

CANADA / JUDGMENT

Robledano v. Jacinto

2018 BCSC 152

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Supreme Court of British Columbia

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2018 BCSC 152 Robledano v. Jacinto

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Robledano v. Jacinto,

2018 BCSC 152

Date: 20180131

Docket: S148743

Registry: Vancouver

Between:

Maria Angeles Robledano

Plaintiff

And

Ricardo Jacinto, Corazon Jacinto Torres, Amelita Jacinto,

Carmencita Jacinto Dy, Elizabeth Jacinto Keegan,

Maria Luisa Jacinto Gumboc, Peter Queano,

Milagros Jacinto Queano

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:

P.W. Hansen

Counsel for the Defendant, Milagros Jacinto Queano:

J. Ko

C. Cho

Place and Dates of Trial:

Vancouver, B.C.

January 23-27, 2017

July 10-13, 2017

August 25, 2017

September 22, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 31, 2018

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Introduction

- [1] This action involves the estate of Barbara Jacinto ("Barbara") who died unexpectedly on April 14, 2014. On July 21, 2011, she had executed a will designating the plaintiff, Maria Robledano ("Maria"), as the sole beneficiary, and Barbara's seven siblings as alternate beneficiaries, in the event Maria did not survive her for 30 days. Barbara appointed her brother-in-law Peter Queano ("Peter") as the executor, and her sister Maria Luisa Gumboc ("Luisa") as the alternate. A copy of the will, but not the original, was found after Barbara's death.
- [2] Barbara and Maria had been involved in a relationship for almost 30 years by the time of her death, which Maria says was marriage-like for most of that time.
- [3] Maria seeks a declaration that Barbara's will, contained in the copy, has been proven in solemn form, and an order that it be probated as the valid will. In the alternative, Maria asks the court to find she is Barbara's surviving spouse within the meaning of s. 2 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. Section 20 of WESA provides the intestate estate of a person who dies, leaving a spouse but no children, must be distributed to the spouse.
- [4] The defendants include Barbara's siblings and Peter, who is married to her sister, Milagros Queano ("Milagros"). Milagros is the only defendant to file pleadings in this action.
- [5] Milagros takes the position Barbara's estate must be distributed to the siblings pursuant to s. 23(2)(c) of WESA. She argues Barbara died without a will, relying upon the common law presumption of revocation. Milagros denies that Maria and Barbara were spouses at the time of her death, describing their relationship as an on-again, off-again romantic relationship and close friendship.
- [6] For reasons of clarity I have referred to the parties and other witnesses by their first names.

Overview

- [7] Barbara was born in November 1947 and Maria in March 1963. Both are from the Philippines.
- [8] They met at dance club in 1982, and began a romantic relationship. Maria was 18 years old and a student at the time; Barbara was 33 and worked in a bank. In 1985, they left the Philippines and moved to Vienna, where they lived together. About three years later, they immigrated to Canada, settling in Burnaby, BC. By then, some of Barbara's siblings had also immigrated to Canada and were living in the Lower Mainland.
- [9] In 1996, Barbara and Maria bought a condominium located in Burnaby ("Carrigan Court"). For a period of time, each of them had a relationship with a man, although they both continued to reside at Carrigan Court. From around 2000 to 2004, Maria was involved with Steve Payne, someone she had worked with for many years. In or about 2001, Barbara met an elderly man named Alfred Hamilton, who lived in Washington State. A romantic relationship developed and Mr. Hamilton and Barbara discussed marriage. In late 2003, they

purchased a house in Coquitlam as joint tenants, with funds he provided ("Allouette Property").

- [10] Mr. Hamilton died in November 2004 and Barbara became the sole registered owner of the Allouette Property. His estate, the executor and the beneficiaries, namely his children, brought an action against Barbara claiming she held the Allouette Property on a resulting trust or alternatively her ownership was invalid because she had exercised undue influence over Mr. Hamilton, inducing him to buy the property ("Hamilton Action"). The litigation carried on for several years. Barbara relied heavily on Maria's support during that time. Barbara paid for her legal fees with funds she and Maria borrowed against Carrigan Court. Their family members and friends were not aware of the case.
- [11] According to Maria, Barbara became dysfunctional and increasingly demanding from 2008 onward in response to the stress of the Hamilton Action.
- [12] Maria testified about her observations of the relationship between Barbara and Mr. Hamilton at the trial, which took place in 2010. The action was dismissed in early 2011. The reasons for judgment describe Maria as Barbara's cousin. It seems that neither the court nor Mr. Hamilton ever learned about the nature of Maria and Barbara's relationship before she became involved with him.
- [13] After Mr. Hamilton's death, Maria and her mother Ramona Robledano ("Ramona") moved to the Allouette Property from Carrigan Court. Ramona Robledano came to Canada from the Philippines in 2004, after she retired.
- [14] In 2005, Maria and Barbara began renting out Carrigan Court. The rental income, at least in part, was used to pay expenses related to the Allouette Property.
- [15] In or about 2006, Maria's brother, Emmanuel Robledano ("Emmanuel") and his family also left the Philippines for Canada, and until 2008, lived at the Allouette Property.
- [16] In April 2010, Ramona moved into a condominium in Port Coquitlam, which Maria purchased after a long search, located close to Emmanuel's home ("Grant Avenue").
- [17] Maria testified that she "walked out" on Barbara in or about November 2010, in response to her ongoing difficult behaviour, and became involved with another woman named Maria Balan. Maria began staying at Grant Avenue with Ramona.
- [18] The parties dispute whether or not Maria and Barbara separated. Maria describes the relationship as very strained in 2011. She told Barbara about her involvement with Maria Balan, which Maria states was sexual only initially. According to Maria, she and Barbara resolved their difficulties by early 2012. Milagros alleges Barbara ended the relationship with Maria prior to then, although they remained close friends.

- [19] It was in the middle of this period, on July 21, 2011, however, that Barbara executed her will designating Maria as the sole beneficiary of the Allouette Property and the residue of her estate. The will was prepared by a lawyer and there is no dispute it was validly executed. On the same day, Barbara signed another document witnessed by the same lawyer and his assistant, which reads in part:

MEMORANDUM

Notwithstanding that I have nominated my brother-in-law, PETER QUEANO as the beneficiary of my HSBC Mutual Fund and my sister, MILAGROS JACINTO QUEANO as the beneficiary of my HSBC Basic Group Life Insurance Policy .., I request and direct PETER QUEANO AND MILAGROS JACINTO QUEANO to respect my wish to transfer the proceeds from the Mutual Fund and the Insurance Policy respectively to my longtime best friend, MARIA ANGELES ROBLEDANO for her own use absolutely.

- [20] The lawyer provided Barbara with the original will. No wills notice was registered. Barbara did not tell Maria or anyone else about the will or the memorandum.
- [21] In September 2011, Barbara and Maria travelled to Europe together for three weeks. They spent part of the holiday with Barbara's long time friend Carmencita Gueverra ("Carmen") and her partner Mercy. On the return flight, Barbara met a young woman named Mahnaz. Milagros and other defence witnesses say Barbara developed a "crush" on Mahnaz, which Milagros relies on as proof the relationship with Maria was over. Aware Mahnaz and Barbara spent time together, Maria strongly denies this affected the nature of her relationship with Barbara.
- [22] In December 2011, Barbara travelled to the Philippines to visit friends and family. It was her first trip without Maria. Barbara's sister, Amelita Jacinto ("Amelita"), who lives in the Philippines, hired Rufina Sialza ("Rufina") as a live-in "maid" for Barbara while she was there. Barbara returned to Canada in early 2012. Maria states it was clear at that point their relationship was fully restored and Barbara proposed a plan to bring Rufina's adult daughter Ruby Sialza ("Ruby") to Canada as a caregiver for Ramona so Maria and Barbara could live together again. By then, according to Maria, Ramona required some care. Maria was preparing her meals and was responsible for all of the housekeeping at Grant Avenue. Milagros disputes there was any such plan and says, based on the evidence of her sister Amelita, Barbara intended to hire Ruby to assist her as she got older. According to Maria, she and Barbara settled on an arrangement that involved Maria splitting her time between Grant Avenue and the Allouette Property.
- [23] In March 2012, Barbara and Ramona arranged a surprise birthday celebration for Maria with their friends. Maria organized a very large surprise birthday party for Barbara's 65th birthday in November 2012, attended by family, friends, and co-workers. In or about March 2013, Barbara's sister Luisa organized a 50th birthday party for Maria at the Allouette Property, attended by family members and friends.

- [24] In April 2013, Barbara and Maria travelled to Europe together again. In August 2013, Barbara and Maria went to the Philippines to attend a family wedding, along with some of Barbara's siblings.
- [25] Barbara sold the Allouette Property and, in September 2013, moved to a rental condominium located in downtown Vancouver on Hamilton Street ("Hamilton Condo"). She and Maria placed many of their belongings in storage during the move. In February 2014, Barbara purchased a condominium on Cambie Street, moving in at some point in March 2014 ("Cambie Condo"). Maria was significantly involved in both moves and almost entirely responsible for the last one.
- [26] In January 18, 2014, Barbara signed a form cancelling a life insurance policy with HSBC in the amount of \$85,000. Maria was the beneficiary under the policy.
- [27] Maria says that around that time, Barbara proposed they started a cleaning business together.
- [28] Not long before she died, in March 2014, Barbara planned a small surprise birthday dinner for Maria at a Vancouver restaurant.
- [29] Maria and one of her witnesses testified that Barbara said she intended to sell the Cambie Condo, which had increased in value during the very short time she owned it.
- [30] According to Maria, she and Barbara continued to spend at least every weekend together after she moved downtown, with the exception of the weekend before her death. Maria had been invited to Las Vegas the following weekend. She said she was preparing food much of that weekend for Barbara and Ramona in anticipation of being away. She and Barbara's brother-in-law, Rodin, who had been renovating the Cambie Condo, became concerned when they could not reach her on Monday and Tuesday, April 14 and 15, 2016. The police were contacted and found her body in the Cambie Condo on April 16, 2014.
- [31] Various family members joined Maria and Rodin there that day.
- [32] An envelope or folder containing a copy of her will and the memorandum was found. There is no dispute that only the first part of the will, appointing Peter as the executor and Luisa the alternate executor, was read at that time. Maria, Milagros, other siblings and Peter testified they were not previously aware of the will or its terms.
- [33] Attached to the copy of the will was a handwritten note from Barbara that stated, "To Whom it May Concern Original of this Will is in my [safety deposit box] SDB#771 at HSBC - Lougheed/North Rd. Babsy" ("SDB").
- [34] Peter did not provide Maria with a copy of the will or the memorandum or tell her about their terms.
- [35] Maria shared the SDB with Barbara. It is agreed Barbara was the last person to access it on July 20, 2013.

