

CANADA / JUDGMENT

Morgan v. Pengelly Estate

2011 BCSC 1114

COURT

Supreme Court of British Columbia

DECIDED

17 August 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 1114 Morgan v. Pengelly Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Morgan v. Pengelly Estate,

2011 BCSC 1114

Date: 20110817

Docket: S106160

Registry: New Westminster

Between:

John Ewan Morgan

Plaintiff

And

Derek James Pengelly, Executor of the Estate

and Trustee of Janice Christine Stewart Pengelly a.k.a.

Christine Stewart Pengelly, deceased, the said Derek James Pengelly,

Stewart Russell Pengelly and Craig Steven Pengelly

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

G.A. Laughlin

Counsel for the Defendants:

R. Davies, Q.C.

Place and Date of Trial:

New Westminster, B.C.

December 13-17, 2010

and February 9, 2011

Place and Date of Judgment:

New Westminster, B.C.

August 17, 2011

- [1] The claimant, John Ewan Morgan, and decedent, Christine Pengelly, lived together for approximately nine years prior to her death in 2006.
- [2] In July 1999, following a period of cohabitation, they attended, before relatives and friends, a ceremony at the United Church in Celistia, B.C., and participated in what appeared to be a marriage ceremony. The effect of the ceremony, says the claimant, is to revoke Ms. Pengelly's will, executed in 1996 (the "Will").
- [3] Prior to the ceremony at Celistia, the parties signed an agreement, dated June 29, 1999, which provided for the ownership and management of their assets, both during cohabitation and upon subsequent separation or death (the "Agreement").
- [4] In 2006, Ms. Pengelly died. The Will divided her sizeable estate equally between her three sons.
- [5] The claimant contests the validity of the Will or, if it is found to be valid, seeks a variation of its terms under the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "WVA"). Additionally, he says the decedent was unjustly enriched by virtue of his unpaid labour, primarily work performed at 1947 Bristow Road, Celistia, B.C. (the "Celistia property").
- [6] The respondents deny the marriage was valid and point to the absence of a marriage licence. In any event, they say their mother revived the Will by signing it before her friends, Stan Owens and Mari Pym, on December 3, 1999, and that there is no basis to vary those bequests.
- [7] The respondents counterclaim in trespass, seeking damages or occupational rent for the claimant's use and occupation of the Celistia property.

The Issues

- [8] The issues arising from the litigation have been characterized by counsel as follows:
1. Was the ceremony of July 3, 1999 between the plaintiff and deceased a valid marriage resulting in the revocation of the decedent's will made January, 1996?
 2. If so, was her will revived December 3, 1999, in accordance with s. 18 of the Wills Act?
 3. If the will was revoked, but not revived, is the plaintiff entitled to any part of the decedent's estate under s. 85 of the Estate Administration Act or did he waive his rights under the rules for intestate succession under the June 29, 1999 agreement?
 4. If the 1996 will is valid, or was revived December 3, 1999, did the decedent fail to make adequate provision for the plaintiff's maintenance and support such that the plaintiff is entitled to relief under the Wills Variation Act?
 5. What effect, if any, does the June 29, 1999 agreement have upon his claim under the Wills Variation Act?
 6. Is the plaintiff entitled to a remedy for unjust enrichment?
 7. Is the defendant, Derek Pengelly, in his capacity as executor of the estate of Christine Pengelly, entitled to damages from the plaintiff either in trespass or is he entitled to occupational rent from the plaintiff arising from the plaintiff's ongoing occupation of 1947 Bristow Road, Celista, British Columbia?

The Evidence

The Relationship

- [9] The claimant is currently 81 years of age. He divorced his first wife in the early 1990s and retired from his employment with the government of Alberta. By 1995, the claimant was pursuing various part-time endeavours to augment his government pension. His pension was reduced by the amount of support paid to his former wife as a result of his divorce, such that his actual monthly income was approximately \$1,500. The claimant acknowledged that none of his business pursuits were flourishing and none had produced meaningful income over and above his pension.
- [10] He knew both Christine Pengelly and her husband, Don, from their high school days in Alberta. He had remained close enough to Don Pengelly that he came to B.C. following Don's death so as to attend the memorial service. While here, he renewed his friendship with Chris.
- [11] When Ms. Pengelly suffered a heart attack while vacationing in Palm Desert in the winter of 1996, the claimant returned to B.C. to assist her in her recovery. During his early visits to B.C. he stayed at the home of his son. Later, as the relationship between he and Ms. Pengelly developed, he began staying with her.

- [12] She told him of the Celista property and her concerns as to its upkeep. He volunteered to help her and by the spring of 1996 they attended Celista and readied it for the summer season.
- [13] He installed an irrigation system on the lawn and did a number of chores about the premises. He painted, restored roofs, did general maintenance, and assisted in the restoration of the concrete work about the premises. He used his own funds for the purchase of materials and paid for his own transport between his home in Alberta and the Celista property. Contractors were engaged for the larger tasks and Ms. Pengelly paid the costs.
- [14] They travelled south together in the winter of 1997. Ms. Pengelly acquired a trailer and pad in Palm Desert. The claimant says he contributed several thousand dollars to the purchase price, but no documentary evidence was provided to support that assertion. The trailer and pad were registered jointly in the names of the Ms. Pengelly and her son, Derek Pengelly, although he contributed nothing to its acquisition.
- [15] In the period between Don Pengelly's death and the fall of 1997, Mr. Morgan travelled between B.C. and Edmonton, where he maintained his own apartment. In the fall of 1997 he gave up his apartment, moved his effects to B.C., and wound down his business enterprises in Alberta.
- [16] The relationship between he and Ms. Pengelly blossomed such that by the summer of 1997 she asked him to move in with her. He considered the matter and, by the fall of 1997, commenced living with her full time. They did not separate until her death in 2006.
- [17] The cohabitation arrangements did not meet with the approval of two of Mr. Morgan's daughters. He and Ms. Pengelly were made to feel unwelcome when they attended family events in Alberta, or at least perceived such. As a result, they began to discuss marriage. In 1998, the parties decided to "formalize their relationship." The claimant proposed.

The "Marriage Ceremony"

- [18] After deciding to marry, plans were made for a ceremony at Celista in the summer of 1999. Invitations were sent, the church booked, and arrangements made for a reception to follow. To all involved, including the respondents, it appeared that the parties were getting ready for a wedding.
- [19] Ms. Pengelly took care of the arrangements. The minister, Helen Hobbes, attended at their home and the service was discussed. Ms. Hobbes was an ordained minister of the United Church of Canada and lawfully entitled to perform marriages.
- [20] In one of the meetings, and in a letter dated March 23, 1999, the claimant and decedent were made aware of the requirement to obtain a marriage licence.

- [21] According to the claimant, Ms. Pengelly did not want a licence because she feared registration of the marriage would come to the attention of Air Canada and cause it to revoke the airline passes she received as the widow of a former employee. This was raised as the "main reason," but no other explanation was offered for the absence of a wedding licence.
- [22] The claimant testified that he and Ms. Pengelly were told by Ms. Hobbes that "posting of the banns" might obviate the legal requirement for obtaining a wedding licence. However, it appears that the posting of banns was a practice of the Anglican Church (which shared the church facility at Celista with the United Church) and it is unclear what steps were taken, if any, by Ms. Hobbes following the decision not to obtain a licence. Ms. Hobbes was not called as a witness.
- [23] The other suggestion by Ms. Hobbes was a church blessing in lieu of a wedding ceremony. The claimant says that both he and Ms. Pengelly rejected this alternative because the blessing took only five minutes and they both thought that too short. It was decided that Ms. Hobbes would do a "regular service."
- [24] On July 3, 1999, before family and friends, Mr. Morgan and Ms. Pengelly walked down the aisle of St. David's Church at Celista, B.C. and, to all assembled, went through what appeared to be a marriage ceremony replete with all the pomp and ceremony associated with a church wedding. A video taken of the ceremony and the reception would seem to belie the notion that what was performed was a church blessing. All necessary language required under the Marriage Act, R.S.B.C. 1996, c. 282, was spoken and the celebrants were pronounced "man and wife" before the assembled guests.
- [25] The resultant "marriage" documentation provided by the church describes the event as the solemnization of a marriage on July 3, 1999. The only anomaly on the Marriage Registry was that the words "Church Blessing" were inserted where the marriage licence number ought to be inserted.
- [26] The claimant says that he thought the ceremony was a valid marriage and was unaware of the impact of the absence of the marriage licence until after Ms. Pengelly's death. He considered himself "widowed" after her death.
- [27] At some time, the claimant became aware of questions surrounding his marital status. After Ms. Pengelly's death he attempted to register the marriage with Vital Statistics, but he was told that he would need Ms. Pengelly's signature to do so.
- [28] Ms. Hobbes did not testify as to her involvement with the parties. Following the commencement of this litigation, clarification of the status of the ceremony was sought and, in a letter dated March 19, 2008, the following explanation was provided by Ms. Hobbes to the Assistant Regional Manager of Vital Statistics as to the events of July 3, 1999:

Dear Ms. Rezvani:

As the United Church minister who performed the ceremony for them on July 3rd, 1999, at St. David's Church in Celista, B.C. I have just signed the Vital Statistics form. This accompanying letter will offer an explanation of the events of the ceremony of July 3rd, 1999.

St. David's was part of a cluster of three small churches which together formed the "Shared Parish of Shuswap Lakes." This meant they were served by either an Anglican priest or a United Church minister, on a rotating basis of every four years. An ordained United Church Minister, I served the Parish from 1996 - 2000, so was also licensed under the Anglican Bishop of Kootenay to perform marriages, sacraments, etc.

Mr. Morgan and Ms. Pengelly came to me seeking to be married. However, as Ms. Pengelly was Anglican, she wished it to be an Anglican rite. This however, was not possible since Mr. Morgan had been previously married and divorced. As a divorced person, he would need to go through the Marriage Commission of the Anglican Church before this could happen. It therefore could be simply a "Church Blessing" - almost the same ceremony, but it would not be a legal marriage according to civil law.

Or, they could purchase a Marriage License, and it would be a legal union, under United Church policy, though not according to the Anglican tradition.

In retrospect, I realize they must not have completely understood the ramifications of this somewhat complex difference between denominational regulations.

However, I understood that they chose the Anglican route, and therefore did not buy a license. I performed the ceremony, entered it into the church registry, (which is set up for weddings), but to make it clear, wrote in the Registry "Church Blessing only". In almost every other way, however, it could have been a marriage, as they exchanged vows, rings, etc.

This is all I can offer, in explanation of the mistaken understanding around the ceremony that I performed on July 3, 1999. I am sure that there was no intent for deceit either on my part nor on the part of the couple. I am sorry that this is now the cause of some distress.

[29] Nowhere in the letter, tendered for the truth of its contents by the consent of the parties, does Ms. Hobbes mention the concerns of Ms. Pengelly as they related to airline tickets or as to the posting of banns. The stated concern, as Ms. Hobbes understood it, was the requirements of the Anglican Church for Mr. Morgan to "go through the Marriage Commission."

[30] Both Mr. Morgan and Ms. Pengelly knew that a marriage licence had not been obtained.

[31] Whatever the understanding of the claimant, it would appear from the evidence of Ms. Pengelly's three sons that she had a different view of the effect of the ceremony.

- [32] According to them, on various occasions following the ceremony, their mother spoke to each and advised them of her view that the ceremony did not result in a true marriage. Each was told this sometime following the ceremony and again when she was in hospital shortly before her death.

