Coad says that on February 26, 2018, the Sister became the Mother's litigation guardian. Mr. Coad says further that it was not until this moment that any of Ms. Lariviere's family members opposed his application.

[43] On March 12, 2018, Mr. Coad commenced a wills variation proceeding.

[44] On March 19, 2018, Mr. Bohbot withdrew as Mr. Lariviere's counsel. The same day, he filed a certificate of fitness as counsel for the Sister, acting as the Mother's litigation guardian. This was addressed by the parties on the first day of the trial, with Mr. Locke raising the issue, which led to the following exchange:

THE COURT: All right. And Mr. Locke has also raised a concern about your former representation with Mr. Lariviere and he wants to make sure there are no sudden surprises or complaints later that your appearance as counsel in this case has prejudiced him, Mr. Lariviere, or prejudiced--or that you say prejudices your client in some respects. So, we need to get that sorted out.

MR. BOHBOT: We've--my clients aren't taking any position whatsoever on any of the wills. Mr. Lariviere is a co-residual beneficiary in the 2005 and 2006 will as well. We're not making any submissions towards the wills at all.

THE COURT: All right. And I take it your client's allied in interest with Mr. Lariviere in terms of opposing Mr. Coad's claim?

MR. BOHBOT: Of being the common law spouse, yes.

[45] Mr. Lariviere agreed that he had "no concerns whatsoever" about Mr. Bohbot's participation in the trial with respect to the spousal issue.

[46] On March 28, 2018, Mr. Lariviere (now self-represented) filed a petition, again seeking an order revoking Mr. Coad's grant of administration.

[47] On April 12, 2018, the parties appeared at a case planning conference before Justice Affleck, who ordered that the proof in solemn form proceedings would be heard first, prior to the court engaging in any consideration of whether Mr. Coad was Ms. Lariviere's spouse at the

time of her death. The Sister's case plan proposal took no position on the order that the proceedings should be heard, while Mr. Lariviere's case plan proposal was unfortunately largely irrelevant to the case planning issues. As discussed further below, this order is central to Mr. Coad's position on appeal that he was prejudiced by the trial judge's ruling to hear both issues together. Mr. Coad submits that as a result of this order, he and the other parties all believed for 13 months prior to the trial that the spousal issue would not be a part of the trial.

- [48] On April 18, 2018, Mr. Coad responded to Mr. Lariviere's latest petition, arguing that it was premature and duplicative, given the orders of Master Taylor and Justice Affleck. A month later, on May 14, 2018, Justice Fitzpatrick adjourned the hearing of the petition generally.
- [49] On May 30, 2018, Mr. Lariviere filed yet another petition seeking to prove the 2001 Document in solemn form. Mr. Locke responded to this on June 20, 2018, arguing that it was duplicative and an abuse of process. On July 11, 2018, Justice MacNaughton adjourned this petition, referred the matter to trial, and ordered that Mr. Lariviere not file any further petitions until after the next case planning conference.
- [50] On June 4, 2018, TD Bank, the first mortgagee on the Property, brought an action for foreclosure. The judge considered the default on the mortgages to be an example of Mr. Coad's self-interest in his administration of the estate. Mr. Coad responded that the mortgages were already in default by the time he received the grant of administration in August 2017; the first thing he did upon receiving the grant was attempt to refinance the mortgages but he could not do so with Mr. Lariviere's caveat and CPL on title; his choice to apply rent revenue to repairs was made in good faith in the assumption that he would be the administrator; and there was insufficient rental revenue to pay the mortgages, let alone retain for himself.
- [51] Over the next several months, the parties appeared at multiple case planning conferences, exchanged documents, and attended examinations for discovery. Mr. Lariviere repeatedly attempted to have his petition heard but this was consistently struck from the chambers list, adjourned and referred to trial. According to Mr. Coad, Mr. Lariviere was examined for discovery on November 19, 2018, and at the time, Mr. Locke stated that he would not ask questions on the issue of Mr. Coad's spousal status.
- [52] On November 22, 2018, Mr. Lariviere applied for a summary trial, which Mr. Locke opposed in his response to application:

Mr. Justice Affleck has ordered that issues relating to [Mr. Coad's] common law status are to be considered only after proof in solemn form proceedings have been completed. This is for a number of reasons. The main reasons are that [Mr. Lariviere] would have no standing to pursue this issue if there is found to be an intestacy and that the alternate intestate successor, the Deceased's mother, could be prejudiced by [Mr. Lariviere's] actions in this regard if he is permitted to proceed notwithstanding.

- [53] After an adjournment, a one-day summary trial was held before Justice Fleming on February 11, 2019. Justice Fleming found the matter unsuitable for a summary trial and scheduled a trial management conference. Of importance to Mr. Coad's argument on appeal, she ordered that "[t]he two applications to set aside the Grant must be heard with the applications regarding the validity of the testamentary instruments".
- [54] The trial management conference was held before Justice Fleming on February 21, 2019. She made various orders, including granting leave to Mr. Bohbot to file a response to petition on behalf of the Sister. Crucially, she ordered that "S186225, S186247, and P17770 to be heard at the trial of the within action". As I review in the next section, the trial judge relied on this in ruling that the spousal and validity issues would be heard together.
- [55] On behalf of the Sister, Mr. Bohbot filed a response to petition on February 28, 2019. Her position was that Mr. Coad was not Ms. Lariviere's spouse.
- [56] On March 14, 2019, Mr. Lariviere responded to Mr. Coad's wills variation proceeding commenced over a year earlier by counterclaiming against Mr. Locke. Mr. Locke responded on April 8, 2019.
- [57] Mr. Coad claims that at some point in March 2019, he negotiated a sale of the Property for \$1.635 million but Mr. Lariviere would not consent. On March 22, 2019, Mr. Coad applied to remove the CPL that Mr. Lariviere had filed on December 8, 2017 when he first sought to prove the 2001 Document in solemn form.
- [58] The trial occurred over eleven days during the summer of 2019. During the trial, the Mother passed away. As mentioned, the trial judge ultimately found that Ms. Lariviere died intestate and Mr. Coad was not her spouse at the time of her death, such that the sole beneficiary was the estate of the Mother (the "Mother's Estate").
- [59] Shortly after the judge's final order, Mr. Lariviere also passed away.
- [60] On November 27, 2019, the Sister was appointed administrator of Ms. Lariviere's estate.
- [61] In March 2020, the Property sold for \$1.69 million.