- [36] On May 6, 2014, Peter and Milagros met with Maria at the HSBC and found the SDB contained other documents but not the original will. From the HSBC they drove to a White Spot restaurant where Maria and Milagros spoke at length. They give different accounts of an unpleasant conversation during which they discussed the relationship between Maria and Barbara as well as the will, although not its terms.
- [37] At some point, Peter found the HSBC mutual fund and the life insurance policy documents in a box containing Barbara's documents at the Cambie Condo. He and Milagros surrendered those documents to the HSBC, obtained the proceeds, about \$76,000 from the mutual fund and \$10,000 from the life insurance policy, deposited them into their joint account and used them, without notifying Maria, or retaining copies of the documents.
- [38] Maria says that after she visited the SDB with Milagros and Peter, she received a letter from Peter's lawyer advising her there was no will and he was "going to file for administration". On May 29, 2014, Peter applied for an estate grant without the will annexed, taking the position Barbara had died intestate. Maria retained counsel who, she testified, obtained copies of the will and memorandum from the bank manager at the HSBC (having received them from Peter). According to Maria, it was only at this point she learned she was not only a beneficiary under Barbara's will but the sole beneficiary.
- [39] After filing an objection to Peter's application, Maria commenced a proceeding by petition on November 13, 2014. After amending the petition, she filed her notice of civil claim on June 26, 2015, seeking essentially the same relief.

Issues

- [40] The two main issues in this case are:

1. Whether or not Barbara revoked her will applying the common law presumption of revocation; and if so,
2. Were Maria and Barbara spouses within the meaning of s. 2 of WESA at the time of her death?

- [41] A third issue emerged at the very end of the trial when Maria indicated she was seeking a declaration that the will had been proven in solemn form, which included both the copy of the will and the memorandum. In subsequent written submissions, she argued the memorandum represented Barbara's testamentary intentions and should be found to be part of her will, relying upon s. 58 of WESA, a curative provision that allows the court to order that a record or document is fully effective as though it was part of the will of a deceased.

Legal Framework

- [42] Section 58 of WESA reads in part:

Court order curing deficiencies

- (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents:
- (a) the testamentary intentions of the deceased person,
- (3) Even though the making ... of a will does not comply with this Act, the court may, as the circumstances require, order that a document be fully effective as though it had been made
- (a) as the will or part of the will of the deceased person,

[43] Section 55 of WESA provides a will may be revoked as follows:

55 (1) A will or part of a will is revoked only in one of the following circumstances:

- (a) by another will
 - (b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37 [how to make a valid will];
 - (c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;
 - (d) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that
 - (i) the consequence of the act of the will-maker or the other person is apparent on the face of the will, and
 - (ii) the act was done with the intent of the will-maker to revoke the will in whole or in part.
- (2) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[44] The principles that govern the common law presumption of revocation are not disputed. If a will can be traced to the custody of the testator and is not found after his or her death, a rebuttable presumption arises at common law that the testator destroyed the will for the purpose of revoking it. The strength of the presumption depends upon the character of the custody the testator had over the will: *Haider v. Kalugin*, 2008 BCSC 930, at paras. 9 -11. Some of the factors to be considered in determining whether the presumption has been rebutted include:

- whether the terms of the will were reasonable;
- whether the testator continued to have a good relationship with the beneficiaries in the copy of the will up to the date of death;
- where personal effects of the deceased were destroyed prior to the search for the will;

- whether there were dispositions of property that support or contradict the terms of the copy of the will sought to be probated;
- statements made by the testator that confirm or contradict the terms of the will;
- whether the testator was of the character to store valuable papers and had a safe place to store them;
- whether there is evidence the testator understood the consequences of not having a will; and
- whether the testator made statements to the effect she had a will.

(Haider, at para. 13)

[45] Spouse is defined in s. 2 of WESA, which includes the following:

When a person is a spouse under this Act

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

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

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

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

[46] *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), has been identified as a leading authority with respect to the meaning of a marriage-like relationship. The decision lists seven components, each accompanied by questions which may "to varying degrees and combinations" describe a "cohabitation" relationship. The components included shelter, sexual and personal behaviour, services, social, societal, support (economic), and children.

- [47] Subsequent cases have emphasized the presence or absence of any particular factor is not determinative of whether a relationship is marriage-like and a checklist approach is not appropriate, recognizing the variation and differences that exist in spousal relationships (Austin v. Goerz, 2007 BCCA 586). In Austin, the court endorsed the view expressed in Yakiwchuk v. Oaks, 2003 SKQB 124:
- [10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.

[Emphasis in original.]

- [48] More recently, in Weber v. Leclerc, 2015 BCCA 492, leave to appeal ref'd [2016] SCCA No. 1, the court observed:
- [23] The parties' intentions - particularly the expectation that the relationship will be of lengthy, indeterminate duration - may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.

- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [49] Weber discussed Molodowich as providing helpful indicators of the sorts of behavior that society, at a given point in time, associates with a marital relationship but again, not a checklist (at para. 25).

Credibility and Reliability

- [50] The credibility of the parties and some of the other witnesses is a significant and contested issue in this case.
- [51] In addition to Maria and Milagros, a number of witnesses testified at the trial. Maria's witnesses included her mother Ramona and brother Emmanuel, friends Esther Leyran ("Esther"), Roselle Tobias ("Roselle"), Resurreccion Reynoso ("Resurreccion"), Rosario Anza ("Rosario"), and Rufina and Ruby. The defendant's witnesses also included Peter, Barbara's sisters Luisa, Amelita, Carmencita Jacinto Dy ("Carmencita"), and Elizabeth Keegan, as well as Barbara's long time friend Carmen. Each party also relied upon some documentary evidence.
- [52] Not surprisingly, the evidence of the parties and their respective witnesses closely aligns with their positions.
- [53] Milagros urged me to find Maria not credible arguing she appeared to have difficulty focusing and frequently gave tangential answers, she was highly emotional, and her evidence was inconsistent with the evidence of her own witnesses. Milagros also argued Maria's evidence should not be believed because she made a false statement under oath during her testimony at the trial in the Hamilton Action by describing herself as Barbara's cousin. Milagros took the position Ramona also did not present as a credible witness, alleging she exaggerated her health issues and need for Maria's support and assistance, to support Maria's explanation for why she and Barbara did not live together full time after November 2010. Milagros characterized the evidence given by Rufina and her daughter, Ruby, as unreliable.
- [54] In contrast, Milagros described her own evidence and that of all of her witnesses as credible, suggesting their testimony was internally and externally consistent and consistent with the probabilities affecting the case.
- [55] The proper approach to assessing the truthfulness of any interested witness's testimony was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357, with these words:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its

consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[56] The factors identified by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, also play an important role in assessing whether the evidence of a witness is not only truthful, but also accurate:

- the capacity and opportunity of the witness to observe the events at issue;
- his or her ability to remember those events;
- the ability of the witness to resist being influenced by his or her interest in recalling those events;
- the internal and external consistency of the witness's evidence; did his or her testimony change between direct and cross-examination; are there inconsistencies in between prior statements, discovery evidence and his or her evidence at trial;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether his or her evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness's demeanour, meaning the way he or she presents while testifying.

[57] Applying the Faryna approach and considering the Bradshaw factors, I disagree entirely with the submissions of Milagros regarding the issue of credibility. Based on my assessment I find the evidence of Maria and her witnesses to be largely credible and reliable. In contrast, I have very serious concerns about the credibility of Milagros and Peter, and significant concerns about the credibility of several other defence witnesses.

[58] Although Maria was somewhat unfocused at times and inclined toward minutiae, her highly detailed responses struck me as an attempt to provide a complete account of events and to be transparent. It was obvious to me she was devastated by Barbara's death, as well as saddened and bewildered by the family's subsequent rejection of her. Maria trembled as she testified and was tearful in ways one would expect of any reasonable person in these very painful circumstances. Profound feelings of loss permeated her testimony, and enhanced rather than detracted from her credibility. She appeared despondent not only when she gave evidence but also while she sat in the gallery watching the rest of the trial.