The Agreement and the Will

- [33] The Agreement provided for the ownership and management of the parties' separate property during and after cohabitation. It contained specific reference to Part V of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), and a waiver of rights which would accrue by virtue of marriage. It specifically waived the claims of each under the WVA. The Agreement was to take effect upon the marriage of the parties.
- [34] It also provided for an annual review of its provisions on May 31 of each year commencing in 2000. In the absence of review, the provisions were deemed to continue to operate fairly.
- [35] Two weeks prior to the ceremony, before the Agreement was signed, Ms. Pengelly's lawyer wrote to her advising her that her pending marriage would revoke the Will. On July 6, 1999, three days after the ceremony, the solicitor forwarded the Will to Ms. Pengelly advising her to file a new Wills Notice. In handwriting beneath the body of the letter is written the words:
- We were advised by Stephen Soll, lawyer in Kamloops that original will could be re-dated signed and witnessed & be valid. No new Wills Notice has been filed.
- [36] The Will remained unchanged from before Ms. Pengelly's marriage. It is said to have been revived on December 3, 1999, by Ms. Pengelly re-signing and having two of her friends, Mari Owens (then Pym) and Stan Owens, witness her signature.
- [37] Both Mr. and Mrs. Owens were called as witnesses. Both recall attending the Lower Mainland on December 3, 1999. They were planning an early Christmas celebration with Mrs. Owens' family in West Vancouver before leaving on December 5 for a trip to New Zealand.
- [38] The claimant and Chris Pengelly were also leaving the city for a trip to Hawaii as a belated "honeymoon."
- [39] Neither Mr. nor Mrs. Owens could recall meeting Chris Pengelly that day. The claimant says that he and Ms. Pengelly spent the day together and that she did not leave his company, although he offered no particular evidence as to why the day stood out in his memory.
- [40] Beside the signatures of the two witnesses is printed "Stan Owens Mari Pim Box 23 Celista B.C. V0E 1L0." Mari Owens says her name prior to marrying Stan was spelled "Pym." Mr. Owens acknowledged that the Will bore his signature, but had no explanation as to how it could get there. Mrs. Owens was adamant that she did not witness the re-signing of the Will although she, too, acknowledged the signature appeared to be hers.

- [41] Both Derek and Craig Pengelly testified, over the objection of counsel for the claimant, that their mother advised them of meeting with Ms. Pym and Mr. Owens on December 3, 1999. Craig was told after his mother's return from Hawaii. Derek, who was living with his mother and the claimant at the time, was told the day the meeting was to have occurred. He testified that he was expecting to see them at the townhouse for dinner, but was told by his mother that they were pressed for time so they had only met for the few minutes. Phone records from the decedent's Port Moody residence indicate two phone calls to the Owens' residence in Celista sometime in November 1999.
- [42] The Will, bearing the three signatures I have referenced, or at least a copy of it, was found in a filing cabinet at the decedent's Port Moody residence along with the Agreement and documents relating to her investment accounts.
- [43] From the date cohabitation commenced until Ms. Pengelly's death, the parties kept separate finances, apart from a modest account in Palm Desert into which they each deposited funds to pay for their expenses while in California.
- [44] Otherwise, they paid their own expenses as it related to personal items. Ms. Pengelly paid all expenses associated with the three residences she owned: the Celista property; #168 101 Parkside Drive, Port Moody, B.C. (the "Port Moody property"); and #94 43155 Portola Avenue, Palm Desert, California (the "Palm Desert property").
- [45] The claimant and Ms. Pengelly lived together uneventfully from the date of the ceremony until her death.
- [46] The claimant acknowledged that Ms. Pengelly made him aware of her intention that her three sons share the bulk of her estate. That intention never wavered and was expressed to the claimant throughout their relationship.
- [47] He agreed that he signed the Agreement willingly and that he understood its meaning. He testified that Mr. Soll advised him that agreements of the sort he signed had a shelf life of several years.
- [48] Mr. Soll confirmed this view when he gave evidence and said he likely would have advised Mr. Morgan in such a fashion. The basis of his belief was never explained.
- [49] The Agreement's terms were never reviewed by the parties. The claimant said that Ms. Pengelly told him "not to worry" about it. The topic of the Agreement never came up again.
- [50] The Agreement contained a waiver by each of the parties of any claims either may have against the other of them arising from their "marriage." The waiver included claims under the Divorce Act, FRA, WVA, and Estate Administration Act. It also included a waiver of any claims either might have based on "the law pertaining to trusts or unjust enrichment" or based on "any direct or indirect contribution to property owned by the other whether or not savings occurred through the effective management of then household."

- [51] In or around the fall of 2005, Ms. Pengelly began to have thoughts of selling the Celista property. She discussed the intended sale with her sons and with the claimant. She advised all of them of her intention to gift the claimant \$100,000 from the sale proceeds of the Celista property as recognition of his efforts in improving and maintaining the properties she owned and to provide the claimant with the financial wherewithal to afford more travel with her. In the whole of the cohabitation, the parties had maintained separate finances. They contributed equally to a joint U.S. account for the time spent in Palm Desert, but otherwise paid their own expenses for travel and personal items. The claimant made a regular, albeit modest, contribution to the operation of the household.
- [52] Although an offer for approximately \$1.2 million was received, the Celista property did not sell. It was not listed for sale at the time of Ms. Pengelly's death.
- [53] In 2006, Ms. Pengelly had another heart attack. She was taken to Royal Columbian Hospital where, after several days, she appeared to be recovering. She thought she was going home and was, in fact, waiting for the claimant to attend to pick her up when she suffered another heart attack. This time it was fatal. Ms. Pengelly died on December 21, 2006.
- [54] In the days before her death, she reiterated her advice to her sons that she wanted the claimant to receive \$100,000 from the sale of the Celista property. She added to this by advising that she wanted him to have a new vehicle as well. The claimant had been experiencing hip problems and was having difficulty getting in and out of his vehicle.

Following Ms. Pengelly's Death

- [55] Following her death, the claimant remained in the Port Moody property. He sought assurance, at a family meeting following her death, that her wish to give him \$100,000 would be honoured. He agreed with counsel for the estate that he was pleased with her generosity.
- [56] A memorial service was held and the claimant participated fully in the planning. The bulletin for the memorial described the claimant as Ms. Pengelly's "husband."
- [57] The Will provides for an equal division of the decedent's estate between her three sons, Derek, Stewart, and Craig. Nothing was left to the claimant. Despite that, he was assured by all three sons, on more than one occasion, that their mother's wishes would be honoured.
- [58] Throughout the course of time he lived with the decedent, the claimant's Will provided no bequest to her.
- [59] The claimant remained in the Port Moody property for a period and then went south to Palm Desert. He was contacted and advised of the estate's wish to sell the Port Moody property and minor repairs and improvements began to be made during the spring of 2007.
- [60] The Port Moody property was sold and the proceeds are held in trust awaiting, as I understand it, the outcome of this action.

- [61] In the spring of 2007, the claimant went to Celista and stayed, as was the habit of both he and the decedent, until sometime in October. He remained responsible for the upkeep of the Celista property, but the estate maintained the expenses.
- [62] In July 2007, Derek Pengelly, on behalf of the estate, advised the claimant, in writing, that he was required to give up possession of the Celista property to the estate. Instead of moving, the claimant changed the locks.
- [63] By agreement of counsel, on a without prejudice basis, the claimant allowed the decedent's sons the use of the Celista property for one month in the summers of 2008 and 2009. For reasons unexplained, this arrangement did not carry on in 2010.
- [64] The affidavit of the executor, Derek Pengelly, sets the gross value of the estate at over \$2.7 million. Capital gains taxes, combined with probate fees, have reduced that sum by approximately \$250,000. Derek Pengelly expressed the view that the value of the Celista property, at \$1.5 million, was overstated in the probate documents and that its actual value at the time of his mother's death was closer to \$900,000. Prior to her death, Ms. Pengelly apparently rejected an offer of \$1.2 million. No current appraisal of the Celista property was tendered in evidence.
- [65] The Palm Desert property was jointly owned by Derek and is not referenced in the estate documents. An offer of \$80,000 was refused by Derek sometime following Ms. Pengelly's death.

The Parties

- [66] The circumstances of the claimant, both at trial and the death of Ms. Pengelly, are modest. His estate is much the same value as it was when the Agreement was signed. By virtue of increase to his employment pension, CPP (which include survivor's benefits), and OAP his income has grown from around \$1,500 a month to over \$2,000 (net of the deduction from his pension). His total assets are worth less than \$20,000.
- [67] All three of Ms. Pengelly's sons married and are the primary providers of support for their families. All three earn reasonable incomes and are, by any standards, self supporting and show no demonstrable need for financial assistance.
- [68] Derek Pengelly, the youngest, is 46 years old. He teaches special needs children and earns about \$72,000 annually. His wife works and earns about \$36,000 annually. Jointly they own a residence with equity of around \$250,000. They have other savings in RRSPs and non-registered accounts.

- [69] Craig Pengelly is 50 years old and works as an automotive mechanic. He earns around \$68,000 annually and, together with his wife, owns a \$400,000 home free of encumbrances. He and his wife have other savings, registered and non-registered, of around \$70,000. His wife, Maureen, works as a consultant and her income during the last several years has been modest. They have three children.
- [70] Stewart Pengelly is 53 years old and also works as an automotive mechanic. He earns around \$56,000 annually. He and his wife, Colleen, are the parents of two children. They jointly own a home with about \$240,000 equity. They have combined RRSPs of around \$180,000 and other modest savings. Neither has an employment pension.
- [71] Throughout his time living with Ms. Pengelly, the claimant says he worked almost daily at some activity associated with the upkeep or improvement of one of the three properties where the two of them resided. The work was more time consuming at the Celista property, where lawns needed cutting, machines needed fixing, and the residence needed continual protection from the elements.
- [72] Since the death of Ms. Pengelly, the estate has covered the operational expenses of the Celista property. At the date of trial, the expenses totalled approximately \$23,000.
- [73] The estate has never accepted that the claimant has any proprietary right to the use of the Celista property beyond July 2007, and has counterclaimed for occupational rent.
- [74] The claimant maintains an apartment in Edmonton for the months he is not in Celista or in Palm Desert. Despite the fact that the Palm Desert property remained available for his use, the claimant rented accommodation elsewhere when in Palm Desert.
- [75] In 2008, the trial of this matter commenced before Cohen J. The result was a lengthy adjournment which ultimately resulted in a joint application for a mistrial. The motion for a mistrial was granted in 2010.

Position of the Parties

- [76] The claimant submits that the Celista ceremony resulted in a valid marriage and, as a result, the Will was revoked pursuant to s. 15(1) of the Wills Act, R.S.B.C. 1996, c. 489. The result, says the claimant, is an intestacy entitling the claimant to the share of Ms. Pengelly's estate prescribed under s. 85 of the Estate Administration Act, R.S.B.C. 1996, c. 122. Alternatively, if the Celista ceremony did not result in the revocation of the Will, or the Will was revived on December 3, 1999, the claimant asserts that the Will did not make proper provision for his support and maintenance. He relies on the provisions of the WVA to have the Court vary its terms to provide an "adequate, just and equitable" result having regard to the circumstances of the claimant. The claimant submits that the Court should vary the provisions of the Will so as to provide 50% of the estate to recognize his legal claims against the estate and 25% of the residue to recognize the decedent's moral obligation to him.