Reversal of the case plan order

- [62] Despite the order of Justice Affleck, the trial judge decided that the validity and spousal issues would be tried concurrently, rather than separately. It would appear that the judge was fundamentally concerned about several things: (1) the centrality of credibility to both issues, (2) the risk of conflicting findings, and (3) the fact that the same witnesses would have to be called for both issues once Mr. Lariviere's affidavit evidence was disallowed. There were multiple procedural issues that the judge was asked to address, including who should go first, the admissibility of Mr. Lariviere's affidavit evidence, the order that the testamentary documents should be considered and whether the spousal status issue should be severed.

[63] The question of whether the spousal issue would be heard at the same time as the validity issue was raised almost immediately, as Mr. Bohbot attempted to put Justice Affleck's case plan order before the court. From the very beginning, the judge was concerned:

If the issue of whether Mr. Lariviere [sic] is a common law spouse or not has any impact upon whether the deceased died with a will or intestate, what about the risk of inconsistent findings? In other words, if another judge hears the other issue later on or if I'm going to be hearing matters of the issue of common law spouse on the validity of a will issue involves questions of credibility, why aren't these matters all being tried together?

[64] When the judge asked Mr. Lariviere for his submissions, he read in Justice Fleming's order, "The petitioner's file be referred to action numbers 186225, 186247, and P17770 to be heard at the trial of the within action". Mr. Lariviere clearly interpreted Justice Fleming's order to mean that the spousal issue should be tried at the same time as the rest of the issues.

[65] The judge appears to have considered these actions to be on separate issues, with S186225 being the proof in solemn form action and S186247 being Mr. Coad's spousal status.

[66] Mr. Locke then stepped in:

My Lord, I should clarify that Madam Justice Fleming was alive to the possible controversy here and how to sort of thread the needle between what Mr. Justice Affleck had ordered and what she thought, and it sounds like you also agree. It might be something that you need to consider in the context of this overarching decision you make with respect to the validity of the will.

[67] He added:

The validity of the wills isn't something that necessarily needs to consider common law status at time of death mainly because the wills that we're dealing with are between 2001 and 2006 and the deceased died in 2016, and the period that's really in issue with the common law spouse is the 2013 to 2016 period. So, while it's certainly relevant, it doesn't form the general milieu of what's happening. It's not necessarily something that needs to be determined in this context.

[68] The judge was then concerned about who would have carriage of the estate if he found that Ms. Lariviere died intestate but that Mr. Coad was not her spouse, which Mr. Locke acknowledged was an issue that "Justice Fleming did loop back into it". The judge asked, "How can I effectively deal with the trial on all of the issues but the issue of the common law spouse?".

[69] Mr. Locke conceded:

Well, that's a good question. With [S186247] looped in, it does make it more difficult than I think it was when we were just dealing with the validity of the wills themselves, but determining who the administrator is or should be does add a wrinkle to that and I'm not exactly sure what the answer to navigating that is. Perhaps--perhaps having that issue decided afterwards along with the common law spouse issue pursuant to the order of Mr. Justice Affleck would be the appropriate course of action here.

[70] The judge noted that all the parties were present before Justice Fleming when she made her order and asked how she addressed the issue:

Well--but you see, all of--you and your friend and Mr. Lariviere were in front of Madam Justice Fleming at the trial management conference. How was that issue addressed? Because if she was alive to it and there were submissions about it, then how was it addressed? Because all I have in front of me is an order saying that there are four actions to be tried at the same time.

[71] Again, Mr. Locke conceded the judge's point:

Yes, and it was addressed and I don't think Her Ladyship had a clear answer as to how that would be navigated, unfortunately. She was alive to the concerns and the concerns that you clearly have as well that they would overlap and how that would be dealt with wasn't explained by her, but she did feel it was necessary to have that issue inserted into the context of the validity claims.

[72] After a discussion about whether the various testamentary documents should be considered in chronological or reverse chronological order, the judge said:

You see, without being overly critical, you've come--all of you have come to court. No one's agreed on how this should proceed and it's your case. It's the case of counsel and the parties and I'm presented with orders that on their face appear to be conflicting. One is an order pronounced by Mr. Justice Affleck by virtue of an agreement that seems to have been superseded by an order of Madam Justice Fleming and no one has come to grips with how this case should be conducted.

So, in those circumstances I need to hear about prejudice, any form of prejudice whatsoever in determining who should go first and then I'm going to determine whether I should be hearing--deciding the common law issue at the same time.

[73] The judge considered that, even if the spousal issue was not heard, he would have to hear evidence about Mr. Coad's spousal status in any event in determining who should be the administrator of the estate in order to sell the Property:

And so, then, lastly, dealing with the common law spouse issue, that I'm going to be--you say I'm going to be hearing evidence about that and argument about that insofar as the application to who should be the person to sell the property.

[74] Despite that, Mr. Locke pushed back:

Well, I think there's a bit more in that and I think the--it's who should remain as administrator because now they're both administrators and they're at a deadlock. Who should sell the property I think does play into that as a natural course of action, but I'm not sure that you actually have to decide who's the common law spouse or if anyone in order to make a ruling on that.

[75] The judge was also concerned that, even if he did not hear the evidence on the spousal status issue, he would still have to make findings of credibility, which Mr. Locke acknowledged:

I think that that will be something you'll have to consider and I think that is something that comes up in the--and part of the reason why this couldn't be decided by summary trial because Mr. Coad and Mr. Lariviere have very different views of what happened. So, you probably will have to assess Mr. Coad's credibility as part of this and whether that leads you to make a determination on the common law status, we will be calling other witnesses who will speak to what they've observed on the outside as well.

But it's not the focus of what we're going to be doing here today--or rather, for this week. So, it's a bit of a contextual side show.

[76] The judge then turned to Mr. Bohbot, asking about his client's position on the administrator of the estate. The judge asked, "How do you rationalize then, your position with the order made by Madam Justice Fleming where she says all of these actions are to be heard at the trial of the within action?". Mr. Bohbot submitted:

She--what she meant is that she needs to hear arguments in regards to the relationship of the parties if she were going to review the wills, the 2005 and 2006 wills, to determine whether or not they can be--they can be proven in solemn form. But she was going to limit the arguments to the wills and not find a conclusion as to whether or not he was, in fact, a common law spouse.

As Mr. Locke said, it's kind of threading a needle--threading a needle, if you will. You are going to have to entertain some arguments, but again the relevant time for these wills is 2001 to 2006. The respondent claims to have been the common law spouse only as of 2013, the last three years or so of her life.