- [59] I have considered very carefully the impact of an untrue statement Maria may have made while testifying in the Hamilton Action on her credibility. Mr. Hamilton is described in the reasons for judgment as a deeply conservative, religious person. Maria readily acknowledged at one point that she testified to being Barbara's cousin, although she then clarified she could not recall if she was actually asked about the nature of their relationship, nor was it established that she was.
- [60] Maria explained she and Barbara each decided to try and have a relationship with a man in or about 2000. Maria very much wanted to have a child. By the time Barbara met Mr. Hamilton in 2001, Maria was romantically involved with Mr. Payne. Maria said others introduced her to Mr. Hamilton as Barbara's cousin and Maria had been introduced that way on occasion at some of Barbara's family events, which the defence witnesses denied. Maria stated she and Barbara continued living together as friends during this period, specifying they were not intimate from 2000 until 2011. Maria indicated she did not regard the sexual nature of their relationship beforehand as relevant to the issues in the Hamilton Action. At the same time, she agreed she did not want to compromise Barbara's case, in light of the genuine relationship that developed between Barbara and Mr. Hamilton.
- [61] Maria also described the profound effect of the litigation on Barbara. She became increasingly dysfunctional as the litigation wore on, despite Maria's attempts to persuade her that losing the Allouette Property did not really matter. More than once, she testified that Barbara did not cope well with problems. It was up to Maria to try and fix those problems and support Barbara at the same time. Maria was not challenged on this point.
- [62] It is of course a very serious matter to knowingly give evidence that is not the whole truth. I accept if she was asked Maria would have described herself to the court in the Hamilton Action as Barbara's cousin, motivated by her devotion and loyalty to Barbara. I am satisfied, however, Maria testified honestly at this trial. Important parts of Maria's evidence were corroborated by the testimony of other witnesses or uncontradicted. She, unlike the defence witnesses, readily acknowledged circumstances that were not in her interest. Generally, I found her account of events much more consistent with the probabilities affecting the case than that of Milagros and her witnesses. Further, as I have indicated, her demeanour was genuine and consistent with the nature of her evidence.
- [63] I also found Ramona to be a credible witness. Her testimony was entirely straightforward and direct. At more than 80 years old and confined to a wheelchair, Ramona's physical limitations were apparent. Milagros suggested Ramona exaggerated her need for care because when they spoke in February 2012 at a birthday celebration for one of Emmanuel's children, she was able to walk slowly and did not tell disclose any significant health issues, apart from high blood pressure. Leaving aside the reasonableness of not speaking candidly about one's health status in those circumstances, I accept Ramona actually did tell Milagros about some other issues at that time, which Milagros did not mention in her testimony. Milagros also suggested Ramona appeared to have had doubled in size since that conversation, although I do not recall Ramona being asked about this. Milagros also relied

upon Emmanuel's testimony that Ramona babysat his children from 2011 until 2014 to suggest she was capable of living independently and did not need Maria's help before then.

- [64] There is no dispute about Emmanuel's credibility. His evidence was entirely reasonable, responsive and sincerely given. He testified Ramona only cared for the children at her apartment and he and his wife provided her with food and meals for them.
- [65] His evidence along with Maria and Ramona's, demonstrates that her dependency on Maria was influenced by a variety of factors including her own and perhaps cultural expectations, although I accept that during certain periods and over time Ramona required significant help and support. Clearly, both Emmanuel and Maria felt responsible for Ramona even when she was physically capable of looking after herself. Emmanuel said he told Maria she had to be primarily responsibility for Ramona once she moved to Grant Avenue in or about April 2010. He had two jobs, his wife was posed to return to work and they had two young children. And yet it was after this Ramona began to babysit. Emmanuel also described Ramona calling Maria every time she needed anything. Always respectful, Maria was not explicit about either of them being dependent on her, but her evidence and that of others demonstrated this was her reality.
- [66] There are a number of reasons why I have serious concerns about the credibility of Milagros, Peter, Amelita and other witnesses for the defendant.
- [67] I found critical parts of Peter and Milagros's testimony implausible and unreasonable. A glaring example of this was their evidence that after discovering the copy of the will in the Cambie Condo on April 16, 2014, and learning Peter was the executor, they did not read the will again and therefore learn about its terms, until after the visit to the SDB at HSBC on May 6, 2014. It is inconceivable that Peter as the executor would not have read it at the earliest opportunity. Furthermore, Peter testified to taking steps such as contacting the HSBC about accessing the SDB and learning that Maria was a "joint signer" prior to that date, which would require him to provide a copy of the will in order to establish his role as executor.
- [68] In addition to being implausible, Milagros's testimony on this point cannot be reconciled with her account of a conversation she had with Maria at the White Spot restaurant immediately following their visit to the SDB. Milagros said she could tell Maria was aware of the terms of the will because she referred to "beneficiary" in the singular. Milagros also indicated she suggested to Maria that they try and settle things given the original will appeared to missing, in other words, taking a strategic position that would make little sense if she did not know Maria was the sole beneficiary. Milagros's testimony about when she read the will is also entirely inconsistent with the evidence she gave at examination for discovery, which was that she and Peter reviewed it after returning home on April 16, 2014. Her explanation for the inconsistency, that she was angry over being diagnosed with terminal cancer and with Maria, was unconvincing.

[69] I was also very troubled by the evidence of Milagros and Peter about obtaining and using the proceeds of the HSBC mutual funds and the life insurance policy without notifying Maria of the memorandum or their intentions. When asked about why they did not comply with the memorandum, Peter testified:

Because as far as I'm concerned - we had the money. We received the payment. But as far as we're concerned this is covered by a memorandum which is attached to the will, which is missing. As we had not - you know, we don't have the final result of the litigation.

[70] Later, Milagros submitted the memorandum was not a testamentary instrument and therefore not part of the will. During cross examination, Milagros was reluctant to acknowledge that she and Peter had spent the proceeds, responding more than once they were "available" and then testifying they could be replaced if necessary.

[71] In my view, their conduct and their evidence demonstrates a lack of integrity and demonstrates they were strongly influenced by their financial interest in this matter.

[72] Unfortunately, Milagros also made obvious attempts to manipulate my view of her credibility, invoking the depth of her religious faith in an effort to convince me she was being entirely honest and Maria was not. On more than one occasion Milagros told me the fact she was suffering from terminal cancer and the prospect of meeting God, Barbara, and her parents, meant that she could not possibly lie to the court.

[73] If that was not enough, I also became concerned Milagros had taken certain positions in order to prevent me from hearing the evidence of Rufina and Ruby. As I have indicated, Amelita hired Rufina as a live-in domestic worker for Barbara while she was visiting the Philippines in late 2011 and early 2012. Again, according to Maria, after Barbara returned from her trip, she told Maria she was thinking of sponsoring Rufina's daughter Ruby as a caregiver for Ramona, so the two of them could live together full time.

[74] Prior to the trial, in November 2016, Milagros brought on a summary trial application which did not proceed. Rufina and Ruby swore undated affidavits before a notary public, in Tagalog. The affidavits, along with certified English translations, were provided to Milagros. The affidavits discuss Barbara's plan to bring Ruby to Canada as a caregiver for Ramona, although not by name, along with other events and conversations involving Barbara, and to a lesser extent, Amelita and Maria.

[75] Both Rufina and Ruby were listed as witnesses on Maria's trial brief. At the outset of the trial, Maria applied for an order allowing both of them to testify by way of videoconference from the Philippines. I was told they had encountered difficulties obtaining visas and referred to a document from Immigration Canada showing Ruby's request for a visa had been denied. Milagros opposed the application on several grounds. At the same time, she argued their affidavit evidence was not admissible because of problems with the jurat. Although her frustration with late notice was understandable, she argued their evidence was not material to whether or not Maria and Barbara shared a marriage-like relationship, but later expressed

the view that living together was a significant factor in the analysis. Significantly, she could not identify any actual prejudice that would flow from allowing Ruby and Rufina to testify by videoconference.

- [76] Once I granted the order allowing them to testify by videoconference, Milagros asked that family members in the Philippines be allowed to be present while Ruby and Rufina gave their evidence from a business center. I denied that request based in part on a concern I would be unable to observe and manage any interactions that might occur between those family members and the witnesses.
- [77] After hearing the evidence of Amelita, I concluded my concern had been well founded. Her testimony showed she had urged Rufina to recant her affidavit evidence and displayed an attitude of profound disrespect for Rufina, whom Amelita referred to as "the maid" or "this Rufina". Amelita was also indignant, dramatic and self-important. She emphasized she felt compelled to make the big sacrifice of traveling to Vancouver to appear in court because of the "big lies" contained in Rufina's affidavit, which mostly related to minor details such as when it was Barbara left the Philippines to return to Canada in early 2012, whether Amelita accompanied Barbara and Rufina to the hospital when Barbara was ill during her visit, and who phoned whom shortly after Barbara died.
- [78] Amelita testified that after receiving the affidavits, she called "the maid" and arranged to meet with her. According to Amelita, when she questioned Rufina about the events discussed in the affidavit, Rufina described them differently and accurately. Based on Amelita's evidence alone, I have no doubt she was very confrontational and intimidating. Amelita said she asked Rufina if she was willing to retract the affidavit and Rufina indicated she would have to speak to her daughter. They arranged to meet again. Amelita complained that although she provided Rufina with a generous amount of money for transportation, Rufina did not attend the second meeting and avoided her many phone calls.
- [79] Amelita's evidence was called during Maria's case. Rufina testified later that Amelita told her she would go to prison if she did not destroy the affidavit. I have put no weight on Rufina's other evidence that Amelita contacted their neighbours and others in an attempt to ruin the family's reputation, because Rufina has relied upon what others told her about what Amelita said and did.
- [80] I conclude I cannot safely rely upon the evidence of Milagros, Peter, and Amelita, except where it is uncontradicted and clearly consistent with the probabilities affecting the case or confirmed by other independent or credible evidence.
- [81] I also have concerns about the credibility of Barbara's sisters Luisa and Carmencita. Their evidence aligned entirely with their financial interest. Both strongly resisted acknowledging or denied circumstances that were contrary to that interest. Similar to Milagros, Luisa testified she was and remained unaware of the contents of Barbara's will, apart from knowing she was named as the alternate executor. She specified she did not know or care about the fact that she and her sisters were alternative beneficiaries, which I find

implausible.