- [77] While deemingly acknowledging the validity of the Agreement, the claimant says that the Agreement had a "shelf life" of only a few years and, as such, plays little, if any, role in the determination as to what is adequate, just, and equitable in the circumstances.
- [78] The claimant also submits that the decedent, and accordingly her estate, was unjustly enriched by his contributions to her estate over the course of their cohabitation resulting in a separate compensable claim. He suggests that this is a factor to be addressed independently in assessing the estate's legal obligation to him.
- [79] The respondents deny that there was a valid marriage which revoked the Will. If there was, they submit that the evidence discloses that the Will was revived on December 3, 1999, and that the bequests in the Will dictate the distribution of the decedent's estate.
- [80] They deny that the estate was enriched such as to entitle the claimant to a standalone equitable remedy. Any benefits provided to the estate by the claimant were offset by benefits conferred upon the claimant by the decedent and, as such, there is a juristic reason for denying the claimant any compensation.
- [81] They say the Agreement, while admittedly not determinative of the claimant's claims under the WVA, vitiates the legal obligation otherwise owed by the decedent to the claimant, leaving only the moral obligation as the foundation for any claim by the claimant against the estate. The moral obligation needs be viewed in light of the Agreement and the claimant's acceptance of the decedent's oft expressed desire to leave the entirety of her estate to her three sons.

Evidentiary Issues

- [82] The claimant objected to the admission of the decedent's out of court statements as offending the rule against hearsay. I reserved judgement on the admission of a journal purporting to be the decedent's and the admission of statements of the decedent indicating that she had met her friends, the Owens, at a mall on December 3, 1999, for the purpose of re-signing the Will.
- [83] The journal's admission was contested on the basis of authenticity and its hearsay content. The disputed entry reads, "Our marriage was in the Church only. There is no marriage licence so is not really legal."
- [84] The passage is undated and it is unclear when the decedent formed this understanding. Prior to the ceremony, Ms. Pengelly went to the trouble and expense of having the Agreement drafted by her solicitor and executed by the parties.
- [85] As to the evidence of statements to all three of her sons regarding her belief in the validity of the marriage, I refer to *Barkwill v. Parchomchuk*, 2011 BCCA 207, where Finch C.J.B.C. said:

- [23] As to the hearsay submission, it is important to recall that not all out of court statements amount to hearsay. It is only those out of court statements that are relied on for the truth of their contents. Statements of the testatrix can raise an inference of mental capacity without being relied on for their truth. Such statements are not inadmissible as hearsay. They are merely evidence that such a statement was made.
- [24] Even so, declarations of a testator's state of mind or intentions have been admitted in more wide ranging circumstances than other forms of hearsay, including cases involving testamentary capacity and undue influence: see Bryant, Lederman and Fuerst, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 3d ed. (Markham, Ont.: LexisNexis, 2009) at 337-39.
- [86] Here the statements are not tendered for the truth of their contents. The validity of the marriage is a question of law. The decedent's statements go only to her state of mind concerning the effect of the ceremony and are, accordingly, admissible evidence. The probative value, however, may be slight.
- [87] Given my view as to the admissibility of Ms. Pengelly's statements, at various times, to each of her sons, making clear her opinion as to the validity of the "marriage" ceremony, I need not carry on to determine the admissibility of the journal entry said to be in her handwriting. The effect is the same. I am satisfied that she told her three sons the marriage was not valid. Admission of the journal entry, assuming it to be in her handwriting, merely restates that. As such, I need not consider counsel's submissions as to whether the handwriting has been proven to be that of the decedent, for this purpose.
- [88] As to the admittedly hearsay evidence that she and the Owens met December 3, 1999, so they could witness the revival of the Will, counsel for the respondents says that the evidence is admissible under the principled exception to the rule against hearsay.
- [89] The admission of such statements was recently considered in *Modonese v. Delac Estate*, 2011 BCSC 82.
- [90] At para. 81, Groves J. referred to three "important points to keep in mind when applying the principled approach to hearsay":
1. The onus is on the party tendering the hearsay evidence to establish necessity and reliability on a balance of probabilities: *Khelawon* at para. 47.
 2. The principled approach should not be compartmentalized, but rather should be considered as a continuum between necessity and reliability. In particular, "there may be instances where the necessity is so great - such as where the declarant is dead - that some elasticity on the issue of reliability may be given": *Roussin v. Bouzenad*, 2005 BCSC 1719 at para. 14, [2005] B.C.J. No. 2682.
 3. The principled approach is not based on fixed criteria, but is applied case-by-case by identifying the relevant concerns and factors in determining admissibility.

- [91] The test of "necessity" is met where the party adducing the evidence proves that "hearsay is the only available means of putting that evidence before the court." Here, as in *Modonese*, necessity is made out by virtue of Ms. Pengelly's death. If her statements concerning the revival of the Will are to be adduced at all, they can only be presented in hearsay form.
- [92] As to the issue of reliability, Groves J. stated:
- [90] When assessing the reliability of a hearsay statement, the court should adopt a functional approach. Starting from the premise that hearsay statements are presumptively inadmissible, it should then search for indicia of trustworthiness sufficient to displace the general exclusionary rule. In each case, the focus of the inquiry must be on the particular dangers arising from the hearsay nature of the evidence: *R. v. Blackman*, 2008 SCC 37 at para. 42, [2008] 2 S.C.R. 298.
- [91] This requirement can be satisfied in one of two ways: First, where there is an absence of any real concern about the truth of the statement because of the circumstances in which the statement was made; and second, where the truth and accuracy of the evidence can be sufficiently tested by means other than contemporaneous cross examination: *Khelawon* at paras. 62-63.
- [92] All relevant factors and the context should be considered, including the presence of supporting or contradictory evidence in appropriate cases.
- [93] The indicia of trustworthiness in this situation with respect to the statements Ms. Pengelly made to Derek Pengelly and later to Stewart Pengelly are the circumstances in which they were made and the availability of corroborating evidence.
- [94] The decedent had no motive to fabricate the statements she made to her two sons. Adopting the language of Groves J. in *Modonese*, "the statements at issue were made in the context of everyday intimate conversations between close relatives and friends, which is an accepted indicator of reliability."
- [95] In respect of Derek Pengelly, the statement came in response to his question as to why the Owens were not coming for dinner that night.
- [96] Corroboration is provided by the fact that the Will bears signatures acknowledged by Mr. Owens to be his and by Mrs. Owens an acknowledgment that it looked like her signature.
- [97] The evidence of the Owens and their recall, or lack thereof, of the December 3, 1999 meeting, goes to the weight to be attached to the statements of Ms. Pengelly, not its admissibility (*Anderson v. Anderson*, 2010 BCSC 911).
- [98] I am of the view that the decedent's statements to her sons, both as to her views as to the validity of the marriage and her meeting with the Owens in December 1999, are admissible for the above reasons. The former as to her state of mind, the later for the proof of its contents.

Did the Celista ceremony result in a valid marriage
between the Claimant and Decedent

[99] The requirements of a valid marriage are referred to in the Marriage Act. The relevant provisions in these circumstances are as follows:

6. Subject to this Act and any Act of Canada in force in British Columbia, the law of England as it existed on November 19, 1858 prevails in all matters relating to the following:

- (a) the mode of solemnizing marriages;
- (b) the validity of marriages;
- (c) the qualification of parties about to marry;
- (d) the consent of guardians or parents, or any person whose consent is necessary to the validity of a marriage.

...

8. A religious representative may solemnize marriage only under a licence issued under this Act.

15. (1) Subject to section 17, a religious representative must not solemnize a marriage under this Act unless the persons intending to marry possess a marriage licence that, under subsection (3), permits the religious representative to marry them.

(2) An issuer of a marriage licence may issue the licence if the application complies with section 16 and the applicants pay the prescribed fee.

(3) A marriage licence must

- (a) bear the date on which it is issued, and
- (b) authorize the solemnization of the marriage of the persons named in it at any time within 3 months after it was issued.

18. No irregularity in the issue of a marriage licence obtained and acted on in good faith invalidates a marriage solemnized under it.

[100] Section 52(2) of the Evidence Act, R.S.B.C. 1996, c. 124, states the following:

52 (2) If evidence of a ceremony of marriage is put forward for consideration under subsection (1), the marriage is deemed formally valid unless

- (a) decisive evidence to the contrary is put forward for consideration, or
- (b) because of the nature of the ceremony, or of the document, the court requires further evidence that the marriage is formally valid.

- (3) In the absence of decisive evidence to the contrary, a marriage deemed formally valid under subsection (2) is deemed to be essentially valid.

[101] The relevant provisions of the Wills Act are as follows:

14 (1) A will or part of a will is revoked only by one of the following:

- (a) marriage of the testator, subject to section 15;
- (b) another will made in accordance with this Act;

15 A will is revoked by the marriage of the testator, unless

- (a) there is a declaration in the will that it is made in contemplation of the marriage, or

[102] What then is the consequence of acknowledged non-compliance with the statutory requirement to obtain and provide to the officiant a valid marriage licence?

[103] The Marriage Act does not state with clarity the consequences of failure to obtain a licence. The general rule that a contract made in breach of a statute is invalid does not apply in the case of the Marriage Act.

[104] Section 52(2) of the Evidence Act, in circumstances where a purported ceremony of marriage took place, such as the case here, deems the marriage "essentially valid" barring "decisive evidence to the contrary."

[105] In *Gilham v. Steele*, [1953] 2 D.L.R. 89 (B.C.C.A.), the court referred to the continuance of English common law at s. 6 of the Marriage Act. Robertson J.A. stated at 91:

Part of the English law prior to November 19, 1858, was decided in *Catterall v. Sweetman* (falsely called *Catterall*) (1845) 1 Rob Ecc 304, 163 ER 1047 - a decision on the Marriage Act - in which it was held [p. 321] that "marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination", and that the doing of something which was prohibited by the statute in question would not render a marriage null and void unless the statute itself expressly provided that that result was to follow. This case was followed in *Wylie (otherwise Patton) v. Patton*, [1930] 1 D.L.R. 747, 24 S.L.R. 285. As I understand it, it was laid down that all legal presumptions were in favour of the validity of marriage, and on grounds of public policy the general law applicable to the breach of a statute forbidding something to be done, would not apply.

[106] At 96-97 of the same judgment, Bird J.A. summarized the principle expressed in *Catterall* as follows:

that although a statute prohibits solemnization of a marriage without observance of requirements therein described as prerequisite, failure to observe any such requirement does not render a marriage void, nor is nullity to be implied in consequence unless the statute so provides either expressly or by clear necessary intendment.

- [107] The claimant submits that s. 8 of the Marriage Act is to control who conducts marriage ceremonies and not to "invalidate" unlicensed ceremonies. The absence of a licence does not go to the authority of the officiant. Nor is it argued that the minister who performed the ceremony, Ms. Hobbes, was not, in all respects, properly qualified to solemnize the marriage.
- [108] In *Lehoux v. Woolward* (1994), 2 R.F.L. (4th) 382 (B.C.S.C.), the parties were married in the Roman Catholic Church in accordance with that church's requirements, but a marriage licence was never obtained, nor was the marriage registered. It was held, "where there is cohabitation and evidence of a ceremony, marriage is presumed in the absence of decisive evidence to the contrary." This merely restates s. 52(2) of the Evidence Act.
- [109] *Lehoux* was appealed but the appeal was dismissed, nine years after the judgment, for want of prosecution. It cannot be said that the reasoning of the trial judge was upheld on appeal, as was suggested by the claimant.
- [110] Section 6 of the Marriage Act provides that, subject to the law of British Columbia, the Law of England as it existed on November 19, 1858, prevails in all matters relating to the validity of marriages and the mode of their solemnization. Marriages conducted without all legal requirements being met have long been recognized as valid according to English law. *Gilham* dealt with the validity of a marriage conducted by a clergyman who was at the time of the wedding not registered pursuant to the Marriage Act. At 93, Robertson J.A. held:
- No doubt, at common law in England a contract of marriage *per verba de praesenti*, in the presence of a clergyman in holy orders was valid: [Citations omitted.]
- [111] The court went on to find that the Law of England in 1858 had been displaced in British Columbia with respect to the requirement that religious representatives be registered. The court distinguished between the issue of registration of religious representatives from that of irregularities in the obtaining of a licence or parental consent for parties under s. 19 in that the Marriage Act provided specific provisions for presumably invalid marriages performed by an unregistered officiant to be declared valid. The court held that the availability of a procedure to validate such marriages necessarily implied that until this procedure was invoked, the marriage must logically be invalid.
- [112] The claimant says that the absence of such a procedure for the validation of marriages performed without a marriage licence means the ceremony at *Celista* resulted in a valid marriage between the parties despite non-compliance with s. 8 of the Marriage Act.
- [113] Finally, the claimant says that the Marriage Act recognizes that marriages may be solemnized after the publication of banns. He says that "the uncontradicted evidence in the case at bar was that the marriage of Ewan Morgan and Christine Pengelly was solemnized after the publication of banns." This, it is submitted, remedies the "procedural irregularity" of failing to obtain a marriage licence and thereby preserves the validity of the marriage.