So, they were all together, if you will, from 2001 to 2006 and you'll hear about the dynamics of what was going on at that time, but there was--there's no documentary--there's nothing trying to be proven at this trial during 2013 to 2016 which is the time in question when the respondent claims to have been the common law spouse.

[77] The judge confirmed with Mr. Bohbot that his position was that the issue should be severed for another hearing, which is where Mr. Bohbot would lead evidence from the Sister, the Brother, and Ms. Lariviere's best friend. Although Mr. Bohbot was clearly under the impression that Justice Fleming had determined that the spousal issue would be tried separately, the judge was critical of that reading:

Well, the face of the order doesn't say that, but I'm going to have to go listen to the tape. I'm going to have to find out what she said because I don't have any reasons, I don't have a transcript in front of me . On its face it doesn't draw any distinctions about issues not being determined.

[78] The judge's ruling on whether the spousal issue would be heard with the validity issue turned partly on whether Mr. Lariviere would be required to call his affiants for viva voce evidence:

I want to find out if this order from Madam Justice Fleming was entered. I'm going to find out--I want to check and see if there's any transcript or record of what--of any reasons she may have given, and then it seems to me that from an efficiency point of view I'm going to hear and determine whether or not Mr. Lariviere should be permitted to adduce evidence by affidavit, and I think my decision in that respect will then lead to decisions on process issues.

[79] Justice Walker concluded:

So, I'm going to proceed in this manner. I'm going to hear the application to adduce evidence by affidavit and then I'll make a determination from there, and then I'll determine what the most effective means is for the parties' economy, judicial economy and to ensure trial fairness is to proceed forward. And it may be that I determine all of these matters should be determined at the trial of--this current trial of all of these various actions.

[80] The judge then confirmed that all of Mr. Lariviere's seven affidavits dealt with the spousal issue. Given Mr. Locke's objections to admitting the affidavits, the judge ruled that it would be more efficient to have the affiants testify in person:

So, then I think in the circumstances I'm not-- we'll simply have these various affiants come to court and testify. So, now I want to deal with the next matter and it seems to me that the issue of Mr. Coad's relationship with the deceased--whether or not--and his credibility.

His credibility impacts upon his claim for--that he stood in this marriage-like relationship. His conduct in respect of applying for letters of administration may impact upon that claim and I see his claims inextricably intertwined. His credibility on one issue could very much affect his credibility on the other issue, and in my view these matters should all be heard at the same time.

Since Mr. Lariviere's going to be calling Dr. Phillips and Mr. Phillips, I don't see a basis to have the issue of the marriage-like relationship put off into another day where credibility issues will be tried again, their evidence will be adduced again. It's all part and parcel of the same case.

[81] In response to Mr. Lariviere's question on his ruling, the judge answered:

If I split up the issues--I agree with you. If I split up the issues, what it's going to mean is if I make findings about Mr. Coad's credibility on one issue, we've got to come back later and got to deal with credibility again. If you call Mr. Phillips and Dr. Phillips and they're going [to] testify, they're going to have [to] come back later and testify on many of the same matters.

[82] The judge added, "So, all of the issues arise on the same--on much of the same evidence and that's why we're going to hear all of them together". The judge then turned directly to Mr. Bohbot:

That said, I'm going to now address counsel for the contingent beneficiary

And the order of Mr. Justice Affleck, in my opinion, doesn't bind me as the trial judge to a procedure that will promote trial unfairness, a lack of judicial economy, and a lack of economy and efficiency for the parties and promotes a real risk--a real possibility of inconsistent results. It also requires parties to come back and testify twice and many of the same legal arguments to be addressed twice.

So, Mr. Lariviere intends to call the same witnesses you intend to call. So, my view is this trial should proceed and you should get ready to be able to deal with--represent your client's interest in the case.

[83] Mr. Coad's counsel clearly would have preferred that the issues be tried separately, but he did not request an adjournment at any point. Mr. Locke also consistently made comments that conceded that Justice Fleming was aware of the issue and acknowledged that the judge might have to consider Mr. Coad's credibility and his relationship with Ms. Lariviere in the context of determining who the administrator of the estate should be.

[84] Before us, the respondent submitted that the appropriate course of action was to seek an adjournment if Mr. Coad had been unprepared as a result of the judge's ruling. Mr. Coad had argued, relying on the following exchange, that the judge had clearly made up his mind:

THE COURT: All right. To the extent, though, that then-- if that's what she said, to the extent that she left it to me to decide as the trial judge, you should have been here ready to deal with whatever the result is, ready to go if I ordered all the matters to be tried at the same--to be determined and not severed.

So, you see, you needed to be here ready to proceed on the basis that we proceeded on that basis. You couldn't just--you can't just show up and think, oh, well, it may not happen and if it does, I'm not going to be ready because it effectively forces an adjournment or a delay of the trial.

MR. BOHBOT: Everything up until this morning the understanding among the parties has always been that the common law issue was going to be severed. So, it's throwing me a bit of a curve ball.

THE COURT: Well, all right. Look, I would suggest that you get some advice from senior practitioners of the bar or consult the benchers on how you proceed forward from here, but you've got my determination. On your own statement Madam Justice Fleming left that up to the trial judge to decide. I've decided. I've given my ruling this morning. We're going to proceed.

- [85] In my view, while the judge was clearly frustrated with the parties, the context of this exchange is important: Mr. Bohbot, while "accept[ing] the court's decision, of course", did not reappear after the noon recess and was unable to be contacted. When he finally appeared, an hour later, he was neither gowned nor prepared, explaining that he had "essentially just panicked".
- [86] Matters were sent to the trial list, and the trial judge decided to hear all the matters together. The Sister did not participate in the trial, and took no position on either the question of intestacy or whether Mr. Coad was the common law spouse. Despite the submissions before the trial judge on the issue of witnesses, none of the Phillips family testified at trial. Only Mr. Lariviere testified on his own behalf.