- [82] Luisa also found it necessary to tell me about her religious conviction, describing herself as a devout Catholic. Much of her evidence focused on why she came to believe that Barbara had separated from Maria, although Barbara never told her so. According to Luisa, once Barbara retired, the two of them spent time together regularly and often saw each other at church. Luisa said she was surprised when Barbara began taking communion in 2011, something she had not done before that when attending mass with Maria. Luisa emphasized that Barbara must have had a clear conscience about adhering to Catholic doctrine, which provides a person in a same sex relationship or a sexual relationship outside of marriage cannot be in a state of grace, a requirement for taking communion.
- [83] Milagros gave essentially the same evidence. She said she was surprised and happy to see Barbara receive communion at a family member's funeral in April 2014, concluding she was not in a same sex relationship at that time. Significantly, although Maria testified that she and Barbara continued to attend church together, Maria was not cross examined about the issue of taking communion. In light of this, my concerns about the credibility of Luisa and Milagros, I give little weight to their testimony on this point. In any event, I do not regard it as probative of either Barbara's state of mind or the status of her relationship with Maria.
- [84] In general, I find it is necessary to approach Luisa's evidence cautiously.
- [85] I doubt the sincerity of Carmencita's testimony mostly because of the marked contrast between her apparent recollection of circumstances favourable to the defence position and the vagueness of her memory or her reluctance to recall significant and important events for her that Maria and Barbara attended together after their alleged separation, such as her daughter's wedding in 2011, her 60th birthday party in July 2012, her grandson's baptism in November 2012, and various other holiday and birthday celebrations, as well as her own attendance at Ramona's 80th birthday in December 2013.
- [86] Finally, I also have concerns about the credibility of Carmen, Barbara's very close friend. She was the only witness, apart from Amelita to testify that Barbara told her she had ended her relationship with Maria and was involved romantically with Mahnaz. It is inconceivable that Barbara would have said such things to Amelita. There is no dispute that Barbara did not discuss her sexuality or her relationship status, along with other significant events such as the Hamilton Action with her siblings, and was generally a very private person. Carmen, however, was a long time friend with a same sex partner. Although she had lived in the United States since 1977, she and Barbara spoke often by phone until September 2013, when she moved downtown and no longer had a "land line". Carmen and Mercy and Barbara and Maria visited and travelled together many times over the years.
- [87] Carmen's testified that Barbara told her she had ended the relationship with Maria after their trip to Europe in 2011. If admitted for its truth, the statement is inconsistent with some of Carmen's other evidence and that Maria, Ramona, Emmanuel and friends about the extent and the nature of Maria and Barbara's ongoing involvement with one another.

Carmen acknowledged being aware of various ways in which Maria continued to attend to Barbara's needs until her death, as well as their trips together in 2011 and 2013, but minimized the significance of those circumstances. This part of her evidence struck me as insincere and unreasonable but consistent with aspects of her testimony I found incongruous. In particular, although Carmen had known Maria for many years, called her on her birthday in March 2014, and was on the phone with her on April 16, 2014 as she drove to the Cambie Condo and until after she learned of Barbara's death, Carmen's depictions of their subsequent interactions indicated Maria was all of sudden insignificant to her. For example, Carmen testified that she did not speak to Maria beyond saying hello at the celebration of life Maria held for Barbara in California, but she would not agree there was anything unusual or surprising about this. Similarly, Carmen was evasive and nonchalant when asked about Maria's grief and distress over Barbara's death. In cross examination, she resisted the understated suggestion that Maria was "rather emotional" during their phone call on April 16, 2014, stating, "maybe she was".

Hearsay Evidence

[88] As I have indicated, many of the witnesses testified about what Barbara said to them about various issues. Although the defence made a general objection to the admissibility of Barbara's hearsay statements during the plaintiff's case, the issue was not otherwise addressed. Hearsay evidence is presumptively inadmissible, subject to the application of the traditional exceptions and the principled approach. Of course, out of court statements adduced for the fact they were made are not hearsay. Neither party identified the purpose of the evidence about various statements made by Barbara to their respective witnesses.

[89] The admissibility of a declarant's evidence about a deceased's statements for its truth is determined based on the exception to the hearsay rule, which permits the admission of statements by a person as to his or her state of mind or emotional state, or the application of the principled approach (see *Modonese v. Delac Estate*, 2011 BCSC 82, at paras. 82-85). *R. v. Panghali*, 2010 BCSC 1114, established hearsay evidence must have some measure of trustworthiness before it may be admitted pursuant to the state of mind exception (at paras. 18-21).

[90] *R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.) explained the exception as follows, at 341:

Assuming relevance, evidence of utterances made by a deceased (although the rule is not limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred.

[91] In *Harshenin v. Khadikin*, 2015 BCSC 1213, Justice Dardi discussed the application of the principled approach to statements attributed to the deceased, at para. 32:

[32] Four decisions of the Supreme Court of Canada guide the court's inquiry regarding the principled approach: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Starr*, 2000 SCC 40; and *R. v. Khelawon*, 2006 SCC 57. The admissibility of hearsay under the principled approach is summarized in *Khelawon* at para. 2:

When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails.

[92] Necessity is clearly established by Barbara's death. Assessing the reliability of statements attributed to her, involves determining whether the circumstances in which they were made "substantially negate" the possibility that the declarant was untruthful or mistaken: *R. v. Smith*, [1992] 2 S.C.R. 915, at 933. In some instances, my credibility assessment of the declarant determines whether I am even satisfied that a particular statement was made. Generally, therefore, I cannot accept the evidence of Milagros and Amelita regarding Barbara's statements to them for either a hearsay or non-hearsay purpose, because of the serious concerns I have about their credibility. Again, the probabilities affecting the case, corroborating credible or independent evidence are factors I consider when assessing the evidence of any witness but particularly Carmen, Carmencita and Luisa having determined their testimony needs to be approached cautiously.

Discussion

Memorandum

[93] At the conclusion of the trial, as I have indicated, Maria sought a declaration that the copy of the will and memorandum had been proved in solemn form, and an order that they be probated as the valid will. Given the absence of any argument or express pleadings regarding the memorandum, I asked the parties to provide written submissions that addressed whether the court ought to consider the memorandum, and if so, how should the issue be decided.

[94] Maria's submissions discussed the substantive question, and whether the evidence established the memorandum represented Barbara's testamentary intentions, pursuant to s. 58 of WESA. Apart from that, she suggested it was well understood by the parties that references to the will included the memorandum. Certainly, the evidence of Peter and Milagros was that they viewed the memorandum as part of the will and therefore to be ignored when the original(s) were not found.

- [95] Focusing on the procedural question, Milagros argued it would be highly prejudicial for any relief to be granted based on the memorandum, given the state of the pleadings in particular, and the absence of any other notice that Maria intended to propound the memorandum as part of the will or pursue a personal claim against her and Peter for the return of the proceeds.
- [96] On the substantive question, Milagros took the contradictory position the court should find that Barbara revoked the memorandum along with the original will, applying the presumption of revocation, and/or that s. 58 of WESA does not apply because the memorandum does not have testamentary status. She argued that even if a copy of the memorandum were to be probated as part of the will, it would have no effect, because testamentary instruments can only direct the disposition of funds within the testator's estate and the proceeds passed outside the estate to Peter and Milagros as the designated beneficiaries.
- [97] In reply submissions, Maria mentioned her pleadings for the first time and suggested the court should exercise its discretion to allow them to be amended to accord with the evidence led at trial, "if needed to clarify", adding, under relief sought, a declaration that the memorandum is part of the will and recovery of any funds, "properly belonging to the Estate, paid out in breach of trust". She also submitted she was not aware Peter and Milagros had received the proceeds from the mutual funds and the insurance policy until she heard their testimony at trial.

Analysis

- [98] In all civil cases, the pleadings define the issues of fact and law to be determined in an action (*Xu v. Hu*, 2015 BCSC 1400, at para. 14). In *Xu*, the court observed:
- [14] Amongst other things, [the pleadings] give opposing parties fair notice of the case to be met and provide the boundaries and context for document disclosure: *Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2011 SCC 56, para. 43; *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703, para. 5. For this reason, if a party has been unfairly disadvantaged by a failure to raise, or properly particularise, an issue in pleadings the court should not determine that issue.
- [99] It is clear Maria's pleading did not provide "fair notice" of the issues of fact and law related to the memorandum. The notice of civil claim refers only to "a Will" executed on July 21, 2011, and does not seek any relief pursuant to s. 58 of WESA, although the provision is identified as a legal basis in support of the relief sought. The notice of civil claim specifies the contents of the will are contained in an attached copy of the will, but there is no indication any documents were actually attached. The copy of the notice of civil claim contained in the trial record has no attachment.

- [100] A testator may revoke (revocable) beneficiary designations in a will but Barbara did not do so: WESA, s. 96. Instead she arranged for a separate document, the memorandum, to be prepared. It appears, although I make no finding in this regard, she intended to create a trust appointing Peter and Milagros as trustees of the proceeds of the HSBC mutual funds and insurance policy, based on their role as beneficiaries under those instruments, for the benefit of Maria, or Barbara's estate in the event of Maria's death.
- [101] The question becomes not only would Milagros and Peter be unfairly prejudiced by allowing the proposed amendments, but can the court properly resolve the issues related to the memorandum based on the evidence and the submissions? In my view, the answer is no.
- [102] Although Peter and Milagros obtained the proceeds and spent them without informing Maria or notifying her of the memorandum, at some point, Maria obtained a copy of the document and could have pleaded facts and sought relief based on its terms, including a claim for recovery of the proceeds. Assuming she first learned Peter and Milagros used the proceeds when they testified, she could have proposed amending her pleadings to add a claim for breach of trust at that point, rather than obliquely in reply submissions after the end of the trial. Maria has not explained why she did not act earlier.
- [103] Only Milagros chose to defend the action. Had the notice of civil claim pleaded facts and a personal claim against Peter related to the memorandum, he may also have done so.
- [104] Although Milagros and Peter gave evidence about the memorandum, I do not know what, if any, additional factual issues may arise if amendments were permitted. Further, the amendments proposed in the reply submissions still do not adequately assert a claim in relation to the memorandum against Peter and Milagros. I have not been provided with any submissions regarding the relevant law and its application to a trust related claim. Consequently, even if it were appropriate to do so, I am not in a position to decide the matter properly. The same is true with respect to applying s. 58 of WESA to the memorandum. Maria has not addressed, in the absence of a trust claim, how the proceeds would form part of Barbara's estate.
- [105] Balancing the relative prejudice to the parties and the state of the record, I am not prepared to decide the third issue.