- [114] The respondents, while acknowledging the factual similarities between the present case and Lehoux, the only authority seemingly on point, note that in Lehoux the husband was self-represented. In the result, the trial judge did not have the benefit of full legal argument.
- [115] In Lehoux, as is the case here, no licence was obtained. In the result, the marriage was never registered. Nor could it have been. In Lehoux, the parties underwent a form of ceremony of marriage at a Catholic church in Coquitlam. The trial judge found that the plaintiff wife did not know of the non-compliance with the Marriage Act. The decisions relied upon by the court are from Ontario. The first of them, *Friedman v. Smookler* (1963), [1964] 43 D.L.R. (2d) 210 (Ont. H.C.J.), dealt with a marriage celebrated in Ontario without a licence or registration. It was saved because of express provisions in the Ontario legislation that cured those deficiencies. The second dealt with a marriage in a German concentration camp during the Second World War. The court held that the marriage was valid according to the law of the parties' domicile at the time.
- [116] Unlike the situation in *Friedman*, the Marriage Act has no saving provisions similar to those in the Ontario legislation.
- [117] The respondents rely on *Keddie v. Currie* (1991), 60 B.C.L.R. (2d) 1 (C.A.), where the Court of Appeal considered the circumstances under which a common law marriage, as opposed to common law relationship, could arise. In *Keddie*, the plaintiff was seeking to be declared a "common-law spouse" for the purposes of the Estate Administration Act, which provided, at the time, "means either 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 person for a period of not less than 2 years immediately preceding his death."
- [118] *Cumming J.A.* discussed a "common law marriage" as legally distinct from a "common law relationship" at para. 16:

A common law marriage or, more accurately, a marriage valid by common law, is an ancient element of our legal system which can be readily differentiated, in terms of formation and status, from the contemporary euphemisms of "common law union" or "common law relationship." ...

- [119] He went on to consider the impact of the Marriage Act, and in particular the incorporation of English law, beginning at para. 33:
- [33] Though the law of England regarding the solemnization of marriage was liberalized as a result of the modifications to Lord Hardwicke's Act (i.e., only marriages "knowingly and wilfully" solemnized in contravention of certain elements of the Act were void, and permitting solemnization before persons other than ordained priests), there was still some difficulty with parties who married elsewhere than in England and who failed to comply with the statutory formalities. It was from this that the "common law marriage" surfaced as an important exception to the requirement that marriages must comply with the terms of the legislation to be considered valid in England. The English marriage Acts specifically

applied only in England. English courts were willing to uphold the validity of marriages which took place outside of England, and which did not comply with the statutory formalities of the *lex loci celebrationis*, in certain instances on the basis of common law requirements: see *Catterall v. Catterall* (1847), 1 Rob. Eccl. 580, 11 Jur. 914, 163 E.R. 1142; *Wolfenden v. Wolfenden*, [1946] P. 61, [1945] 2 All E.R. 539.

[36] The position has been restated by Professor Christine Davies in *Family Law in Canada*, 4th ed. (1984), p. 17, as follows:

a marriage which does not comply with the *lex loci celebrationis* [will be] upheld today as a valid common law marriage in but two circumstances: (a) where it is impossible to conform to the local form of marriage, or (b) where the parties have not submitted to the local law.

[120] At para. 53 he stated:

[53] The effect of the Marriage Act, when considered in light of the incorporation of English law pursuant to s. 33, is to require that marriages entered into in British Columbia be performed in compliance with the Marriage Act, and to preserve a separate role for the term "common law marriage" from that which is common parlance today. It is not necessary to determine, in the present case, whether a valid common law marriage can ever be entered into in the province of British Columbia. As Chief Justice McEachern noted in *Louis v. Esslinger*, *supra*, there may be instances where a marriage which did not comply with the statutory formalities would be considered valid: see *Re Noah Estate*, (1961), 36 W.W.R. 577, 32 D.L.R. (2d) 185 (N.W.T. Terr. Ct.), where an irregular Inuit marriage was held valid, and *Connolly v. Woolrich* (1867), 11 L.C.J. 197, where a Cree marriage was held valid. This issue may arise in the context of marriages within British Columbia which are alleged to fall within one of the two requirements for application of the common law marriage exception (i.e., impossibility of complying with the local law, or no submission to local law).

[121] At para. 71 he stated:

[71] Having decided that a marriage "valid by common law" is indeed a legal relationship distinct from a "common law union" or "common law relationship," s. 85 of the Estate Administration Act must be read in that light. It is clear that the facts in the present case do not fall within the common law marriage exception to the requirements of formal validity of marriage discussed above. Mr. Keddie has failed to show that there was a relationship that placed the parties within the common law marriage exception and that they satisfied the requirements of a common law marriage. The alleged "marriage" took place in the province of British Columbia and these parties were required to comply with the provisions of the Marriage Act. They did not do so. The first branch of the s. 85 test has not been met.

[122] Neither of the exceptions applied to Mr. Keddie's situation, and neither of them, the respondents submit, arise here.

[123] The claimant's reliance on *Gilham* ignores, according to the respondents, the words of s.18 of the Marriage Act, which reads:

18 No irregularity in the issue of a marriage licence obtained and acted on in good faith invalidates a marriage solemnized under it.

[124] This would only be necessary if the legislature intended that obtaining a marriage licence was a prerequisite to a valid marriage. Section 18 relaxes the rule where there has been an honest mistake in the obtaining of the licence, for instance, a mistake in someone's name or where the date of birth is incorrect.

[125] If no licence at all is obtained, there can be no valid marriage. The licensing provision was included for the first time in B.C.'s marriage legislation in 1930, when what is now the current Marriage Act was first enacted (S.B.C. 1930, c. 41, s. 16). Section 37, on which the analysis in *Gilham* was based, was also included at that time. Neither provision had been found in the earlier legislation. The reasoning in *Gilham* is clearly applicable to both cases of non-compliance: performance of a marriage by a person not registered to solemnize marriages and failure to obtain a marriage licence.

[126] Even were that not the case, the general rule referenced in *Gilham* has no application to these facts. There the court relied on the decision of the Saskatchewan Court of Appeal in *Wylie v. Patton*, [1930] 1 D.L.R. 747 (Sask C.A.), as authority for the general rule as to the effect of non-compliance with the Marriage Act. In *Wylie*, the plaintiff sought a decree of nullity of her marriage to the defendant, and one of the grounds raised on the appeal was that a licence had not been obtained at the time of the marriage - it was applied for and obtained later on the day that the marriage was solemnized. The plaintiff was unaware of the lack of the licence at the time the marriage was solemnized. Haultain C.J.S., after reviewing the authorities, came to the conclusion that non-compliance with the statute did not automatically invalidate a marriage; at 750, he quoted with approval from a 1923 text, *Evans' Law & Practice of Divorce in Canada*, at p. 143, as follows:

unless such statutory enactments [i.e., the Marriage Acts] by express word or clear necessary intendment render a marriage void or voidable in the event of such requirements not being fulfilled nullity will not result and such marriage cannot on such grounds be set aside and that even prohibition under penalty other than nullity does not imply nullity.

[127] Haultain C.J.S. also quoted from the English text, *Browne & Watts on Divorce*, 10th ed., p. 100, at 749, as follows:

All such requisites as 'banns,' 'licences,' etc., etc., are formal, and a marriage is void only when they are deficient, and known to be wanting to both parties to the marriage.

- [128] His Lordship observed that "[t]his statement is borne out by a large number of authorities, to some of which I will refer." The plaintiff's claim failed because she did not know about the lack of the licence at the time the marriage was solemnized; therefore, the marriage was only voidable, and she had adopted it by cohabitation with the defendant.
- [129] Here, the facts are different. Both parties knowingly chose to proceed with the ceremony without a valid marriage licence. The mistake, if there was one, was a mistake of law, not fact.
- [130] The confusion, if there is any, arose over the publication of banns. The claimant asserts that banns were discussed and that he and Ms. Pengelly believed they had been posted. The letter from Ms. Hobbes makes no mention of the posting of banns as an alternative to acquiring a marriage licence. Nor does it reference airline tickets as being the reason Ms. Pengelly was reluctant to have the marriage registered.
- [131] Ms. Pengelly came to the view that the marriage was not legally performed and shared that view with her three children. When she came to this view is difficult to determine in light of the fact she engaged and instructed counsel on the preparation of the Agreement and then, in reliance on counsel's advice, seemingly took steps to revive the Will in December 1999. Nonetheless, she clearly understood the limitations on the scope of the ceremony by the time of her discussions with her children.
- [132] As to the posting of banns, the respondents say the publication of banns would not have made any difference, because of amendments to the Marriage Act that came into force on January 1, 1988.
- [133] The Miscellaneous Statutes Amendment Act (No. 1), 1987, S.B.C. 1987, c. 42, s. 54, repealed the provisions dealing with the publication of banns. After the section came into force on January 1, 1988, (by order-in-council, B.C. Reg. 415/87), s. 8(1) read:
- a minister or clergyman shall solemnize marriage only under a licence issued under this Act.
- [134] The rest of the section was repealed. Other amendments made at the same time removed other references to banns. The only section that continued to refer to the publication of banns was s. 24, dealing with marriages of minors. That is either a deliberate exception or, as suggested by counsel for the respondents, an oversight.
- [135] Lastly, even were the posting of banns available as substitute for obtaining a marriage licence, there is no evidence banns were published in accordance with church law. The claimant testified that there was discussion about the posting of banns, but never said that he thought it was done.
- [136] In the result, I conclude that the Celista ceremony did not result in a valid marriage between the claimant and Ms. Pengelly.