Trial Judge's Reasons

Credibility and non-disclosure

- [87] The judge's findings on credibility factored significantly into his ultimate decision. With respect to Mr. Lariviere, the judge described him as a "challenging witness" and his evidence as "shaped by his entrenched myopic view" that he was the only person entitled to act as administrator, as a result of the desk order grant (at paras. 84-85). Nonetheless, he was not "deliberately evasive" (at para. 86).
- [88] In contrast, while Mr. Coad "presented far better", he was ultimately found to have "acted through self-interest and not in the best interest of Ms. Lariviere's estate" (at paras. 89-90). In particular, he had allowed the mortgages on the Property to default, including by using rental revenue for repairs rather than mortgage payments, living in the home rent-free, failing to take any steps to negotiate a lower default interest rate with the second mortgagee, and failing to provide a reasonable explanation for his delay in listing the Property for sale.
- [89] He concluded that as both parties failed to make adequate disclosure in their applications for the desk order grants, both desk orders were set aside.
- [90] With respect to Mr. Coad's desk order, he had notified Mr. Lariviere and Ms. Lariviere's family of his intention to apply for a grant of administration without will annexed but did not deliver the actual notice as required. The judge found that Mr. Lariviere did not file a notice of dispute because he was waiting for delivery of the formal notice. Mr. Coad did not notify the registrar of his knowledge of Mr. Lariviere's opposition to his application, provide an acceptable reason for failing to notify Mr. Lariviere or disclose that he had found the 2006 Document. Instead, he immediately transferred title to the Property in his own name despite his knowledge of Mr. Lariviere's opposition (at paras. 104-124).

- [91] Meanwhile, Mr. Lariviere deposed that he had been satisfied that a diligent search for testamentary documents had been done when he admitted at trial that this was incorrect. He also falsely deposed that the 2001 Document met formal requirements under WESA and that there were no "issues" with the application despite knowing that Mr. Coad objected to the issuance of the grant (at paras. 126-131).

Testacy

- [92] At paras. 133-177, the judge outlined the possible outcomes flowing from his determinations on the validity of the various testamentary documents. In the end, he found that Ms. Lariviere died intestate. No appeal is taken from this finding, so I have summarized the judge's determinations briefly.
- [93] The 2001 Document, which was the one most in favour of Mr. Lariviere, was unwitnessed but signed (and both Mr. Coad and Mr. Lariviere agreed that it was Ms. Lariviere's signature). The judge found that while it accurately reflected Ms. Lariviere's testamentary intent in 2001 and was capable of being cured with the curative proviso in WESA, it had been revoked in 2005. Mr. Lariviere argued that this had been revived, but failed to adduce any evidence to support that contention.
- [94] The 2005 Document, which was the one most in favour of Mr. Coad, was also capable of being cured, but it was revoked by the 2006 Revocation.
- [95] The 2006 Document, which appointed the Brother as executor and divided her assets equally between both Mr. Coad and Mr. Lariviere instead of using a trust, was presumptively revoked when the original could not be produced. The judge considered the context, which included that Ms. Lariviere had been a hoarder and that the document was made shortly after Mr. Coad turned her out after she had been hospitalized following the collision.
- [96] In his analysis of the 2006 Document, the judge was highly critical of Mr. Coad's credibility-- and this clearly affected his determination on the spousal issue as well. Although Mr. Coad claimed that he had no recollection of being present during the creation of this document, the judge had "significant reservations concerning both [Mr. Coad's] credibility and reliability" and found his lack of recollection "highly suspect" (at para. 157). The judge found that Mr. Coad's evidence was motivated by his resentment at Mr. Lariviere receiving anything beyond the trust created in the 2005 Document.

Marriage-like relationship

- [97] As discussed below, the judge found, at paras. 178-214, that Mr. Coad and Ms. Lariviere were not in a marriage-like relationship, and as such the entirety of Ms. Lariviere's estate went to the Mother. After reviewing the case law, the judge found that if Mr. Coad and the deceased lived in a marriage-like relationship, Mr. Coad terminated it when he asked Ms. Lariviere not to return after the 2006 accident. The judge further found that, while Mr. Coad moved into the Property in 2013, there was no evidence of Ms. Lariviere's intention in allowing him to

do so and a marriage-like relationship did not resume in 2013. Mr. Coad's evidence that he led from two tenants was rejected, and he did not tender any documents or financial documents that might point to a marriage-like relationship.

Fresh Evidence

- [98] Mr. Coad submits that he did not have a reasonable opportunity at trial to adduce the proposed fresh evidence for a litany of reasons, many of which revolve around inadequate time to prepare for the spousal issue. I will briefly summarize the evidence that Mr. Coad seeks to adduce.
- [99] There are a number of financial documents that he asserts support his viva voce evidence. These include a May 31, 2014 receipt from BCAA where Mr. Coad paid \$81.06 for his membership and a membership renewal statement, both of which cover both Ms. Lariviere and Mr. Coad. He also provides a printout of a joint savings account as of March 21, 2013, and a receipt closing the same account on March 28, 2013, both predating August 2013, which was when Mr. Coad moved back into the Property. There are three letters from various organizations--Vancouver Coastal Health, a claims adjuster, and a mobile service provider--either referencing, addressing or sent by Mr. Coad in relation to Ms. Lariviere or the Property. Mr. Coad also provides the receipt for Ms. Lariviere's cremation.
- [100] There are affidavits, letters, and statements from "other close friends and prominent people in [Ms. Lariviere's] life". Three of these are from friends of Ms. Lariviere, each of whom describe the relationship between Mr. Coad and Ms. Lariviere, and another three are brief notes from doctors who confirm that Mr. Coad was the primary contact for Ms. Lariviere and that he brought her to appointments and filled her prescriptions. One of the affiants is the individual that Mr. Bohbot described as his "one big witness", which Mr. Coad alleges was misleading the court since she was actually his witness.
- [101] There are affidavits and documents relating to Ms. Lariviere's family. Mr. Coad includes affidavits from the Sister and the Brother, which he claims were "intentionally misleading" and "poisoned the mind of the trial judge", but were ultimately not admitted. The judge explicitly asked Mr. Locke if he had any objection to him looking at them as part of his consideration as to whether they would be admissible--and he did not. Neither sibling was ultimately called as a witness, as noted above. There is a letter from the Mother and some photos which appear to be dated prior to the relevant time period of 2013-2016.
- [102] Mr. Coad seeks to adduce letters from Service Canada approving Mr. Coad for Canada Pension Plan survivor's pension and Allowance for the Survivor. He deposes that the Sister and the Mother were happy for him to have been approved, but he has provided no evidence of this.
- [103] There are exhibits relating to the conduct of the Sister as administrator of the estate following the trial judge's order. These include email discussions concerning the storage of Ms. Lariviere's possessions; documentation of the eroded net value of the estate, which Mr.

Coad attributes to the Sister's failure to agree with him on storage and division of assets; a record of the sale of the Sister's house; and a screenshot of a text message that is allegedly from the Sister where she states, "On 'principle', [the Brother] wants me to use all the Trust [sic] funds to ensure that you don't get anything". Mr. Coad had provided an invoice for his work as administrator prior to the Sister's appointment, and he claims he never received a response.