The Relationship Between Barbara and Maria

- [106] I begin my consideration of the two main issues with an analysis of the evidence regarding the relationship between Barbara and Maria over time, although the application of the presumption of revocation is not determined by the whether they were spouses.
- [107] In light of my credibility assessment, I have largely accepted Maria's evidence about the relationship and that of her witnesses about their observations. Unless I specify otherwise, the discussion that follows sets out findings of fact.

- [108] Maria's testimony about the events and circumstances up until late 2010 is essentially uncontradicted, if not undisputed, and corroborated to some extent by the evidence of Ramona, Emmanuel, Esther, Roselle and Resurreccion.
- [109] After settling in Canada, Barbara worked at a bank until she retired in or about 2009. Maria had a demanding job as the manager of several businesses.
- [110] Although Barbara never discussed her sexual orientation with her family and she and Maria were not overtly affectionate with one another around them, her siblings were well aware she and Maria were a couple. Maria was fully integrated into Barbara's involvement with her family. She and Barbara attended family events together, including holiday celebrations, birthdays, baptisms, weddings, funerals, etc. Maria had her own friendships with some of Barbara's sisters. Maria and Barbara enjoyed travelling and took many trips together, including various holidays in Europe and visits with family and friends in the Philippines.
- [111] In many ways, their relationship was much like a traditional marriage between a husband and wife. Maria was responsible for the cooking and most of the housework. Although she did not put it this way, it was clear to me, Maria was expected to be, and was very attentive to Barbara's needs. Barbara was quite reserved but direct, if not blunt. Although Maria insisted on contributing equally to their living expenses, typically, Barbara paid for meals in restaurants and their holidays.
- [112] Barbara and Maria socialized as a couple with a core group of friends that included Esther and her partner Roselle, Resurreccion and Rosario, all of whom gave evidence. Barbara and Maria were openly affectionate with one another around these women. Although it was suggested by the defence they were really just Maria's friends, and Barbara merely tolerated them, the reality is she and Maria spent time with them regularly over many years, celebrating birthdays and special occasions and going on outings up until Barbara's death. These same friends were often included in Maria and Barbara's family gatherings. Maria and Barbara also spent time together with other friends they met in Europe, as well as Carmen and her partner Mercy, who lived in the United States.
- [113] Ramona and Emmanuel both described Barbara as an important person in their family. Emmanuel was only six years old when he met her. He had fond childhood memories of her playing with him and taking him for rides in her car in the Philippines. She attended his wedding there in 2002. Later, when he had his own family moved to Canada, she developed close relationships with his children and was a god mother to one of them.
- [114] From 1985 onward, Barbara and Maria lived together, sharing a bedroom. They bought Carrigan Court in 1996. Maria said she felt the need to have a child after turning 30. She and Barbara discussed various options including using a sperm bank but there was a concern about AIDS at the time. In 2000, Maria told Barbara she wanted to have a relationship with a man, describing herself as experiencing an identity crisis. Maria knew Mr. Payne was interested in her. Maria said Barbara really struggled with the idea and did not want to let her go.

- [115] After Maria became involved with Mr. Payne, a high school friend of Barbara's mentioned Mr. Hamilton. The friend had known him for a long time and he had recently lost his wife. Ultimately, he and Barbara met and, although he was elderly, a genuine relationship developed. Throughout this time, Barbara and Maria continued to live together at Carrigan Court and Barbara remained dependent on her.
- [116] While driving back to BC from Mr. Hamilton's home in Washington State on one occasion, Barbara was arrested for impaired driving. Maria described Barbara as very frightened by the experience and, in general, as someone who was unable to function "unless her one problem is solved". Maria took charge, retaining lawyers in both Canada and the United States. At Barbara's request, she told no one except Mr. Payne. Maria said she and Mr. Payne had discussed marrying, but she was holding off because Barbara needed her help.
- [117] In 2003, Barbara told Maria she and Mr. Hamilton planned to marry. Maria became very depressed when Mr. Payne ended their relationship around the same time. Her mother and Barbara were both concerned about her. According to Maria, Barbara told her she needed to have a baby. A friend in Vienna agreed to be the father. Barbara and Ramona paid for Maria's trip but no pregnancy occurred.
- [118] In 2004, Ramona moved to Canada from the Philippines, bringing with her 100 boxes and lots of furniture that were placed in storage, and staying initially at Carrigan Court. Maria and Ramona moved to the Allouette Property after Mr. Hamilton's death in November 2004. Maria and Barbara shared a bedroom again. Maria kept many of her clothes and belongings in another room. Ramona occupied a third bedroom. Much like Barbara, she depended on Maria to do the cooking and cleaning. When Emmanuel and his family arrived in 2006, they lived in the basement for a couple of years.
- [119] Emmanuel and Ramona always viewed Maria and Barbara as a couple. Although Ramona testified Barbara was very conservative, prim and proper, both she and Emmanuel described Barbara and Maria as affectionate with each other. They shared the same glass, sat close to each other and sometimes cuddled. Ramona said Barbara and Maria also discussed everything before making decisions.
- [120] From 2005 onward, Barbara and Maria rented out Carrigan Court, which has two bedrooms. Barbara opened a joint account with Maria at Vancity, where the rental income was deposited. At least some of it was used to pay expenses related to the Allouette Property as well as Christmas gifts for the children in Barbara's family.
- [121] Mr. Hamilton's children brought the Hamilton Action in 2005. Barbara and Maria retained a lawyer. Maria described Barbara as not able to function very well while the litigation was ongoing. She lost weight, could not sleep without medication, and worried about being fired from her job. Barbara told Maria repeatedly she did not want anyone to know about the case, even though Ramona and Emmanuel were living at the Allouette Property. Barbara paid the lawyer with funds she and Maria borrowed against Carrigan Court. Maria was concerned she may be unable to repay the debt if something were to happen to Barbara and

so she obtained a life insurance policy.

- [122] In 2008, Emmanuel purchased a home with Maria's help. After he and his family left the Allouette Property, Ramona wanted to live close to him in a place where she could be surrounded by her own furniture and belongings. Maria was responsible for finding Ramona a suitable apartment. It took a long time because Ramona had many requirements. Barbara became increasingly demanding of Maria as the Hamilton Action wore on. She described Barbara as screaming at her over minor matters, being hurtful in other ways, unappreciative and entirely unsupportive. For example, after agreeing to do so, she would not help Maria with Ramona's move from the Allouette Property to Grant Avenue, which involved a great deal of work. Maria asked Barbara on occasion why she was mistreating her, but nothing changed.

The Relationship After November 2010

- [123] In or about November 2010, during an incident that involved Barbara screaming at Maria, Maria walked out, indicating she had never done so before, but she could not tolerate the situation any longer. Maria felt she could not tell her mother or her friends what had happened because she did not want to disrespect Barbara, so she went to another friend named Maria Balan. The two of them began a relationship that Maria described as only briefly sexual. She quickly found she was not able to carry on being intimate with Maria Balan because of her love for Barbara. Maria indicated that she continued to have some involvement with Maria Balan up until December 31, 2011, but the focus was helping her with financial problems.
- [124] After "walking out" on Barbara, Maria stayed at Grant Avenue, but her belongings remained at the Allouette Property. Barbara was very cold towards Maria when she would stop by to pick up clothes, but then, just before Christmas in 2010, Barbara called her and said something like, "what do we do about Christmas?" Barbara celebrated Christmas with Maria and her family at Grant Avenue. After that, Barbara asked about New Year's Eve, and Maria organized a party that was held at the Allouette Property.
- [125] In January 2011, the Hamilton Action was dismissed. Maria recalled Barbara showing up at her office driving a new car, which became a prized possession. Maria said she told Barbara at that point about Maria Balan and Barbara responded with, "I want her out of your life". Maria agreed. She said that after that, every time she went to the Allouette Property, she and Barbara talked about their relationship problems. There was a great deal of discussion about Maria having made a mistake by involving herself with Maria Balan. Maria testified reward and punishment was part of their relationship dynamic. She described Barbara as testing her and "making her pay" if she did something wrong. It was apparent from Maria's evidence that throughout their relationship she was the nurturing and supportive partner. Barbara's needs and wants were at the forefront.