The Validity of the Will

- [137] What then is the effect of the ceremony on the Will?
- [138] The meaning of marriage, as the term is used in s. 15(1) of the Wills Act, was considered by Pitfield J. in *MacLean Estate*, 2009 BCSC 1159. There, the issue was whether a will made by a testator after he entered into a "common law" relationship but before he married his common law partner was revoked by the marriage, or could be considered to have been made in contemplation of the marriage, and therefore not revoked. In deciding that the will was not made in contemplation of marriage and was therefore revoked, Pitfield J. construed the term "marriage" as it is found in the Wills Act as follows:
- [18] The Wills Act is not ambiguous. It speaks of the consequences associated with marriage. Marriage is the lawful union of one person with another. A common law relationship is not marriage. A will cannot survive the conversion of a common law relationship to one of lawful marriage absent the finding of a declaration within the will that it is made in anticipation of that marriage, and the conversion of that relationship to one of legal marriage. In this case, the only reference to the status of Ms. Christiansen, then and in the future, is the word "spouse" contained in clause 3.b., and that is not sufficient.
- [139] There is no definition of "marriage" or "spouse" in the Wills Act. Both the WVA and the Estate Administration Act make distinctions between people who are legally married and people who have lived and cohabited with another person in a marriage-like relationship. The purpose, presumably, is to extend the rights of spouses under the legislation to common law spouses. The Wills Act does not define marriage generally.
- [140] Section 16 of the Wills Act, which deals with revocation of gifts on the dissolution of a marriage, states that, "In this section, 'spouse' includes a person considered by a testator to be the testator's spouse." No such extended definition is found in s. 15. Had the legislature intended that a common law relationship would revoke a will, it would have said so in clear unequivocal language.
- [141] In the result, I find that the ceremony which occurred July 3, 1999, was not a valid marriage and the Will was unaffected.
- [142] In the result, I need not determine the issue of whether the Will was revived by her re-signing it before the Owens on December 3, 1999.
- [143] I find, as a fact, that the decedent attended at a mall December 3, 1999, and re-executed the Will before Mr. and Mrs. Owens. I reach that conclusion based on the statements of Ms. Pengelly as to her whereabouts, the recognition by Mr. Owens of his signature and initials on the document, and the telephone records of the decedent establishing contact between she and the Owens prior to December 3, 1999. In the face of all of the evidence establishing that both Mr. and Mrs. Owens were present in the Lower Mainland that day, their mutual failure to recall the event does not satisfy me that the signatures of all three are not what they appear to be. On the balance of probabilities, I find it more likely the Owens have forgotten the event rather than explanations such as forged signatures or them signing the

document, in the absence of Ms. Pengelly, at some other time.

[144] Further, if it is necessary, I find the words chosen by the decedent, "This will is being re-enforced this 3 day of December, 1999," sufficient to have revived the Will. The authorities seem clear that no particular wording is required to revive a will so long as the words chosen indicate an intention to do so (Re MacKinlay Estate (1993), 50 E.T.R. 136 (N.S.C.A.)).

The Impact of the Agreement on the Wills Variation/Unjust Enrichment Claim

[145] The claimant submits that the Agreement is of little or no effect because of his understanding from Mr. Soll that the Agreement would only be effective for several years following its execution.

[146] The respondents submit that the impact of the Agreement defines the legal obligation which the decedent had to the claimant at the time of her death. They argue that the Agreement was valid and in force at the date of Ms. Pengelly's death despite my acceding to the submission that the claimant and decedent were not lawfully married.

[147] The Agreement, according to its terms, is a "marriage agreement within the meaning of the Family Relations Act."

[148] Section 61(2) of the FRA reads:

61 (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

- (a) management of family assets or other property during marriage, or
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

[149] In *Steernberg v. Steernberg Estate*, 2006 BCSC 1672, Martinson J. noted at para. 121:

The FRA distinguishes between "marriage agreements" and other domestic contracts ("ante nuptial or post nuptial settlements that are not a 'marriage agreement'"). The formalities of a "marriage agreement" are set out in s. 61 of the FRA. To be a marriage agreement it must take effect on the date of the marriage (s. 61(2)).

[150] Nowhere in the FRA is "marriage" defined. However, the definition of "spouse" reads as follows:

"spouse" means a person who

- (a) is married to another person,

- (b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,

[151] By implication, the term "married" must mean a valid marriage meeting all of the requirements of the Marriage Act.

[152] Section 120.1 of the FRA provides:

120.1 (1) If spouses who are not married to each other make an agreement, Parts 5 and 6 apply to

- (a) the agreement, and
- (b) if covered by the agreement,
 - (i) an annuity,
 - (ii) a pension or an interest in a pension plan,
 - (iii) a home ownership savings plan, or
 - (iv) property not described in subparagraphs (i) to (iii).

(2) In this section:

"agreement" means an agreement that would be

- (a) a marriage agreement for the purposes of Part 5 if the spouses were married to each other, or
- (b) a separation agreement if the spouses were married to each other or separated after marriage;

[153] In the result, the Agreement is not a marriage agreement, as defined by the FRA, absent a valid marriage. But for the words of Clause 2, which state that the "agreement takes effect on the marriage of the parties," Parts V and VI of the FRA would still apply to property covered by the Agreement and the claimant could have applied under the FRA to have the property provisions of the Agreement varied on the basis of unfairness. This could only be done within the context of an action commenced under the FRA.

[154] What then is the effect of the language in Clause 2 of the Agreement?

[155] In *Trautmann v. Baker* (1996), [1997] 27 B.C.L.R. (3d) 263 (S.C.), aff'd (1997), 25 R.F.L. (4th) 341n (B.C.C.A. (Chambers)), Harvey J. considered a situation where the parties signed a "marriage agreement" but, in fact, never married. In determining the legal effect of the agreement purporting to define the parties' property and maintenance entitlement, he stated:

- [8] In order to qualify for a division of matrimonial property under Part 3 of the Family Relations Act, a claimant must be a "spouse" within the meaning of the Family Relations Act. This means a wife or husband and a person who falls within (a) or (b) above. Because (c) above does not apply to Part 3, "spouses" who fall within (c) above do not qualify for a division of matrimonial property under Part 3 of the Family Relations Act.
- [9] The agreement that the plaintiff and the defendant signed on January 12, 1995 was stated to be a marriage agreement pursuant to s.48 of the Family Relations Act. Section 48 of the Family Relations Act falls under Part 3 of the Act, which is only available to "spouses" which means, a husband or wife, or spouses within (a) or (b) above. Part 3 does not apply to the plaintiff and the defendant because they never married.
- [10] This section contemplates a situation where a marriage agreement is entered into before marriage but states that in this situation, the agreement takes effect on the date of the marriage. Where the parties never marry, it appears that the agreement does not take effect.
- [156] Trautmann was decided before the enactment of s. 120.1 of the FRA, which extends the protection afforded by Part V to unmarried couples who enter into agreements respecting the ownership of property during cohabitation. Presumably, the enactment of s.120.1 would have cured the defect referenced in Trautmann, at least insofar as to the issue of property.
- [157] Nonetheless, Clause 2 of the Agreement states that the Agreement comes into effect on the marriage of the parties.
- [158] The claimant takes no issue with the validity of the Agreement. Instead, the claimant submits that the Agreement's "shelf life" had expired and it should be given little, if any, effect.
- [159] The Agreement is a double-edged sword for the claimant. Absent a valid marriage, the only possible claims he has against the decedent's property arise under the doctrine of trust. If the Agreement is in force, despite the absence of a valid marriage, the claimant still had potential property claims under Part V of the FRA if the Agreement could be characterized as unfair within the meaning of s. 65(1).
- [160] The term "marriage" is not defined in the Agreement. The only contextual reference is found in Recital "A," which reads:
- John and Christine have lived together since September, 1997, and will be married in a Church ceremony on July 3, 1999 in British Columbia.
- [161] The Agreement was prepared at a time when all of the circumstances surrounding the ceremony were known to the claimant and decedent. As of the March 1999 letter, the claimant and decedent knew that a marriage licence was required. The Agreement was prepared in June 1999. Each knew the ceremony was proceeding without a marriage licence being obtained.

- [162] The respondents say that while the marriage was not a legal marriage that triggered the application of s. 15 of the Wills Act, it is clear that the parties intended their relationship to be governed by the Agreement once the ceremony described in Recital "A" took place.
- [163] The ceremony proceeded and, thereafter, the parties treated themselves, in all respects, as a married couple.
- [164] Insofar as the parties were concerned, the event described in Recital "A" occurred. The decedent apparently was aware, or at least of the opinion, that the ceremony would not result in a valid marriage; the claimant says he believed they were married.
- [165] The lawyer who drafted the Agreement was seemingly unaware of the lack of a marriage licence and presumed, wrongly as I have found, that a valid marriage would result from the upcoming ceremony. This conclusion is apparent from the advice regarding the effect of marriage on the Will. The lawyer's lack of information concerning the true nature of the ceremony undoubtedly impacted the choice of words.
- [166] I conclude that the reference to "marriage" in Clause 2 of the Agreement refers to the ceremony referenced in Recital "A".
- [167] The Agreement is nothing more or less than a contract. An essential element in the formation of a contract is consensus as to both the terms and the meaning to be given the words the parties use. Often definitions are provided within the body of an agreement to give its words greater certainty. No definition of "marriage" is provided in the Agreement.
- [168] Here, I agree with the respondents that the word "marriage" as used in Clause 2 of the Agreement must be interpreted by reference to the context in which the Agreement was prepared. It was drafted in such close proximity to the ceremony that the parties had full knowledge, factually, if not legally, of the shortcomings of their upcoming "marriage."
- [169] The ceremony that occurred on July 3, 1999, was the ceremony each contemplated at the time they signed the Agreement. By the time the Agreement was signed, it was known to them that a marriage licence had not and would not be obtained. The ceremony that they had prepared for several months went ahead exactly as planned.
- [170] To conclude that the Agreement never came into force would be, in the respondents' submission, to ignore the parties' clear intention that their relationship, in particular, its termination (whether by separation or death), was to be governed by the Agreement.
- [171] Section 120.1 of the FRA clearly contemplates an expanded role for agreements as to the property entitlement of unmarried parties. The claimant and decedent followed through with the referenced ceremony in Celista on July 3, 1999, and, accordingly, I agree with the submission of the respondents that the Agreement came into effect following July 3, 1999, and, as such, must form a consideration in the assessment of the claims under the WVA and for compensation based on the doctrine of unjust enrichment.

[172] In response to the claimant's contention that the Agreement's "shelf life" expired, I rely on the authority of *Hartshorne v. Hartshorne*, 2004 SCC 22, where it was noted at para. 9 that:

The authorities generally agree that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship.

[173] No authority was offered for the proposition that agreements such as the one signed here simply expire.

[174] The default position under the terms of s. 6(9) of the Agreement was that its provisions remained in full force and effect until varied. The annual review contemplated by s. 6(8) never occurred. The words attributed to the decedent, "don't worry about it," do not lend themselves to the conclusion, unstated by the claimant, that the decedent was intending to convey to him that she no longer relied upon the Agreement's terms.

[175] The claimant acknowledged that Ms. Pengelly reiterated her intentions concerning the devolution of her estate throughout the course of their cohabitation.

[176] In my view, the Agreement remains a consideration in assessing the claimant's plea for variation of the terms of the Will and unjust enrichment.

The Claim under the Wills Variation Act

[177] Whether lawfully married or not, the claimant is a spouse within the meaning of the WVA. Section 2 of the WVA provides:

2 Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

[178] Steernberg indicates that the existence of an agreement barring claims under the WVA is not determinative of the claimant's cause.

[179] The leading decision on the WVA is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. In Steernberg, Martinson J. summarized the principles which emerge from *Tataryn*, commencing at para. 57, as follows:

[57] As noted at the outset, British Columbia law provides that if a testator dies leaving a will that does not, in the Court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, a judge may, in his or her discretion, order that the provision that the judge thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or the children: Wills Variation Act, R.S.B.C. 1996, c. 490, ("the WVA"), s. 2:

Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

- [58] The leading case on the proper legal analysis pursuant to s. 2 of the WVA is the Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 93 B.C.L.R. (2d) 145, 3 E.T.R. (2d) 229). That case sets out the following legal principles.
- [59] The language of the WVA confers a broad discretion on the Court, which allows judges to craft results that are just in the specific circumstances of the case and which are adequate, just and equitable in light of contemporary standards, values and expectations (at ¶15). The WVA addresses two main interests - the "adequate, just and equitable provision for the spouses and children of testators" and testamentary autonomy; testamentary autonomy must yield to what is "adequate, just and equitable." (at ¶16-17).
- [60] In looking at current societal norms, two sorts of norms are available and both must be addressed (at ¶28); together they provide a guide as to what is adequate, just and equitable in the circumstances. They are legal obligations and moral obligations.
- [61] Legal obligations are "the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise" (at ¶28). The legal obligations may be found in the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.), family property legislation, and the law of unjust enrichment (at ¶30). When, as in this case, the parties are not separated or divorced at the time of death the law nonetheless imposes uncrystallized legal obligations that a testator owes to his or her spouse (at ¶28).
- [62] Second, the Court should consider the testator's moral obligations to his or her spouse and children, in light of "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (at ¶28). With respect to the moral obligation to a spouse, the Court concluded that most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after death, a strong moral obligation to do so exists if the size of the estate permits. The moral obligation is broader than the legal obligation and is assessed at the date of death.
- [63] The moral duty is customized to each specific claimant. The test in determining whether a testator spouse has breached his or her moral duty is whether, as a just husband or wife he or she properly considered the situation of his or her spouse and an appropriate standard of living for that person: *Holland v. Holland* (1995), 9 E.T.R. (2nd) 119 (B.C.S.C.).