[104] Finally, he provides various documents that relate to the value of the Property: an appraisal of the Property as of September 2017, an information statement showing the arrears on the TD mortgage and the Form B mortgage in favour of Swami Holdings, the second mortgagee.

Issues on Appeal

[105] Mr. Coad raises essentially three grounds of appeal. First, he says the trial judge erred in failing to give effect to the order of Justice Affleck when he heard the issue of the validity of the testamentary documents at the same time as the issue of whether Mr. Coad and Ms. Lariviere were in a marriage-like relationship. Second, he says that the trial judge misapprehended considerable portions of the evidence, and thereby drew wrong inferences with respect to Mr. Coad's credibility. Finally, he submits that the trial judge erred when he concluded that there was no marriage-like relationship and that Ms. Lariviere died intestate. Mr. Coad's fresh evidence application addresses the first and third issues.

Discussion

Trial fairness

[106] I will first address the issue of whether Mr. Coad's trial was unfair because the trial judge proceeded with the questions of both whether Ms. Lariviere left a valid will and whether Mr. Coad was her spouse. Mr. Coad is clearly of the view that he was treated unfairly.

[107] However, in my view and for the reasons below, when viewed through an objective lens, it is apparent that the trial judge did not err in the manner in which he proceeded with this trial. It is also clear that no prejudice flowed to Mr. Coad as a result of the manner of the proceeding.

[108] It may be helpful to chronologically summarize the matters before the court and certain orders:

- March 2, 2017: Mr. Coad delivered to Mr. Lariviere and Ms. Lariviere's family a notice of proposed application in relation to the estate, advising that he intended to seek a grant of probate with respect to the 2005 Document. Mr. Lariviere objected and delivered a notice of dispute and two documents: a photocopy of the 2006 Revocation and the 2001 Document (which was not witnessed and so did not comply with the validity requirements under s. 37 of WESA).

- June 13, 2017: Mr. Lariviere applied for a grant of probate with respect to the 2001 Document.
- June 19, 2017: Mr. Coad applied for a grant of administration without will annexed, claiming he was Ms. Lariviere's spouse and the sole beneficiary on intestacy.
- August 9, 2017: Mr. Coad received a grant of administration without will annexed, Chilliwack File No. P17770 ("File 770").
- September 5, 2017: On Mr. Lariviere's application, a Master ordered that the 2001 Document is a valid will in Chilliwack File No. P17711 ("File 711").
- September 14, 2017: Mr. Lariviere received a grant of probate for the 2001 Document on File 711.
- October 27, 2017: Mr. Coad filed a notice of application in File 770 seeking an order revoking the orders Mr. Lariviere received on File 711.
- November 3, 2017: Mr. Lariviere filed an application in File 770 defending his orders on the basis that Mr. Coad was not Ms. Lariviere's spouse.
- Late 2017: Mr. Coad found a photocopy of the 2006 Document.
- March 28, 2018: Mr. Lariviere filed a petition seeking an order revoking Mr. Coad's order for estate administration on the basis that Mr. Coad was not Ms. Lariviere's spouse. This opened Chilliwack File No. S34103, which was later transferred to Vancouver and became Vancouver File No. S186247 ("File 247").
- April 12, 2018: Justice Affleck ordered that the issue of whether there was a valid testamentary document would proceed in court before any proceeding occurred in relation to whether Mr. Coad was the common law spouse of Ms. Lariviere.
- May 30, 2018: Mr. Lariviere filed another petition seeking proof in solemn form of the 2001 Document, thus opening Vancouver File No. S186225 ("File 225").
- February 11, 2019: Mr. Lariviere attempted to bring File 225 to court by way of a summary trial. Justice Fleming found the matter unsuitable for a summary trial, instead ordering that the two applications to set aside the grants must be heard with the applications regarding the validity of the testamentary documents.
- February 21, 2019: At a trial management conference, Justice Fleming ordered that File 225 (Mr. Lariviere's petition to have the 2001 Document proved in solemn form), File 247 (Mr. Lariviere's petition to have Mr. Coad's grant of administration set aside), and File 770 (Mr. Coad's application to have Mr. Lariviere's grant of administration set aside) be heard together. She also ordered that the Sister be granted leave to file a response to the File 225 petition on behalf of the Mother.
- May 13-17, 2019: The trial commenced before Justice Walker. Mr. Lariviere's case was completed by May 16, 2019, and Mr. Coad commenced calling evidence.
- June 21 and 24, 2019: The trial continued with Mr. Coad calling evidence.

- July 19, 2019: The trial continued with Mr. Coad calling evidence.
- August 21-23, 2019: The final submissions occurred.
- October 3, 2019: Judgment was rendered.

[109] This last order by Justice Fleming is the critical order to the disposition of this ground of appeal, in my view. Justice Affleck made his order before the additional petition, File 225, was filed. It also apparently did not contemplate that Mr. Coad's status as Ms. Lariviere's spouse (or lack thereof) was key to Mr. Lariviere's application and petition to have Mr. Coad's grant of administration set aside. The issues in the revocation applications (File 247 and File 770) were inextricably linked to the question of whether Mr. Coad was a spouse of Ms. Lariviere.

[110] The transcript excerpts above indicate that the lawyers had not realized the significance of Justice Fleming's order, which clearly invoked both the outstanding issues. The question, then, is not whether the judge erred in requiring both issues to proceed--because, in my view, he did not. Rather, the question is whether that order resulted in unfairness to Mr. Coad, who clearly but mistakenly thought that Justice Affleck's order had not been overtaken by that of Justice Fleming.

[111] For clarity, the trial judge here did not overrule Justice Affleck's case plan order, as it had already been varied by Justice Fleming's case plan and trial management orders. He ordered the matters to go ahead because he was told that the same witnesses were to be called for both issues; Mr. Coad's spousal status and credibility were central to both his entitlement to the estate and the validity of his grant of administration; and there was a real risk of inconsistent findings. The question is whether that was contrary to trial fairness.