- [126] During this period, Barbara questioned why Maria had put up with her for so many years and then stopped all of a sudden. Maria tried to explain she could not cope any longer, given her many other responsibilities. Maria confronted Barbara about treating her very badly. She told Barbara she needed to feel loved and appreciated, which Maria described as standing her ground. However, Barbara wanted her back "in a demanding way". For example, she insisted Maria Balan had to be "out of Canada". Maria said that later on, in November 2011, Barbara threatened to hurt her when Maria would not attend a boxing match with Barbara because she had already agreed to watch it with Maria Balan. Barbara told Maria she had called all the women she knew and was going to go out with them. Maria said she responded with, "Let me know if you fall in love because I don't want to be around".
- [127] Maria strongly denied that she and Barbara "broke up" during this time. Maria agreed at one point during cross examination, they were not partners in 2011. Considered as a whole, however, her evidence satisfies me the relationship did not end but rather struggled through and endured a serious crisis.
- [128] At some point in 2011, Barbara's friend Carmen and her partner Mercy visited from the United States. Maria cooked for all of them throughout the visit but she did not stay at the Allouette Property herself. The four of them talked about a trip to Europe. Barbara kept asking Maria to go with her. Maria agreed on the understanding she may not return to the Allouette Property afterward. Before they left in September 2011, Barbara gave Maria a ring engraved with their names. Maria said it was a gift for their 25-year anniversary but Barbara was late in giving it to her because the Hamilton Action was going on at that time. I note the defence disputed the reason for the gift because Maria did not mention it until her second examination for discovery, but not the gift itself.
- [129] Shortly before the Europe trip, in July 2011, Barbara had the will and memorandum prepared. I accept she did not tell Maria or anyone else including Peter and Milagros about either document, or that some time earlier she had designated Milagros and Peter as beneficiaries to her HSBC mutual fund and life insurance policy. Maria recalled drafting her own will in September 1999, shortly before they left for a trip to Europe, which Barbara witnessed, using a standard form. Maria suggested Barbara do the same. When Barbara asked what she needed to include, Maria told her she had to appoint an executor and co-executor and suggested Peter and Luisa. Maria's will left her assets to her mother, not Barbara. She explained she did not have a lot and Barbara had much more. The only evidence of Barbara ever discussing even remotely estate planning came from Ramona. She testified that Barbara mentioned to her two or three times that when she died Maria would be a rich woman. Ramona said she did not ask what she meant and Barbara did not elaborate.
- [130] Barbara and Maria spent three weeks in Europe together, returning in October 2011. Carmen and Mercy joined them for one of those weeks. Maria described the trip as reigniting something. At that point, their relationship became sexual again.

- [131] Barbara planned to spend Christmas and New Year's in the Philippines and invited Maria to join her but she could not because of work demands. It was the first trip for Barbara without Maria. She became tearful before Barbara left. She told Barbara she was scared she would meet someone else. Barbara was reassuring. Maria drove her to the airport and gave her a long and heartfelt letter she had written the night before in which she apologized to Barbara for hurting her and attempted to explain herself. At one point Maria wrote, "I wanted you to realize my worth, me as a person as a partner to you. And you did show me when I left". Towards the end, the letter reads, "So I guess what I am saying is, if it's not [too] late do you want to give us another shot?".
- [132] Maria and Barbara were in frequent contact while Barbara was away. Rufina, who stayed with Barbara throughout, recalled her speaking to Maria on the phone everyday. Barbara became quite ill during the trip. I accept Amelita called from the Phillipines and asked Maria to persuade Barbara to go to the hospital, which she did.
- [133] Barbara was still ill when Maria picked her up at the airport in January 2012. Maria stayed with her for a week, nursing her back to health. They did not discuss Maria's letter, although Barbara asked Maria if she was still "seeing her", meaning Maria Balan, and Maria said no. Maria knew at that point Barbara had forgiven her.
- [134] According to Maria, Barbara wanted Maria to "come home" but also understood she could not leave Ramona. Barbara told Maria about Rufina's daughter Ruby and suggested they sponsor her as a caregiver for Ramona. The unwavering evidence of Rufina and Ruby corroborated Maria's evidence on this point. Rufina testified to discussing the plan with Barbara in December 2011 and again, with both her and Maria, during their visit to the Philippines in August 2013. Ruby testified that she met Barbara in December 2011. Barbara told her a friend or companion was looking for someone to care for her mother. Ruby wanted to go to Canada and had previous experience caring for the elderly in Singapore. Later, Ruby was asked to complete a massage therapy course in preparation for the job, which she did around the time of Barbara's death.
- [135] Maria testified that along with discussing the idea of sponsoring Rufina's daughter to care for Ramona, she and Barbara settled on an arrangement that involved Maria going back and forth between Grant Avenue and the Allouette Property, where Maria continued to receive her mail. The arrangement continued when Barbara moved downtown in September 2013.
- [136] Maria said she spent almost every weekend with Barbara at the Allouette Property and then every weekend excepting the one before she died, at the Hamilton Condo and the Cambie Condo. They also saw each other during the week sometimes. Maria cooked daily meals for Barbara, both before and after her move downtown, often preparing the food at Grant Avenue and delivering it to Barbara if they were not going to be together in the evening. I also accept Barbara may well have also done some of her own cooking from time to time, given she was retired, and other friends may have brought her special items occasionally.

- [137] Luisa gave evidence that Maria was never present when she would drop by the Allouette Property "spontaneously" at all different times from 2011 onward, which struck me as somewhat contrived and certainly overstated. While I do not doubt Maria may not have been there, given her full time job and the fact that she was also living at Grant Avenue, Barbara was not someone who would welcome many unplanned visits. Luisa's evidence about observing Maria and Ramona's bedrooms to be completely empty after Barbara had painted them, if true, is explained by the painting itself, if not, a plan to sell the property.
- [138] The evidence of Emmanuel and Ramona, which I accept, corroborated Maria's evidence about her splitting her time between Ramona and Barbara. Emmanuel testified Maria stayed with Barbara most weekends. Maria would arrange for him or his wife to look in on Ramona or stay overnight with her while Maria was gone. Maria was often with Barbara when Emmanuel and Ramona would call her. Ramona confirmed that things did not change after Barbara moved downtown in September 2013. Ramona testified Maria was always at "that condo of hers". Maria's regular presence at the Hamilton Condo and the Cambie Condo was confirmed to some extent by Esther. When she visited, she saw Maria's housecoat hanging in the bathroom and food she had prepared for Barbara in the fridge. Similarly, when Esther and the others visited with Maria and Barbara at her downtown residences in the evenings, Maria stayed with Barbara when they left.
- [139] I also accept Ramona's evidence she continued to see Barbara often after November 2010, until her death. Barbara had dinner at Grant Avenue regularly, Ramona visited the Allouette Property fairly frequently, and they also saw one another at many birthday and holiday celebrations involving both families. Both Ramona and Emmanuel were unaware of Maria's affair with Maria Balan. They continued to view Maria and Barbara as a couple. Esther, Roselle, Resurreccion and Rosario gave the same evidence.
- [140] In September 2012, at Barbara's request, Maria took a holiday from work while Barbara hosted a visit from some high school friends and acquaintances. One of those women, Imelda Santos had not known Barbara well while they were at school, and learned shortly before the visit that Barbara was gay. She testified it was clear Maria and Barbara were a couple and they spoke openly about their relationship in those terms. Maria stayed at the Allouette Property throughout the visit. She and Barbara together took the women on outings around the city.
- [141] The evidence of many witnesses including Maria, her family members and friends confirm that Barbara and Maria continued to celebrate their birthdays with one another, their families and their friends. They also continued to attend many family events together on both sides. Barbara and Ramona organized together a surprise birthday dinner for Maria at a Chinese restaurant in March 2012. Maria attended Barbara's family's annual Christmas event in 2012 and 2013. She organized an enormous surprise party for Barbara's 65th birthday. The same is true of Maria's 50th birthday party, which took place at the Allouette Property in the spring of 2013. While I accept that Luisa was largely responsible for organizing the event, this reflects Barbara's disposition more than anything. Carmencita

testified Barbara was not the type to plan a party for anyone. I do not view the evidence given by defence witnesses that Maria attended fewer of Barbara's family events from 2011 onward or that she and Barbara would arrive and leave separately as significant, given the uncontradicted evidence about the many, many events Maria did attend, the reality they did not live together full time after November 2010, and Ramona's increasing needs over time.

- [142] Barbara made a significant effort to recognize Maria's birthday in March 2014. Both Resurreccion and Maria testified Barbara gave her a new laptop as a gift. Resurreccion attended mass with Barbara that morning. After church, they dropped by Maria's office to surprise her. Maria received a phone call from Barbara's friend Carmen to wish her a happy birthday while Barbara and Resurreccion were at the office. Maria was not able to have dinner with Barbara that evening because Ramona was ill. Barbara arranged a surprise dinner for Maria the following evening with friends at La Bodega Restaurant. Afterwards, they all returned to the Cambie Condo and continued celebrating.
- [143] Regarding financial matters, Maria acknowledged that she had never declared Barbara to be her partner on her income tax returns. In addition to the joint Vancity account they had related to Carrigan Court, Barbara had access to Maria's bank account and monitored it for overspending. Barbara would alert Maria when her account was overdrawn and cover her, sometimes using funds from their joint account. Text messages exchanged between Barbara and Maria from July 2012 and January 2013, confirm they discussed precisely what Maria described on those occasions. Significantly, Maria and Barbara shared the SDB.
- [144] Maria was cross examined at some length about Barbara's decision to sell the Allouette Property and move downtown away from Coquitlam and Grant Avenue. Maria agreed she viewed the house and its proceeds as belonging to Barbara alone, but said they discussed the pros and cons of selling it several times. One of the considerations was the interest Barbara was paying on the line of credit related to the Hamilton Action. Barbara was retired. Peter testified that before she moved, he told her she was asset rich and cash poor. Further, Maria described living downtown as a dream of Barbara's.
- [145] When the Allouette Property sold quickly, Barbara became very anxious about finding a place to buy. Maria advised her to rent and take her time, which she did.
- [146] In August 2013, Barbara and Maria travelled to the Philippines to attend a wedding for one of Barbara's family members. Some of her sisters also made the trip. Barbara and Maria shared a room at a different hotel. She described their time together as particularly intimate because a typhoon forced them to stay indoors.
- [147] Maria had packed everything at the Allouette Property before they left, except Barbara's personal belongings. She described Barbara as highly organized and meticulous, if not particular and recalled her shredding documents before the move, which also required them to place many of their belongings for storage. Maria arranged for a storage locker in advance of the move. She recalled Barbara calling her, from the storage location, upset, on the day of the move, when she discovered the locker was not big enough. Maria told her to

rent another one.