- [64] The moral claim of independent adult children is more tenuous than the moral claim of spouses. But if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made (at ¶31).
- [65] Circumstances that will negate the moral obligation of the testator are "valid and rational" reasons for disinheritance. To constitute "valid and rational" reasons for disinheritance, the reason must be based on true facts and the reason must be logically connected to the act of disinheritance: *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (B.C.C.A.); *Clucas v. Clucas Estate* (1999), 25 E.T.R. (2d) 175 (B.C.S.C.); *Comeau v. Mawer Estate* (1999), 25 E.T.R. (2d) 276 (B.C.S.C.); and *Kelly v. Baker* (1996), 15 E.T.R. (2d) 219 (B.C.C.A.).
- [66] As between moral claims, some may be stronger than others. The Court must weigh the strength of each claim and assign to each its proper priority. In doing so, the Court should take into account the important changes resulting from the death of the testator. There is no longer any need to provide for the person who died and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in light of the person who dies' legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children: *Tataryn* at ¶32.
- [67] The test of what is "adequate and proper maintenance and support" as referred to in s. 2 of the WVA is an objective test. The fact that the testator was of the view that he or she adequately and properly provided for the disinherited beneficiary is not relevant if an objective analysis indicates that the testator was not acting in accordance with society's reasonable expectations of what a judicious parent would do in the circumstances by reference to contemporary community standards: *Tataryn*; *Walker v. McDermott*, [1930] S.C.R. 44; *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371 (C.A.); *Clucas*, above; and *Dalziel v. Bradford et al.* (1985), 62 B.C.L.R. 215 (B.C.S.C.).
- [68] When possible, all claims should be met. However, if an estate is not large enough to accommodate both the testator's legal and moral duties, then the legal duties should take priority (at ¶38).
- [69] In many cases there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the Court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and

institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires (at ¶33).

[180] I begin by considering the decedent's clear intention, made known to the claimant both by word and by the Agreement, that she wished to divide her estate equally between her three children. The decided case law and the WVA make clear that the testator's intentions are not to be ignored in applying the objective standard called for under Tataryn. Tataryn also stands for the proposition that the freedom of a testator to dispose of his estate as he chooses, "is to be interfered with not lightly but only in so far as the statute requires."

[181] Following Tataryn, the first consideration is of any legal duty flowing to either the claimant or the three named beneficiaries.

[182] Arriving at the legal duty owed to a spouse, such as the claimant, entails a consideration of the Agreement and its impact upon any claims which might otherwise be available to the claimant under the FRA or the doctrine of unjust enrichment.

[183] One of the stated purposes of the Agreement, according to Recital G, is:

[to] determine ownership, management, and division of all property either or both of them may own or may acquire if one of them predeceases the other while they are still living together.

[184] In s. 9(2) both parties promised not to challenge the other's will:

... and, in particular, will not make an application under the Wills Variation Act to challenge any gift either party may leave by will to their children or grandchildren

[185] Under s. 24 of the Agreement the parties gave up claims as against each other:

all claims at law, in equity, or by statute against the other relating to support or a division of property, including, without limiting the generality of the foregoing, all claims under the Family Relations Act, the Wills Variation Act, the Estate Administration Act, and the Divorce Act, with respect to (a) support, (b) property, (c) succession rights, and (d) any other matter arising from their relationship.

[186] While those covenants by the claimant do not bar his claim under the WVA or the law of trust, as stated in Steernberg, they must be given some effect in the analysis of the legal and moral obligation owed the claimant by the decedent.

[187] As was stated by the Court of Appeal in Boulanger v. Singh (1984), [1985] 59 B.C.L.R. 383 (C.A) at 389:

... an agreement between parties may be perfectly suitable at the time it is made, and it may be treated as binding upon the parties during the lifetime of the testator. But, having regard to the scope and the policy of the statute [the Wills Variation Act] and the public interest, the moral duty of the testator may have to be reviewed in a wider context, and in the light of circumstances existing at the date of the death of the testator. This does not mean to say that a solemn and well-

considered agreement between the parties is to be disregarded. To the contrary, a fair agreement ought to be given considerable weight. ...

[188] Hartshorne mandates a two part test to consider whether the agreement operates unfairly. At para. 47, Bastarache J., speaking for the majority, said:

The ultimate point then, is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. ...

[189] In considering whether the Agreement is unfair, I have regard to the claimant's evidence, throughout, that he never considered the decedent's stated objective to leave her estate to her three sons to be unreasonable. His will, albeit in financial circumstances more modest than her, left nothing to Ms. Pengelly.

[190] The Agreement provided for a straightforward separation of the parties' assets and financial lives. No financial entitlement was provided to either the claimant or Ms. Pengelly under the Agreement, whether during the relationship, upon separation, or upon death. Other than the co-mingling of American funds in the account used for their holidays in Palm Desert, the parties abided by the Agreement until Ms. Pengelly's death.

[191] The claimant's day to day living expenses were significantly defrayed by the fact that Ms. Pengelly provided accommodation, without cost to the claimant, in Celista, Port Moody, and Palm Desert. The savings enjoyed by the claimant allowed him to travel and enjoy forms of recreation which would otherwise have been beyond his means.

[192] None of the assets in the estate came into being through the joint efforts of the parties. Absent the Agreement, had the parties actually married, not all of the assets in the estate would have been family assets within the meaning of the FRA. There is no evidence the decedent's investment accounts were ordinarily used for family purposes such as to entitle the claimant to an interest in them.

[193] With respect to property, all of the assets in the estate were the same as were specifically referenced in the Agreement. Nothing came into being between the date the Agreement was signed and Ms. Pengelly's death in 2006.

- [194] Each made identical promises to the other with respect to their property. Each had children by their previous marriages and each left their estate, in its entirety, to those children.
- [195] With respect to support, s. 11(1) of the Agreement provides that, if the relationship ends, "notwithstanding any change of circumstances no matter how unforeseen or radical," neither party would claim interim or permanent support from the other. The arrangement was to be reviewed after five years (pursuant to s. 11(2)) but, in the absence of a review, the provisions of Clause 11.1 carry on.
- [196] Throughout cohabitation, the means of the claimant and Ms. Pengelly were reasonably modest. His income, net of payment to his ex-wife, hovered in the area of \$20,000 annually. Ms. Pengelly's income, in most years, varied from \$42,000 to a high of \$50,000.
- [197] The second part of the Hartshorne analysis requires the Court to determine whether the Agreement would have operated unfairly in view of the factors enumerated in s. 65(1) of the FRA.
- [198] This investigation entails a consideration of the factors listed in s. 65(1) of the FRA, and determination as to whether, in view of one or more of the enumerated factors, the contract operates unfairly. It's here that consideration must be given to the parties' personal and financial circumstances at the time of review and any changes which have occurred since the Agreement was signed. The burden rests on the claimant to establish that the Agreement operates unfairly.
- [199] Section 65(1) of the FRA provides as follows:
- 65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient,
or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance,
improvement or use of property or the capacity or liabilities of a spouse,
- the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- [200] In *Johnstone v. Wright*, 2005 BCCA 254, Donald J.A. stated that the fairness of a marriage agreement under ss. 65(1) and 120.1 of the FRA "must be approached on the reasoning" in *Hartshorne*:
- [26] The facts in *Hartshorne* have some similarity to those in the present case. Like the respondent, Mrs. Hartshorne received independent legal advice against signing the agreement but went ahead anyway. Neither suffered any economic disadvantage because of the marriage or its breakdown and nothing in the state of affairs at the time of break-up was unanticipated by the agreement. But unlike the respondent, Mrs. Hartshorne had two children of the relationship and she entered into a formal marriage. Both factors arguably support a stronger case than the respondent's on fairness, yet the Supreme Court of Canada found that the agreement was not unfair.
- [27] In a nutshell, *Hartshorne* upholds the integrity of private arrangements and permits interference only when things did not turn out the way the parties expected. Bastarache J. summed up the reasons for the majority in this way:

67 Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made.

- [28] On that analysis the respondent cannot sustain the trial judgment. Nothing unexpected occurred. When they cohabited the parties kept their finances separate, the respondent stayed at her job, her fortunes improved somewhat and she lived very well at no expense to herself. When the relationship was over the respondent was left in the position contemplated by the agreement.
- [30] The elements of the agreement leading to the finding of unfairness relate to what might have happened if the parties had stayed together for a longer period. This kind of hypothesizing does not accord with the approach in *Hartshorne*. What matters is not what could have happened if things were different but whether the agreement is unfair in the actual circumstances existing at the time of distribution.

[31] At para. 78 of her judgment the trial judge finds that the agreement is unfair in not providing any share of the appellant's assets after six and a half years. This is most perplexing because it characterizes as unfair the central purpose of many if not most cohabitation agreements. This is recognized in *Hartshorne* where in a discussion comparing marriage agreements with separation agreements Bastarache J. referred to the motivation for cohabitation agreements:

39 In some cases, marriage agreements ought to be accorded a greater degree of deference than separation agreements. Marriage agreements define the parties' expectations from the outset, usually before any rights are vested and before any entitlement arises. Often, perhaps most often, a desire to protect pre-acquired assets or an anticipated inheritance for children of a previous marriage will be the impetus for such an agreement.

[Emphasis by Donald J.A.]

[201] I conclude that nothing unusual occurred that was not within the contemplation of the parties at the time the Agreement was signed. Any misunderstanding the claimant had concerning its duration rests with the advice given by his counsel and not reliance upon statements made by Ms. Pengelly.

[202] The Agreement specifically waived the right of the claimant to seek support against the decedent in the event of marriage break up.

[203] The claimant's income, since signing the Agreement, has increased. The respondents say that had a claim for support been brought by the claimant prior to Ms. Pengelly's death, the Agreement would have provided a complete answer.

[204] With respect, I disagree. Just as agreements such as that signed by the claimant and decedent are not determinative of claims under the WVA, nor are they determinative of claims for support brought under either the FRA or the Divorce Act.

[205] Nonetheless, given the length of the relationship, the relative incomes of the parties throughout their relationship, and the provisions of the Agreement, I am of the view the claimant's entitlement would have been modest, whichever model of support were claimed, compensatory or non-compensatory.

The Claim for Unjust Enrichment

[206] A further foundation for the legal obligation contemplated in *Tataryn* is the law of unjust enrichment.

[207] The claimant asserts that the estate was unjustly enriched by his efforts in providing labour and materials which benefitted the decedent throughout the period of cohabitation.