[112] The consideration of trial fairness engages a number of matters, depending on the factual matrix of the case. Here, Mr. Coad was represented by counsel. No adjournment was sought on the basis that he was taken by surprise and more time was needed to prepare and contact witnesses. No request for further discovery was made, despite the fact that Mr. Lariviere was not questioned on the issue of Mr. Coad's and Ms. Lariviere's relationship during examinations for discovery. Pointing to the exchange between the judge and Mr. Bohbot, quoted above at para. 84, Mr. Coad argues that the judge had made up his mind, and there was no point to requesting an adjournment. But, as mentioned, the judge's impatience with Mr. Bohbot stemmed from his failure to re-appear in the afternoon. Without a request, it is impossible to know what the judge might have decided. If he had refused, then Mr. Coad would have a stronger argument. However, the real question is whether Mr. Coad suffered any prejudice as a result of both issues proceeding to trial. Given that there was a four-week and then another three-week adjournment mid-trial, when Mr. Coad's case was still open, it is difficult to see how Mr. Coad suffered prejudice as a result. There was sufficient time to gather documents and witnesses.

Fresh evidence

[113] This brings me to the fresh evidence. As recently affirmed in *Barendregt v. Grebliunas*, 2022 SCC 22, the test set out in *Palmer v. The Queen*, [1980] 1 SCR 759, applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below (at para. 3). Accordingly, the same test applies to the evidence of Mr. Coad's relationship with Ms. Lariviere and the evidence of the Sister's conduct in administering the estate. That test, as set out in *Palmer* at 775 and *Barendregt* at para. 29, requires that the following be met:

- a) The evidence could not, by the exercise of due diligence, have been obtained for the trial;
- b) The evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- c) The evidence is credible in the sense that it is reasonably capable of belief; and
- d) The evidence is such that, if believed, it could have affected the result at trial.

[114] Mr. Coad did not seek to adjourn the trial on the basis that he was taken by surprise and was not prepared to proceed. He says now that the costs against the estate were accumulating at a rapid pace, and he did not want to delay the trial. Of significance is the fact that the trial did not complete in the allotted time, and there were two significant breaks. Mr. Coad's case was still open, yet he did not marshal the evidence he now says was important and has tendered as fresh evidence.

[115] In my view, the fresh evidence does not pass the due diligence or relevance tests. With the exception of the evidence of the Sister's conduct, all of the evidence tendered by Mr. Coad could have been gathered during the intervals between hearing dates. The Sister's conduct, meanwhile, had no bearing on the question of whether Mr. Coad was Ms. Lariviere's spouse, especially since the Sister did not testify or otherwise participate in the trial. The rules for admitting fresh evidence are in place to protect finality of proceedings. Litigants are generally not allowed to buttress their cases on appeal, after they have been unsuccessful with evidence that was available at the time of trial, with the hindsight of the trial reasons (*Barendregt* at para. 6).

[116] I would not admit the fresh evidence.

Mr. Lariviere's standing to challenge Mr. Coad's status as spouse

[117] Mr. Coad takes issue with Mr. Lariviere's standing to challenge his status as a spouse. His argument is that if the sole issue had been whether any of the testamentary documents were valid, once the intestacy was decided, Mr. Lariviere had no more standing in the case. The difficulty with his argument is that Mr. Lariviere had an order from a Master that the 2001 Document was valid, and that he was the primary beneficiary. He had, in my view, every right to defend his position by challenging Mr. Coad's order on the basis that Mr. Coad was not Ms. Lariviere's spouse so did not have standing to contest the 2001 Document or any

right to administer her estate.

- [118] Mr. Coad also takes issue with the standing of the Sister and the Mother, both at trial and on appeal. He says that the Sister, acting as litigation guardian for the Mother, was the only party that had standing on the issue of his spousal status and she never filed a claim against him. He says that, having not challenged his spousal status at trial, the Mother and Sister have no standing now. Mr. Coad is not entirely correct: the Mother was permitted to file a response as a result of Justice Fleming's order on February 21, 2019 and she did, in fact, file a response on February 28, 2019. While she ultimately did not participate in the trial, the Mother's response disputed Mr. Coad's status as a spouse and took the position that, as a result, she was the sole beneficiary of Ms. Lariviere's estate.
- [119] Following the trial, the judge directed the executor or administrator of the Mother's Estate to appear before him to appoint the administrator of Ms. Lariviere's estate (at para. 218). On November 27, 2019, upon application, the trial judge appointed the Sister as the administrator of Ms. Lariviere's estate. MD Trust--the executor of the Mother's Estate, the beneficiary on the intestacy--did not wish to act as administrator.
- [120] The Mother's Estate is, as a result of the finding of intestacy, directly affected by any decision made in this Court. It was added as a party by Mr. Coad when he named it as a respondent in his notice of appeal, and in any event, could (and would) have been added as a party by a justice, pursuant to Court of Appeal Rules, B.C. Reg. 297/2001, r. 2(2).
- [121] Both the Mother's Estate and the Sister, as administrator of Ms. Lariviere's estate, have standing to make submissions as parties. I add that the Mother's Estate adopted the position of the Sister in its factum, and did not appear on the appeal.
- [122] I would not give effect to the ground of appeal that the trial was conducted unfairly. Nor would I give effect to the submission that Mr. Lariviere, the Mother and the Sister had no standing to challenge the issue of whether Mr. Coad and Ms. Lariviere were in a marriage-like relationship.

Findings of fact and credibility

- [123] Mr. Coad takes issue with many of the findings of fact by the trial judge, pointing out conclusions that he says were erroneous and contrary to the evidence. The Sister does not dispute some of the errors, but submits that they were not material.
- [124] As I have concluded that the trial judge erred in his conclusion with respect to whether Mr. Coad was the spouse of Ms. Lariviere, I see no need to pick through the many allegations of error raised by Mr. Coad.

Were Mr. Coad and Ms. Lariviere in a marriage-like relationship?

- [125] When a person dies without a will and has no descendants, their spouse inherits the estate (WESA, s. 20).

[126] A "spouse" is defined in s. 2 of WESA:

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.]

[127] This Court recently considered the question of whether persons were in a marriage-like relationship in *Jones v. Davidson*, 2022 BCCA 31. The decision highlights the fact that there is no specific definition of whether a marriage-like relationship exists. The precise definitions of the past are no longer valid in our changing world. Such relationships are no longer defined by financial dependence, sexual relationships or the mingling of property and finances. The Court, at para. 21, affirmed the lack of a "checklist" approach, as succinctly set out in *Austin v. Goerz*, 2007 BCCA 586. In *Austin*, this Court said at para. 58:

[58] It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages. In this regard I respectfully agree with the following from the judgment of Ryan-Froslic J. in *Yakiwchuk v. Oaks*, 2003 SKQB 124:

[10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property- in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons

for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.

[Emphasis added by Frankel J.A.]