- [148] Documents from the storage company indicate Barbara rented two additional units, signing the agreements on different dates around the time of the move. A document entitled "Tenant Information" identifies Maria as the emergency contact for one of the additional storage units and authorized her to enter it. There is no such document related to the third unit. Milagros suggested the move therefore involved Barbara and Maria dividing up their belongings to complete their separation, which Maria firmly denied. In my view, it is not reasonable to draw such an inference from the absence of an authorization regarding the third unit. Peter stated the storage facility would not allow him access to Barbara's storage lockers based on a copy of the will. Neither party ever sought an order from the court requiring the storage company to do so.
- [149] Maria did not disagree the Cambie Condo would have been rather small for them, although Barbara was starting to "downsize". Maria and Barbara discussed her selling some of the furniture they had in storage not long before she died. On April 11, 2014, in a text message to Barbara, Maria attached photographs and stated, "Here are pics that I have plus the ones I [texted] you last night. Maybe with these pics you may start contacting Consignment shops to get this [project] going" and then, "P.S. You should be selling the mattress and the bed separately".
- [150] Until her death, and although Maria worked full time and Barbara was retired, Barbara continued to rely upon Maria to take care of other various issues, such as preparing a written complaint to the landlord of the Hamilton Condo in October 2013, and to the building manager in March 2014, dealing with a tenant issue in early January 2014, and arranging for property insurance on Carrigan Court and the Cambie Condo.
- [151] Maria also helped Barbara with her condominium search, which involved looking at over 70 strata units before purchasing the Cambie Condo. Maria said she went with Barbara to view some of the properties and read the minutes regarding those units for her. Although Maria acknowledged Barbara did not seek her approval before making offers, text messages confirm and amplify Maria's evidence on this point. They indicate Barbara sought Maria's input and advice, told her about offers, sent her photos and discussed unit layouts.
- [152] On February 2, 2014, Maria texted Barbara after reviewing documents related to the Cambie Condo, including financial statements, suggesting she query particular issues such as parking. On February 3, 2014 Maria asked for an "update" on the "[C]ambie condo" and Barbara responded with, "No deal :(". The following day however, Barbara texted Maria, "I think I got the condo 821 [C]ambie". Barbara also told Maria not to tell anyone about the deal.
- [153] Not long before that, in January 2014, Barbara had signed a form cancelling a life insurance policy with HSBC which named Maria as a beneficiary that was put in place because of the line of credit on Carrigan Court related to the Hamilton Action. Maria said she was unaware she was the beneficiary, although she had asked Barbara, several years earlier, to ensure

she was not left with that debt. Maria suggested Barbara may have planned to pay off the line of credit with the proceeds from the Allouette Property, but simply did not get around to it before she died unexpectedly, which in my view, in light of all of the evidence, is certainly plausible.

- [154] I accept that in or about late 2013 or early 2014, Barbara told Maria she was concerned about her retirement savings running out and proposed they start a janitorial business together, suggesting Maria quit her job of 20 years. Barbara was aware one of the companies Maria managed provided janitorial services. Maria advised her they would need to buy cleaning contracts for commercial buildings or an existing business to make money. Barbara asked Maria to investigate. Maria said she made a few quick calls but not much more because of her busy schedule.
- [155] Maria's evidence on this point is corroborated by Resurreccion. She testified that while she and Barbara were driving to Maria's office on her birthday in March 2014, Barbara told her that she and Maria planned to start a janitorial business, and she wanted Maria to quit her job because it was too stressful for her. Esther said Barbara told her the same thing after the birthday dinner for Maria the following day. Emails Maria exchanged with a company called Facet Advisors Business Brokers Inc. in late January 2014, regarding a business listed for sale, also confirm her testimony to some extent. Although they do not specify the nature of the business being discussed, she did ask whether client contracts instead of the whole business could be purchased. Furthermore, on February 20, 2014, she sent an email to Barbara that reads, "Look at this, still have to call 3 companies in regards to this venture we're thinking, but am busy now, most probably tomorrow I call them".
- [156] In February 2014, Barbara also became ill with the flu or a bad cold. Maria took care of her as she always had, bringing her medicine, feeding her, as well as sponge bathing and massaging her, and applying ointment to her chest and back. Barbara also slipped and fell a couple of times while she was living at the Hamilton Condo. Not long before Barbara moved to the Cambie Condo, she called Maria at work after falling in the kitchen. Maria came with pain medication straight away. She described Barbara as barely able to walk, sit or lie down. Maria encouraged Barbara to see their family doctor, which she did. Because she was injured, Maria was almost entirely responsible for the move to the Cambie Condo. Although she attempted to minimize their significance, Carmen acknowledged Barbara had told her about most of these same circumstances.
- [157] Maria gave somewhat vague evidence about a conversation with Barbara that occurred during this time. According to Maria, Barbara said something to the effect of, "I need you now" and "I'm losing my balance", and she responded by telling Barbara she would start the paperwork, suggesting Barbara was asking her to move forward with the plan to sponsor Ruby. Although I am not prepared to make findings based on the discussion she described, I am satisfied that the goal of having Ruby care for Ramona was never abandoned and Barbara did tell both Maria and Esther she intended to sell the Cambie Condo shortly before she died, once she completed a further upgrade or renovation, because it had

increased in value.

- [158] Milagros made much of the fact that Maria did not have keys to Barbara's residences. I reject Carmencita's evidence that Maria told her Barbara had demanded she return the keys to the Allouette Property and that she was not allowed to visit unless invited. Maria testified she had a tendency to lose or misplace keys, including her own key to the SDB. The latter point was confirmed by Peter. I accept Maria accessed the Allouette Property with a garage door opener not a key and Barbara planned to give her a key to the Cambie Condo after she returned from her trip to Las Vegas.
- [159] Several defence witnesses testified about Barbara's involvement with Mahnaz, a young woman she met when flying back to Canada from Europe in October 2011. Maria was also on the flight and was aware Barbara spent some time with Mahnaz and other women from 2012 onward. Milagros and the other siblings described Barbara as having a "crush" on Mahnaz, based on her demeanour at times and references to a special friend, although she never mentioned anyone by name. Carmen testified that Barbara spoke many times of her interest in Mahnaz. Text messages between Barbara and Mahnaz certainly indicate they had some ongoing contact with one another. The tone and content of their communication is friendly but not sexual or even overtly romantic.
- [160] Although Maria denied that Barbara was dating other women and simply enjoyed spending time with young people, I formed the impression she felt somewhat vulnerable with Barbara. A text message she sent to Barbara while trying to reach her before her body was found, suggests this, along with the irrationality that comes with frantic desperation. It may well be that Barbara's interactions with Mahnaz were at least flirtatious. I am satisfied by the evidence as a whole, however, that the nature of the relationship between Maria and Barbara was not altered by her involvement with Mahnaz or anyone else. There is no suggestion Barbara had told her the relationship was over because of another woman. Barbara was prone to taking Maria for granted but not misleading her. On the contrary, she was direct and with Maria, if not blunt. I am also of the view that Maria would not have catered to Barbara's needs as much as she did if they were merely "friends with benefits" instead of partners. As noted in *J.J.G. v. K.M.A.*, 2009 BCSC 1056, "[t]he essential inquiry is the existence of a marriage-like relationship; not the quality of that relationship" (at para. 71, emphasis in the original).
- [161] Barbara died unexpectedly on April 14, 2014, which was a Monday. As I have indicated, Maria and Luisa's husband Rodin went to the lobby of her condominium on the morning of April 16, 2014, very concerned. Maria had been trying to reach her for two days. Maria spent the previous weekend preparing food for Barbara and Ramona because she was scheduled to fly to Las Vegas on Friday April 18, 2014, to visit a friend. Rodin had just finished a renovation at the Cambie Condo the week before. He told Maria he noticed Barbara's car was there but she was not responding to his attempts to reach her. Maria became extremely concerned when Barbara did not arrive at the ninth, last and most important night of a prayer vigil for Carmencita's mother-in-law on Tuesday, April 15, 2014,

which the two had planned to attend together.

- [162] Police entered the Cambie Condo on April 16, 2014, without Maria and Rodin. The coroner also attended. Later in the afternoon, Barbara's body was removed. By then, some of her siblings and other family members started to arrive. Emmanuel also came. The Cambie Condo became fairly crowded with people.
- [163] Milagros suggested Maria's behavior in response to Barbara's death was not that of a spouse and she never identified herself in this way, failing to acknowledge much of what Maria did do, and the reality she and Barbara had never been overt about the nature of their relationship around Barbara's family or, I expect, the church. Maria remembered telling the police she was Barbara's partner even though she was not treated as the next of kin.
- [164] There was much dispute about the particulars of who found the copy of Barbara's will, and where in the Cambie Condo, which I do not regard as significant. I am sure Maria was distraught and entirely overwhelmed and Barbara's siblings shocked and distressed by her unexpected death. Milagros described with some disdain Maria wearing Barbara's bath robe at one point and closing herself in Barbara's bedroom, precisely the sort of behaviour one would expect of a bereft partner.
- [165] Maria told family members while they were there that Barbara wished to use Burquitlam Funeral Services. A partially completed document found amongst her important documents confirmed this. Maria said she and Milagros later discussed who the pallbearers should be. She along with some of the siblings attended Burquitlam the next day. Maria recalled arriving late, as she often did, which had been a bone of contention for Barbara. Maria recalled Milagros saying Luisa's sons had been given Barbara's car and nobody responding. This evidence was not contradicted and is concerning.
- [166] It was Maria, along with Resurreccion and Esther, who cleaned the Cambie Condo after Barbara's death, removing the perishables from the fridge and taking out the garbage. Maria's love letter to Barbara from December 2011 was in plain view, indicating not only that she kept it, but it was there to be seen and read by those in the Cambie Condo after Barbara's death.
- [167] With the siblings' knowledge, Maria contacted the parish priest she and Barbara had, about conducting a funeral mass at another church. She paid for the funeral reception and refused to be reimbursed. She arranged for special cards called "stampitas" to be prepared for the service. Barbara was cremated. The siblings decided that Barbara's ashes would be taken to the plot where her parents were buried in the Philippines. Although they denied it, I accept Maria asked for some of Barbara's ashes and they simply ignored her request. As I have indicated, Maria held a celebration of life for Barbara in California, which Carmen attended, along with other friends and family members.