[208] The evidence discloses that the work done was primarily at the Celista property. No specific evidence was led as to any enhancements or improvements to either the Port Moody property or the Palm Desert property. Indeed, in response to a demand for particulars as to the nature of the claim in trust, the claimant responded:

Constructive trust-those assets to which the plaintiff contributed during the relationship, e.g. the maintenance of the home Celesta (sic)

- [209] With the exception of Celista, the evidence does not provide a foundation for concluding that the claimant made a financial contribution to the acquisition, preservation, or enhancement of any of the assets within the decedent's estate. His claim that he put up several thousand dollars toward the acquisition of the Palm Desert property was not supported by any corroborative evidence. The property was placed in the joint names of the decedent and Derek Pengelly. Derek made no financial contribution, but was made a joint tenant with the right of survivorship. The claimant knew of the property's registration and made no complaint.
- [210] In considering the claim for unjust enrichment, I need to determine the legal obligation owing by the decedent to the claimant during her lifetime for services said to have enriched her during the parties' cohabitation. The claimant advances a separate substantive claim against the estate seeking a remedy in both resulting and constructive trust. I agree with counsel for the respondents that it makes the most sense to consider claim for unjust enrichment, the constructive trust claim, and the claim under the WVA together.
- [211] That was the approach adopted by Ballance J. in *Mawdsley v. Meshen*, 2010 BCSC 1099. In *Mawdsley*, the parties had lived together for 18 years in a marriage-like arrangement. The decedent, Ms. Meshen, was extremely wealthy when the relationship commenced. Prior to her death, she undertook a variety of estate planning initiatives which significantly reduced the value of her estate (from over \$10 million to something near \$500,000).
- [212] The claimant, Mr. Mawdsley, sought to set aside the transactions to restore various assets to Ms. Meshen's estate and have her will, which provided nothing for him, varied under the WVA. He also alleged the estate had been unjustly enriched by virtue of his efforts over the parties' 18 years of cohabitation.
- [213] Ballance J. found that the parties had an agreement, albeit one that was never reduced to writing, in these terms:
- [219] I am satisfied that Dennis and Joan had an explicit arrangement that they would share the costs of their daily living expenses such as groceries, meals and entertainment, more or less evenly, and that their own personal expenses and the costs related to the maintenance of their assets would be borne by them individually. Throughout their relationship they comported themselves in accordance with that arrangement with few deviations. To the extent that there was any unevenness in their respective contributions to their living, social and recreational expenses, I conclude that it was Joan, both personally and through her

companies, who made the greater financial contribution overall.

[214] That arrangement mirrors the arrangement between the parties here.

[215] Ballance J. found that the parties in Mawdsley had a verbal agreement that their assets would remain their separate property. Here, the Agreement was in writing, but to similar effect. Had I not found the Agreement enforceable, I would reach a similar conclusion as to the parties' intention to maintain separate financial estates free from the control of the other.

[216] In Mawdsley, the decision to vary the testatrix's will in Mr. Mawdsley's favour was on the basis of the deceased's moral obligation to him. Despite evidence of tasks performed by the plaintiff on an ad hoc basis for the decedent's businesses, the court expressed doubt whether such rose to the necessary level to create a separate obligation founded upon the law of unjust enrichment.

[217] In dealing with the claim under the rubric of unjust enrichment, Ballance J. referred to the recent Court of Appeal decision in *Wilson v. Fotsch*, 2010 BCCA 226. In *Wilson*, the Court of Appeal revisited the test set out for unjust enrichment in *Peter v. Beblow*, [1993] 1 S.C.R. 980. Huddart J.A., for the majority, noted that in long-term marriage-like relationships, as is the case here, it is likely each of the parties has received and retained benefits from the other. She noted that where one spouse has been enriched, it would be unusual that the other would not have suffered a corresponding deprivation. Finally, in *Wilson*, Huddart J.A. cautioned that accounting for any reciprocal exchange of benefits as between the parties in the benefit analysis or in the deprivation stage is inappropriate. She noted that the court may consider those reciprocal benefits in determining the absence of a juristic reason, but only for "the limited purpose of assessing the parties' legitimate expectations."

[218] On the evidence before me, I conclude that each of the claimant and decedent bestowed benefits upon the other and, accordingly, suffered a deprivation within the meaning of the term as defined in *Wilson*.

[219] At para. 35 of *Wilson*, Huddart J.A. explored more fully the assessment of the parties' expectations at step two of the juristic reason inquiry:

On an inquiry into the reasonable or legitimate expectations of parties in a marriage-like relationship, there are neither presumptions nor a default position. Although it is unlikely the absence of a legitimate expectation of a share in the value created during a relationship would be sufficient reason to deny recovery, regard must be had to the evidence of the nature of the particular relationship. The proper approach is to find the parties' expectations from the evidence of their particular relationship and evaluate this aspect of the juristic reason analysis in light of those findings. Reciprocal benefits may be relevant to that analysis, but they cannot be decisive. The questions at this step are those set down by Dickson J. (as he was then) in *Pettkus* at 848-49 and discussed in *Bruyninckx* at para. 86: Did the plaintiff suffer prejudice in the expectation of an interest in property or a monetary reward? Did the defendant accept the benefit

in circumstances where its retention would be unfair given his or her knowledge of that expectation?

- [220] Here, the rationale, or juristic reason, offered up to deny the claimant compensation for the enrichment to the decedent which flowed from their relationship is twofold: (1) the donative intention of the claimant in doing the work for which he now seeks compensation and (2) the expectations of the parties as evidenced by the Agreement. The latter includes a consideration of benefits received by the claimant in living rent free at both Celista and Port Moody, thus freeing his modest income for pursuits such as travel and recreation rather than providing for the necessities of life.
- [221] In the face of the claimant's evidence that he volunteered his work on the Celista property without any expectation of gain and the reasonable expectations of the parties being set out in the Agreement, it is unlikely that the claimant could have succeeded in establishing a claim for unjust enrichment during the decedent's lifetime. In concluding this, I have not ignored the decedent's advice to her sons that she wished to gift \$100,000 to the claimant upon the sale of Celista. The reference by the decedent to the work done on the Celista property was a recognition by her that the claimant was a proud man unlikely to accept the money if characterized simply as a gift. I do not conclude that the statement by her that her wish to give the claimant \$100,000 from the sale proceeds was in any way intended to reflect the benefit she derived from the work he performed. Rather, it was a mechanism to provide him with funds to carry on with the travel that both he and the decedent enjoyed.
- [222] On the evidence, I conclude that the claimant did the majority of the yard work at the Celista property and, in the early years of cohabitation, installed an irrigation system. The costs associated with the purchase of material are said to have been around \$5,000. They were fully paid for by the claimant. The claimant's evidence concerning the Celista property, other than the irrigation installation, was generally non-specific. It related to yard work, general maintenance during the re-opening of the cabin each spring, and some modest painting and handyman work about the home. While the claimant's efforts regarding the installation of the irrigation system provided a benefit to the decedent, he volunteered those services without any expectation of recompense, much less an expectation that he was acquiring an interest in the Celista property. He acknowledged such in cross-examination.
- [223] The claimant said that "half his day" was devoted to chores around the two residences where the parties spent most of their time together. Given that the Port Moody property was a townhouse with no outside gardens or lawns mentioned in the evidence, it is hard to fathom what the claimant might have been doing absent a detailed description of the tasks he performed. The Celista property would have required far more than either the Port Moody property or the Palm Desert property.

- [224] Absent detailed evidence of the household expenses of both residences, I conclude that the roughly \$300 per month provided by the claimant for household expenses was sufficient to pay the claimant's one-half share of the costs of food and perhaps utilities. It was not sufficient to make a contribution to the taxes or costs of upkeep of either of the two residences. Apart from the joint account maintained in the United States, each paid their own expenses for travel, entertainment, vehicles, and other expenses.
- [225] Accordingly, I reject the argument that the claimant made any financial contribution to the preservation of any of the real estate which forms the subject matter of his claim.
- [226] On the basis of this evidence, the claimant asserts that he "is entitled to compensation from the estate of Ms. Pengelly in respect of this enrichment, and the estate assets are subject to a trust in favour of Mr. Morgan." Further, the claimant says "the extent of this entitlement" is one of the number of factors to be considered in the court's exercise of discretion to vary the Will of Ms. Pengelly."
- [227] To the extent Ms. Pengelly was enriched, she bestowed benefits of equal to or of greater worth upon the claimant. Neither did so with the expectation of compensation or gain. The Agreement is clear evidence of that which I would have found to have been unstated were the Agreement not in existence.
- [228] That, however, does not end the enquiry. After considering the legal obligations, if any, owed to the claimant by the decedent, the court is then obliged to consider the moral obligations. As described in *Tataryn*, those obligations "are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards." McLachlin J. (as she then was) stated, at 822-823:
- ...There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made [citations omitted]
- [229] As was stated by Martinson J. in *Steernberg*, at para. 63, the moral duty is "customized to each specific claimant." The test to determine whether the moral duty has been breached is whether the testator "properly considered the situation of his or her spouse and an appropriate standard of living for that person."

[230] The starting point in the Tataryn analysis is not, as suggested by the claimant, determining the entitlement of a spouse under the FRA. Nor is it by reference to what the claimant would receive on intestacy under the Estate Administration Act.

[231] In determining the moral obligation of a testator to a surviving spouse, and after the legal obligations has been met, as stated in Tataryn, "it falls to the court to weigh the strength of each claim and assign to each its proper priority."

[232] In *Bridger v. Bridger Estate*, 2006 BCCA 230, Mr. Justice Mackenzie addressed the competing moral claims of the surviving spouse and three independent adult children. After finding that the testator had satisfied his legal obligation to his spouse outside his estate, he found that the testator's moral obligation was properly addressed by dividing the balance of the estate equally among the spouse and children. At para. 20, he said:

Tataryn recognizes that there is no clear legal standard to judge moral claims and the test is more nebulous where the surviving spouse is not strictly speaking a dependent spouse and the children are all financially independent adults. While, as McLachlin J. observes in Tataryn, there may be a number of options for dividing assets by a testator which are adequate, just and equitable, I do not think they include a disposition that entirely prefers the moral claims of adult independent children to those of a loyal spouse who provided care for the testator over years of debilitating decline. ...

[233] This reasoning was echoed by Mr. Justice Low in *Picketts v. Hall (Estate)*, 2009 BCCA 329, at para. 62:

It seems to me that it is also not a viable option for the court to approve a disposition that substantially prefers the moral claims of adult independent children to those of a long-term, caring and dedicated spouse.

[Emphasis by Low J.A.]

[234] Regardless of the validity of the Agreement and its provisions regarding waiver of claims under the WVA, the court retains the ultimate discretion as to the application of the WVA.

[235] In *Steernberg*, Martinson J. dealt with the impact of a marriage agreement on a WVA claim by a surviving spouse, concluding that "such prenuptial agreements do not bar a wills variation claim and are just one factor to consider." She stated:

[70] Tataryn did not deal with the question of the significance of prenuptial agreements in the wills variation context. The leading Court of Appeal decisions in British Columbia considering the effect of prenuptial agreements are cases in which there was an express waiver of the right to apply under the WVA. The Court in those cases concluded that such prenuptial agreements do not bar a wills variation claim and are just one factor to consider: *Boulanger v. Singh* (1984), 59 B.C.L.R. 383, 16 D.L.R. (4th) 131, 18 E.T.R. 1 (C.A.); *Wagner v. Wagner Estate* (1991), 62 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 699, 44 E.T.R. 24 (C.A.), leave to appeal to S.C.C. denied (1992), 89 D.L.R. (4th) vii; *Lobe v. Lobe Estate* (1996), 13 E.T.R. (2d)

126 (B.C.S.C.), aff'd (1997), 37 B.C.L.R. (3d) 138, 17 E.T.R. (2d) 275 (C.A.); *Howard v. Howard Estate* (1997), 32 B.C.L.R. (3d) 1, 16 E.T.R. (2d) 161 (C.A.); and *Chutter v. Chutter Estate*, 2000 BCCA 205.