- [128] As affirmed at para. 22 of Jones, this Court's decision in *Weber v. LeClerc*, 2015 BCCA 492 at paras. 23-24, leave to appeal to SCC refused, 36812 (21 April 2016), is also instructive:
- [23] The parties' intentions - particularly the expectation that the relationship will be of lengthy, indeterminate duration - may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.
- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [129] In Jones at para. 23, this Court also considered the decision of *M. v. H.*, [1999] 2 S.C.R. 3, in the context of what was referred to then as a "conjugal relationship". It is important to note--particularly in light of the trial judge's reasons, as discussed below--that the term "conjugal" has essentially the same meaning as "marriage-like", and does not solely refer to sexual relations. As set out in *M. v. H.*:
- [59] *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception

of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[Emphasis added.]

[130] In Jones, this Court concluded at para. 24:

[24] The upshot of these cases, as explained in Austin and Weber, is that the characterization of a relationship as marriage-like is contextual. It involves the subjective intentions of the parties and objective evidence, and the subjective intentions, where there is evidence of such, may be tested by reference to the objective evidence. In turn, that objective evidence may address a wide assortment of characteristics or indicia for which there is no definitive classification system to determine the ultimate characterization of the relationship. That answer must be given by the judge, understanding the concept and fully considering the evidence.

[131] Returning to the instant appeal, the trial judge reviewed the case law, including Weber. He set out a list of factors that he distilled from the law:

[191] From these decisions, the factors that may be considered include:

- (a) The parties' intentions, particularly their expectation of whether the relationship would be lengthy and of indeterminate duration: Weber, para. 23.
- (b) Objective evidence of the parties' lifestyle and interactions supporting a finding that their interactions "closely resembled those typical of married couples": Weber, paras. 24, 29.
- (c) Whether the parties treat themselves as a family unit: Weber, para. 29.
- (d) Whether cohabitation was coupled with romantic and sexual relations: Weber, para. 29; Austin, para. 58.
- (e) Evidence of emotional interdependence, mutual commitment, and attachment: Robledano, para. 60.
- (f) Whether the parties co-mingled assets and shared expenses: Austin, para. 62.
- (g) Whether the parties treated themselves as single or cohabiting for income tax purposes: Weber, para. 30.

[132] The trial judge concluded at para. 198 that if Mr. Coad and Ms. Lariviere had been in a marriage-like relationship, it ended in 2006 when he did not allow her to return to his apartment after her accident. That conclusion is founded on the evidence.

- [133] However, he also concluded that when Mr. Coad moved back in with Ms. Lariviere in 2013, there was "no credible or reliable evidence from which [he could] make any findings regarding Ms. Lariviere's intent in allowing Mr. Coad to move into the Property in 2013" (at para. 201).
- [134] The judge's reasons for rejecting all of the evidence tendered to support the relationship are as follows:
- [204] When Mr. Coad moved into the Property in 2013, he and Mr. Lariviere attended to Ms. Lariviere's increasingly significant medical needs (she suffered from deteriorating chronic pulmonary disease and associated mobility problems), took her to medical appointments, and brought her food and other items. Mr. Lariviere, more so than Mr. Coad, gave Ms. Lariviere advice concerning her financial affairs. Both encountered points of significant friction with Ms. Lariviere from time to time.
- [205] However, I reject Mr. Coad's submission that he has established that their marriage-like relationship existed in 2013 when he moved into the Property and remained intact until her death. He has not established that the factors discussed in the case law (as summarized in para. 191 of these reasons) are engaged.
- [206] Quite apart from the concerns I have expressed about Mr. Coad's credibility, his own viva voce evidence concerning their purported joint financial dealings was vague and generalized. His own deliberate and specific reference to sharing a B.C. auto club membership demonstrated that he was alive to sources of information that could be sought out to corroborate his claim.
- [207] I do not accept that the evidence of the tenants, one former and one who continues to live on the lower floor of the Property, corroborates the claim.
- [208] For the former tenant, the most that he could do, after some prompting, as he appeared to have lost sight of what he was supposed to say, was shrug his shoulders and say that he knew Mr. Coad and Ms. Lariviere as "Sasha and Barb" and that they lived upstairs.
- [209] The current tenant, who lives on the bottom floor of the Property and was paid by Mr. Coad to carry out work at the Property, offered more information in his evidence in an attempt to corroborate that Mr. Coad and Ms. Lariviere were, as he put it, "a typical married couple". Specifically, he testified that they cooked together, that Mr. Coad went out to buy the groceries due to Ms. Lariviere's mobility issues, and witnessed "hugs and a peck on the cheek". At the same time, he conceded that Ms. Lariviere did not speak to him about her relationship with Mr. Coad. He said the only time that he can recall Ms. Lariviere speaking to him about her relationship with Mr. Coad was after she and Mr. Coad argued. In cross-examination, he admitted that Mr. Coad and Ms. Lariviere never told him that they were a common law couple. In all, I found that his evidence concerning the nature of the relationship between Ms. Lariviere and Mr. Coad was speculative.

- [210] I am satisfied that neither witness knew of the nature of the relationship between Mr. Coad and Ms. Lariviere. Neither were prepared to confirm that Mr. Coad and Ms. Lariviere told them they were living in a common law relationship or words akin to it.
- [211] Given my overall concerns over the credibility of Mr. Coad's evidence, I am not content to rely on his uncorroborated viva voce testimony, including his evidence that he provided financial support for Ms. Lariviere from 2013 until her death. He did not provide any documentary evidence let alone any other corroborating evidence to that effect.
- [212] What I am able to find is that Ms. Lariviere collected income from renting out her Property while she lived at Mr. Coad's apartment.
- [213] Mr. Coad did not tender any documents, including financial documents (such as bank account and credit card statements or utility accounts) to corroborate his claim that he lived in a marriage-like relationship with Ms. Lariviere in 2013, and that it carried on until her death. Instead, he sought to establish his claim through his viva voce evidence and that of the two tenants.
- [214] Accordingly, Mr. Coad has not established that he was living in a marriage-like relationship with Ms. Lariviere at the time of her death or at any time after 2006.

With respect, there was little analysis of the evidence, and the judge's reasons consisted primarily of conclusory statements.