- [168] Maria began to notice Barbara's siblings treating her differently fairly soon after Barbara's death. Ramona described them as cold and distant with Maria. Carmencita stated she and her siblings were offended by a remark Maria made about being happy in relation to Barbara's death, which in my view, does not adequately account for their behaviour. In any event, Maria was not only hurt but very confused by the change until she learned about the terms of the will.
- [169] Based on the whole of the evidence and my assessment of credibility, I am satisfied Barbara's siblings did not concern themselves with the status of Barbara's relationship with Maria until after her death. I do not accept that before that time they actually believed the two had separated. They had continued to include Maria and interact with her in the same way they always had.
- [170] It is apparent that by the time Milagros and Maria spoke at the White Spot Restaurant in May 2014, Milagros was aware of not only the terms of the will and the memorandum, but also the legal significance of a spousal relationship in the event Barbara died intestacy. This would explain why Milagros asserted Maria and Barbara had separated, which I accept she did. Maria knew a copy of the will had been found but not what it said, and therefore asked Milagros whether or not Barbara had left her something, but Milagros revealed nothing. Their conversation deteriorated further. What Milagros described as Maria bashing her sister, was in all likelihood Maria trying to explain for the first time, while upset and bewildered, the complexities and difficulties involved in her relationship with Barbara.

Presumption of Revocation

- [171] Milagros argues Barbara destroyed the will for the purpose of revoking it, pursuant to s. 55(1)(c) of WESA, relying upon the common law presumption of revocation.
- [172] To summarize, where the original will was in the testator's possession but cannot be found after her death, the presumption of revocation imposes the burden of proof on the party seeking to rely on a copy. The presumption is rebutted by evidence establishing on a balance of probabilities that the testator inadvertently lost or misplaced the original.
- [173] Maria does not dispute that Barbara was in possession of the original before she died. She also does not challenge the adequacy of the search conducted by Peter, although the storage lockers containing some of Barbara's belongings were never searched. It appears Maria accepts the original will and memorandum were unlikely to be found there. She suggests however, the evidence relevant to the Haider factors is sufficient to rebut the presumption.
- [174] I disagree. Given the unequivocal evidence regarding Barbara's meticulous if not fastidious approach to caring for her personal effects, it is unlikely she would have lost or misplaced the original will. Maria and others testified that Barbara was a tidy, highly organized person who kept careful track of her documents. Almost all of her important documents were neatly arranged in a box found at the Cambie Condo. The others, she had placed in the SDB. Maria also gave evidence that Barbara shredded documents from time to time, and did so

when she was preparing to move from the Allouette Property.

- [175] At the same time, however, I do not accept that Barbara destroyed the original will for the purpose of removing Maria as the sole beneficiary of her estate.
- [176] For the reasons that follow, I have determined that Maria and Barbara were in a marriage-like relationship for more than two years before her death. In light of the surrounding circumstances, Barbara probably intended to update the will given the sale of the Allouette Property and the purchase of the Cambie Condo. Although those transactions do not contradict the terms of the will, she may well have viewed it as out of date as a result. The timing of her last visit to the SDB in July 2013, suggests this; and her decision to keep a copy of the will and the memorandum in a place where they were certain to be found rather than destroy them, otherwise makes little sense. Clearly she wanted Maria and others to know what her wishes were. Significantly, Barbara died unexpectedly, in the midst of a very busy period in her life. She had moved twice in six months and, I accept, had discussed a plan to move again once she had completed a further renovation to the Cambie Condo. She had just started to sort through various belongings that were in storage.

Marriage-Like Relationship

- [177] In determining that Maria and Barbara had a marriage-like relationship for more than two years before her death, I have applied the legal principles discussed above, guided by the flexible approach articulated in J.J.G.:
- [37] the court must examine the relationship as a whole and consider all the various objective criteria referred to in the authorities. The presence or absence of one particular factor will not be determinative. The court must recognize that each relationship is unique and, in applying a flexible approach within the context of the particular relationship, make a determination as to whether the parties intended to and were living in a marriage-like relationship.
- [178] The same sex nature of Barbara and Maria's relationship is an important consideration in applying the flexible approach. It is only in recent years that same sex couples have been legally permitted to marry in Canada. Unfortunately, discrimination against those with a same sex orientation was, and remains, a reality in our society.
- [179] Barbara's ongoing involvement with the Catholic church also forms a significant part of the context. Barbara attended mass regularly if not every day. Many family events were religious occasions, including Christmas celebrations, baptisms, weddings, funerals, as well as prayer vigils. Both Milagros and Luisa who emphasized the depth of their faith and Barbara's seemed unaware of the potentially painful impact of Catholic doctrine, as they described it, for her. At the same time, they also portrayed themselves as tolerant, and there is no evidence about whether or not Barbara struggled to reconcile her sexuality and her religion. What is clear however, is she was never overt about her sexual identity or the nature of the relationship she shared with Maria with her siblings, demonstrating, if

nothing else, the need for sensitivity in assessing the relationship as a whole and weighing the significance of various objective criteria.

- [180] I have already found that Maria and Barbara were a couple, by which I mean spouses, from sometime after they started living together in Vienna in 1985, until in or about 2000, when Maria told Barbara she wanted to try and have a relationship with a man and became involved with Mr. Payne. Until then, the relationship between Maria and Barbara actually included many of the objective components or factors identified in Molodowich. Maria and Barbara resided together full time, shared a bedroom and were sexually intimate. In 1996, they bought a home together, which they owned as joint tenants. They contributed equally to shared expenses, took holidays, attended family gatherings together, and socialized as a couple with friends.
- [181] The fact Maria and Barbara kept their finances mostly separate does not detract from the marriage-like nature of their relationship. Many married spouses maintain separate bank accounts and investments. It is also understandable Maria and, I assume, Barbara did not declare themselves to be in a common law relationship on their income tax documents, in part, given their same sex relationship.
- [182] Maria acknowledged she and Barbara were not a couple again until after the death of Mr. Hamilton, in November 2004.
- [183] I have found that from 2005 until late 2010, the two women resumed and carried on a marriage-like relationship. Although they were not sexually intimate, they lived together full time at the Allouette Property and shared a bed. Maria was again responsible for the cooking and most of the housework. The Hamilton Action exposed or highlighted an inequality in their relationship. I accept Barbara had many positive qualities, but she was a demanding partner. After the Hamilton Action began, Barbara became increasingly difficult and preoccupied with her own needs.
- [184] As I have already indicated, the spousal relationship endured a serious crisis from late November 2010 until in or about January 2012. Barbara struggled with the betrayal of Maria's affair and her own desire to carry on the relationship as it was. Maria tried to shift the power dynamic between them. She wanted Barbara to recognize the impact of her difficult behaviour and Maria's emotional needs. Maria stayed for the most part at Grant Avenue, although her belongings remained at the Allouette Property. They continued to present themselves to their families and friends here as a couple. In July 2011, Barbara executed a will giving Maria the whole of her estate and the proceeds of other assets through the memorandum, demonstrating clearly, the ongoing importance of their relationship during that difficult period.
- [185] In September and October 2011, Maria and Barbara spent three weeks in Europe and resumed their sexual relationship. No doubt Barbara found Maria's contact with Maria Balan after that, hurtful and confusing. I accept that Barbara lashed out in anger and threatened Maria with infidelity. She may well have told Carmen that she was ending things

with Maria and was interested in Mahnaz. I do not accept, however, that Barbara ever actually ended the relationship or told Carmen she was happy for having done so. I have found that when the crises ended in early 2012, Maria began to split her time between Barbara and Ramona. Apart from that, the partnership remained largely the same.

- [186] As I have said, they continued to travel together and spent time with local friends as a couple, and attended many, if not most, events involving each of their families. Significantly, Maria continued to cater to Barbara's needs. In addition to cooking and cleaning for her, she was responsible for resolving or helping Barbara with a range of administrative and personal issues. Barbara had proposed a plan for their future that involved running a business together and hiring a caregiver for Ramona.
- [187] Many of Milagros's submissions about the nature of the relationship between Barbara and Maria depend upon a view of the facts I have rejected. They also rely upon the Molodowich factors as a checklist.
- [188] Milagros emphasized the fact that Maria and Barbara no longer lived together full time, and Barbara's move downtown, in support of her argument Barbara and Maria were close friends, not spouses at the time of her death.
- [189] As Justice Kent observed in Connor Estate, 2017 BCSC 978, the fact that two people do not live together "under the same roof" or have joint finances might, without more, militate against a finding of a marriage-like relationship. But here, there was so much more. I have accepted Maria's role in caring for Ramona explains why she lived with Barbara only part time. The evidence of their lifestyle, their interactions, and their expectations of one another establish their intention to remain together for the long term, or an "indeterminate duration", as partners. I am entirely satisfied that Barbara and Maria had a relationship that was very much spousal in its nature.
- [190] I conclude therefore and declare that Maria is Barbara's surviving spouse within the meaning of s. 2 of WESA. I also grant an order appointing Maria as the administrator of Barbara's estate.
- [191] In the event they cannot agree, the parties are at liberty to schedule a hearing before me with respect to the issue of costs.

"Fleming J."

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