- [71] It has been suggested that in view of the Supreme Court of Canada's decision in *Hartshorne v. Hartshorne*, 2004 SCC 22, prenuptial agreements will likely be treated with more deference by the courts in the wills variation context: see for example. AnnaMarie Laing; *Use of Marriage/Separation Agreements to Defeat Wills Variation Act Claims*, Estate Litigation: Attaching the Will 2005, Trial Lawyers Association of British Columbia (May 2005); and Edward F. Macaulay, *An Update on the Wills Variation Act*, Estate Litigation - 2005 Update The Continuing Legal Education Society of British Columbia (November 2005).
- [72] I have concluded, with respect, that the Court's analysis in *Hartshorne* is of limited assistance in the wills variation context. *Hartshorne* dealt with Part V of the Family Relations Act, R.S.B.C. 1996, c. 128, (the "FRA"). The scheme of the FRA is that, in the absence of a prenuptial agreement, each spouse is entitled to an undivided one-half interest in family assets (s. 56) subject to the Court's power to change the division if it is unfair having regard to the six factors set out in s. 65(1). That section states:
- ...
- [79] There are a number of reasons why I have concluded that the Court's analysis in *Hartshorne* is of limited assistance in the wills variation context. First, the Court in *Hartshorne* was specifically focused on only one legal obligation owed after separation, that relating to the division of property under the FRA. Other legal obligations are found in the law of unjust enrichment and the Divorce Act.
- [80] Second, the Court in *Tataryn* concluded that the second part of the two-part wills variation test, dealing with moral obligations, is distinct from and goes beyond legal obligations. As noted above, the Court said that most people would agree that although the law may not require a supporting spouse to make provisions for a dependent spouse after death, a strong moral obligation to do so exists if the size of the estate permits.
- [81] Third, the FRA explicitly provides that a marriage agreement will prevail unless a spouse can prove that it is unfair. *Hartshorne* was decided in that context. There is no such provision in the WVA.
- [82] Finally, while both the WVA and the FRA consider fairness, each does so in a different context. The FRA is concerned with the situation in which a relationship breaks down and each person continues with his or her separate life; the WVA is generally concerned with a relationship that would have sustained but for the death.
- [236] As stated in *Mawdsley*, the agreement is a relevant consideration, but is not conclusive. It does not oust the court's jurisdiction under the WVA:

- [329] It is settled that the agreement between Joan and Dennis to maintain separation of their assets free of claims by the other does not oust the Court's discretionary jurisdiction under the WVA to vary Joan's will in appropriate circumstances: *Wagner v. Wagner Estate* (1991), 5 B.C.A.C. 55, 62 B.C.L.R. (2d) 1 (C.A.); *Steernberg v. Steernberg Estate*, 2006 BCSC 1672, 28 E.T.R. (3d) 1; *Bridger v. Bridger*, 2005 BCSC 269, 13 E.T.R. (3d) 279, *aff'd* 2006 BCCA 230, 53 B.C.L.R. (4th) 235. Their agreement is a relevant consideration but is not conclusive. In my opinion, it does not negate Joan's moral duty to Dennis.
- [237] Just as the oral agreement in *Mawdsley* vitiated the decedent's legal obligation to the claimant, the Agreement here has the same effect. The question remains, did the Agreement vitiate the decedent's moral obligation to the claimant?
- [238] I conclude that it did not.
- [239] As in *Mawdsley*, I am of the view that there is a strong moral duty on behalf of the decedent to have made provision for the claimant in the event she predeceased him while they continued to reside together as man and wife. In *Mawdsley*, Ballance J. stated:
- [331] Contemporary standards, modern values and expectations contemplate a wide variety of living and financial arrangements among unmarried spouses in the Canadian landscape. In the recent Court of Appeal decision of *Picketts v. Hall (Estate)*, 2009 BCCA 329, the Court canvassed the relevant considerations in assessing the strength of a variation claim brought by a common law spouse, and particularly the moral duty owed to her.
- [332] Having regard to the length of their marriage-like relationship, the lack of any legal obligation owed by Joan to any of her children, the magnitude of the assets passing to the Meshen children under the Joan Meshen Trust and in consequence of the other pre-death transactions undertaken by Joan, Dennis's comparably inferior financial stature and his advanced age, I find that Joan's moral obligation to Dennis is a heavy one that overtakes any legal duty she may have owed.
- [333] In weighing the totality of the evidence in light of the animating legal principles, I conclude that Joan did not make adequate provision from her estate for Dennis and that her failure to leave anything to him under the Last Will falls below the moral obligation of a contemporary judicious spouse in all of the circumstances.
- [240] Counsel for the respondents note that in *Mawdsley*, the value of Ms. Meshen's estate exceeded \$10 million before the creation of the trusts which significantly reduced the estate.
- [241] In the present case, the decedent owed no legal duty to any of her adult children. It is clear she intended them to have the whole of the estate. However, she recognized a moral obligation to the claimant when she advised her sons she wished to provide the claimant with \$100,000 from the intended sale of the Celista property. Later, just before she died, although not in contemplation of death, she augmented that direction by including provision for a new automobile to help overcome the physical difficulty the claimant was

experiencing with his existing transport.

- [242] In fairness, all three sons expressed a willingness to abide those wishes and communicated that to the claimant. He acknowledged he was satisfied with those arrangements, but, presumably, changed his mind after seeking counsel.
- [243] I conclude that the net value of the estate, when adjusted for taxes payable and the overly optimistic view of the Celista property set out in the Affidavit of Inventory and Value, is approximately \$2.2 million.
- [244] As stated in *Tataryn*, I am to vary the decedent's Will only to the extent necessary to achieve the objectives of the WVA. The quantification of the moral obligation must also pay deference to the express wishes of the testatrix.
- [245] The analysis neither starts, nor ends, with an assessment of what the claimant's entitlement would have been under the FRA had the parties separated prior to the Ms. Pengelly's death. As was stated in *Picketts*:
- [59] In the present case, the size of the estate makes it possible to fully address the moral obligations of Mr. Hall toward all beneficiaries. A proper adjustment in favour of Ms. *Picketts* can be arrived at without risking any harm to the lesser moral obligation Mr. Hall owed to his two sons. On the other hand, testamentary autonomy always has to be considered and I do not see that the Act, as interpreted in *Tataryn*, requires the moral claims of the beneficiaries to be placed in a hierarchy with the beneficiaries ultimately receiving portions of the estate in correspondingly decreasing percentages. This is particularly so where the estate is substantial as is the case here.
- [246] There a number of obvious distinctions between the claimant in *Picketts* and Mr. Morgan. The length of cohabitation here is much shorter. In *Picketts*, there was no agreement, written or otherwise. No career aspirations were given up by Mr. Morgan which made him dependent upon Ms. Pengelly, nor did he deplete his resources to pay for things which Ms. Pengelly ought to have provided for him. There was no period where he cared for Ms. Pengelly in the same sense as Ms. *Picketts*. No promises were made to Mr. Morgan. Most importantly, the sizes of the estates are vastly different.
- [247] On the other side of the coin, the claimant is 81 years of age. He was a loyal and loving companion to Ms. Pengelly for nine years. They were married to one another in every sense but legally.
- [248] Each of the named beneficiaries in the Will is independent and self-sufficient.
- [249] Unlike the claimant in *Mawdsley*, Mr. Morgan has a modest net worth and similarly modest income. The estate of Ms. Pengelly is significantly less than the global assets of the decedents in *Mawdsley* or *Picketts*.

- [250] While I conclude that the Will ought to be varied, I do so only to the extent required to provide the justice to the claimant that the Will failed to achieve, commensurate with the decedent's moral obligations.
- [251] In the result, I vary the Will to provide for a bequest to the claimant in the amount of \$225,000. This amounts to approximately 10% of the net value of the decedent's estate. The residue is to be split equally between her three sons, Derek, Craig, and Stewart Pengelly.
- [252] I would not have assessed the obligation of the decedent differently had I concluded the Agreement did not come into effect because the parties did not legally marry.
- [253] The claimant had no entitlement to any of the property of the decedent during her lifetime either by the law of trust or by statute. Absent the Agreement, Part V of the FRA had no application to their relationship.
- [254] Absent a legal marriage, the only potential legal obligation of the decedent arose under Part VII of the FRA. Given the length of cohabitation, the claimant had a potential claim against the decedent for maintenance. In the years 2003 to 2005, the decedent's average income was slightly less than \$47,000 annually. The claimant's average income over the same period was approximately \$24,000 annually.
- [255] Given the manner the parties maintained their finances during the period of cohabitation, it is not patently obvious that the claimant would have established entitlement to maintenance in the event of an application brought during the decedent's lifetime.
- [256] Assuming entitlement was shown, based on nine years of cohabitation and the ages of the parties, application of the Spousal Support Advisory Guidelines would have resulted in a maintenance award of less than \$400 monthly, assuming the high end of the range. The claimant turned 77 in the year of Ms. Pengelly's death.
- [257] The lump sum value of such an award would fall far short of the amount I have determined was an appropriate bequest having regard only to the decedent's moral obligation to the claimant.

The Counterclaim

- [258] Unlike in Mawdsley, here the estate provided proper notice to the claimant of its requirement that he vacate the Celistia property. He did not. Instead, he changed the locks and continued to remain at the Celistia property, from time to time, without contributing to the major day to day expenses such as the property taxes and utilities.
- [259] In the summers of 2008 and 2009, arrangements were made, through counsel and on terms, that the Pengelly "children" would have one month in the summer to enjoy the cabin. Otherwise, the claimant has been in possession.

- [260] The estate, over the approximate four years since notice was given to the date of trial, has paid expenses totalling \$23,000.
- [261] Derek Pengelly estimated the rental value at \$1,300 per month for July and August and \$1,000 per month the rest of the year. The basis of his opinion was the rental asked for newer units adjacent to the Celistra property.
- [262] No evidence was actually proffered of there being a rental market over the course of the winter. The estate would be responsible for maintaining the property in any event, but would have had the option of renting or selling the property in addition to having it available for use by the three beneficiaries during the period the home was retained in the name of the estate.
- [263] The estate's claim is premised upon the law of trespass or, alternatively, if the claimant is found to have an interest in the Celistra property, then on the basis of an award for occupational rent.
- [264] Given that I have concluded the claimant has no interest in the Celistra property, I consider the claim on the basis of the law of trespass.
- [265] The claimant became a trespasser at law when Derek Pengelly notified the claimant that he had to vacate in July 2007. Any presumed licence to continue occupation ended at that time.
- [266] I order that he give up vacant possession of the Celistra property on or before August 31, 2011.
- [267] I assess damages for the trespass on the supposition, supported by the evidence, that the three beneficiaries hope to retain the Celistra property and would have continued to pay the expenses totalling some \$23,000, in any event. This would have been offset by rental income of \$2,600 annually over the summer months and a further \$1,000 a month over the non summer months, assuming full rental. Over the course of 50 months rental revenue, assuming 100% occupancy, would have amounted to \$53,000.
- [268] Applying a discount of 20% for the prospect the cabin would remain unrented, I assess damages for trespass in the amount of \$42,400.
- [269] This sum shall be offset against \$225,000 owed by the estate to the claimant, resulting in a net payment of \$182,600.
- [270] I wish to thank counsel for the able submissions on the evidence and on the law. I have, at times, borrowed from the submissions of each, after giving full consideration to each and arriving at factual determinations based upon my assessment of the evidence.

Costs

[271] The parties are at liberty to arrange a time to speak to the matter of costs or, by agreement, file written submissions on the issue of costs.

"The Honourable Mr. Justice Harvey"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/11/2011BCSC1114.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/morgan-v-pengelly-estate-2011>

Prepared on 28 October 2026 · Esheria