- [135] Whether people are in a marriage-like relationship is a question of mixed fact and law, subject to deference absent a palpable and overriding error: Weber at para. 22. As noted in Jones:
- [12] Our task is to determine whether the judge has made an error of the sort that calls for our intervention. This means on questions of law or principle we consider whether the judge was correct. On matters of fact and inferences drawn from the evidence, we apply a deferential standard. Recognizing that fact finding is the province of the trial court, we ask on questions of fact whether the judge has made a palpable (obvious) and overriding (material to the outcome) error. Where the challenge concerns an inference drawn by a trial judge, we ask whether the inference is clearly wrong or unsupported by the evidence. The standard applied to questions of mixed fact and law is the same as applied to questions of fact unless there is an extricable question of principle, in which case we apply a standard of correctness: Housen v. Nikolaisen, 2002 SCC 33.
- [136] In Benhaim v. St-Germain, 2016 SCC 48 at paras. 38-39, the Court clarified the deferential standard required to find a palpable and overriding error:
- [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in South Yukon Forest Corp. v. R., 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:

Palpable and overriding error is a highly deferential standard of review ... "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

- [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."
- [137] Questions of fact and credibility are clearly the bailiwick of the trial judge. An appellate court cannot interfere with those findings or drawing of inferences unless there is a clear and material error. In my view, the trial judge here committed such errors, and as a result, his findings of credibility and inferences cannot stand.
- [138] Mr. Coad testified at length regarding the care that he gave to Ms. Lariviere. He took her to hundreds of medical appointments, did the regular grocery shopping, and picked up her medication at the pharmacy. They had meals together and celebrations, such as Christmas and Thanksgiving, together. They shared the same bed from 2013 until her death. He testified that he loved Barbara. The trial judge concluded that Mr. Lariviere provided as much assistance, a conclusion not supported by the evidence. In any event, the trial judge's finding with respect to Mr. Lariviere is not relevant to the question of whether Mr. Coad was a spouse. Mr. Lariviere did not claim to be a spouse, nor was he found to be a spouse.
- [139] Mr. Coad was in contact with Ms. Lariviere's family, including the Mother, both before and after Ms. Lariviere's death. He testified that he was the family representative at the hospital. He drove to White Rock to bring the Mother to the hospital when Ms. Lariviere was admitted.
- [140] Two friends of Ms. Lariviere testified with respect to the relationship. The trial judge rejected their evidence out of hand and without analysis, seemingly--in part at least--because Ms. Lariviere never told them that she was in a marriage-like relationship with Mr. Coad.
- [141] Bruce Robertson, who was a tenant in the Property from 2013 until trial, testified that he socialized with Ms. Lariviere and Mr. Coad several times a week. He said they were "like a typical married couple" They were together all day, and they shared a bedroom. When asked if Ms. Lariviere said they were common law, he testified that she never said they were, but she did not have to--it was obvious. Everyone knew about their relationship--it was common knowledge.
- [142] Dean Somerville worked on Ms. Lariviere's house, and got to know her through that initial relationship. At some point, he actually lived with Ms. Lariviere and Mr. Coad, sleeping on their couch--in other words, in very close proximity to be able to assess the relationship. He testified that Mr. Coad was living with Ms. Lariviere: they had a typical relationship, they did everything together, they ate their meals together. Mr. Coad took her to all of her

appointments, did the shopping, went to the pharmacy and the bank for her. They were "Sasha and Barb". They slept in the same room.

- [143] The evidence of Mr. Somerville and Mr. Robertson was not extensively challenged in cross-examination.
- [144] The trial judge concluded that Mr. Coad had not established the necessary factors, which he had set out in his reasons in para. 191 (quoted above). While the judge was alive to the fact that the analysis of this issue requires a contextual and holistic approach, he failed to take such an approach. He concluded at para. 205 that Mr. Coad "has not established that the factors discussed in the case law are engaged", but he did not meaningfully engage with the factors he enumerated, let alone recognize that they were not a checklist and not appropriate in light of the diversity that exists among relationships. He failed to consider the evidence of two witnesses, who had first-hand knowledge of the relationship between Mr. Coad and Ms. Lariviere, rejecting it out of hand without analysis.
- [145] He did not find Mr. Coad credible, particularly with respect to his assertion that he continued a loving, marriage-like relationship with Ms. Lariviere between 2006 and 2013. In particular, he held that such a finding "defies all credibility in circumstances where he chose to have her leave as opposed to Mr. Lariviere" (at para. 203). The judge was entitled to make this finding, and he correctly found that the exception in s. 2(2.1) of WESA did not apply. Ms. Lariviere and Mr. Coad did not resume cohabitation within one year of their separation in 2006.
- [146] However, in my view, he committed palpable and overriding error when he failed to consider what their relationship was in the "relevant period" (WESA, s. 2(3)), which was the two years prior to Ms. Lariviere's death--in other words, after Mr. Coad moved back into the Property in 2013. He placed undue emphasis on the fact that Mr. Coad and Ms. Lariviere did not share what he referred to as conjugal relations, meaning sexual relations, after she left in 2006 (at para. 200). He turned it into a competition between Mr. Coad and Mr. Lariviere: who shared her bed more, who attended to her medical needs more, who gave her advice on her financial affairs more (at paras. 202, 204). But, the uncontested evidence was that Mr. Coad did live with Ms. Lariviere, shared her bed, attended to her medical needs, advised her on her finances, shared meals and celebrations with her, ran errands for her and spent substantial portions of his day with her. All circumstances that led friends who observed them to conclude that they were in a marriage-like relationship.
- [147] The Mother, while originally taking the position that Mr. Coad and Ms. Lariviere did not have a marriage-like relationship, withdrew from the trial and deferred to the trial process. Mr. Coad testified that he told her and the Sister that he was receiving pension benefits as a surviving spouse.

[148] In my view, the trial judge's conclusion was based on a failure to consider uncontested evidence, a failure to take a contextual approach to the evidence by applying his "checklist", and a failure to consider the whole of the evidence.

[149] In my opinion, when the evidence as a whole is considered, and taking into account the trial judge's lack of confidence in the evidence of Mr. Coad, the only conclusion that can emerge is that Mr. Coad and Ms. Lariviere were living in a marriage-like relationship commencing shortly after he moved into the Property in 2013. Therefore, in my view, he is a spouse according to the definition in WESA.

Conclusion

[150] I would allow the appeal to the extent that I would set aside the trial judge's order that Mr. Coad was not in a marriage-like relationship with Ms. Lariviere. I would order that Mr. Coad was in a marriage-like relationship with Ms. Lariviere, and thus inherits her estate. I would not set aside the order that the Sister is the Administrator of the Estate.

[151] I would order that costs are payable from the estate.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Griffin"

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Prepared on 25 October 2026 · Esheria