
CANADA / JUDGMENT

Somodi v. Szabados

2007 BCSC 857

COURT

Supreme Court of British Columbia

DECIDED

14 June 2007

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2007 BCSC 857 Somodi v. Szabados

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Somodi v. Szabados,

2007 BCSC 857

Date: 20070614

Docket: L021066

Registry: Vancouver

Between:

Istvan Somodi

Plaintiff

And

Zoltan Szabados, Executor of the Estate of

Margit Kolvek, Deceased and the said

Zoltan Szabados

Defendants

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the plaintiff

H. Low

E. Sigurdson A/S

Counsel for the defendants

A.E. Thiele

Date and Place of Trial/Hearing:

March 9, 2007

Vancouver, B.C.

INTRODUCTION

- [1] In this action, the plaintiff, Istvan Somodi seeks remedies against the estate of the deceased, Margit Kolvek, and against her son, the executor, Zoltan Szabados, on the basis that although he was in a common-law relationship with the deceased from 1964 until her death on November 20, 1999, and although he made ongoing contributions to her estate, he received nothing from her will.
- [2] Mr. Somodi seeks a variation of the deceased's will in his favour pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 ("WVA"), or in the alternative, that the assets of the estate be impressed with a resulting or constructive trust in his favour, or in the further alternative that compensation for his contributions to the estate be ordered on the basis of quantum meruit.
- [3] The defendants contest the plaintiff's entitlement to any of the relief he is seeking, denying that he had a common-law relationship with the deceased, and denying that he made any substantial contributions to the estate. The defendants contend that any contributions the plaintiff did make to the estate have been amply compensated for already. The defendants also contend that any remedy under the WVA is barred, either because the WVA in force on the date of the deceased's death did not apply to common-law relationships, or because the limitation period for such an action had expired before the action was commenced.
- [4] It is within that context that the plaintiff and the defendants have each brought applications for judgment under Rule 18A: each party asserts that despite the conflicting evidence on the issue of the nature of the plaintiff's relationship to the deceased, and the nature and extent of his contributions to her estate, I can resolve the contradictions favourably to their respective positions.
- [5] The plaintiff's position is that if I am unable to resolve the issues in his favour, the proper order is to remit the matter to trial. The defendants say that I should resolve the contested factual issues in their favour, but if I am unable to do so, the matter should nevertheless be resolved pursuant to Rule 18A.
- [6] The defendant's notice of motion seeks an order that the plaintiff's action as set out in his Writ of Summons and Statement of Claim filed May 9, 2002, be dismissed, and costs.

- [7] In his notice of motion, the plaintiff seeks the following relief:
1. a declaration that the plaintiff, Istvan Somodi, was the common-law spouse of the deceased, Margit Kolvek within the meaning of s. 2 of the WVA;
 2. a declaration that the Last Will and Testament of the Deceased, Margit Kolvek, dated April 18, 1978, failed to make adequate provision for the proper maintenance and support for the plaintiff;
 3. an order that an award be made under s. 2 of the WVA to vary the Last Will and Testament of Margit Kolvek, deceased, dated April 18, 1978, in favour of the plaintiff;
 4. an order that an award be made under s. 2 of the WVA for such provision as this court thinks adequate, just and equitable in the circumstances from the estate of Margit Kolvek, deceased, in favour of the plaintiff for the benefit of the plaintiff; and
 5. costs of the application against the defendant, Zolton Szabados, Executor of the Estate of Margit Kolvek, deceased.
- [8] The plaintiff does not seek, in his application under Rule 18A, an order that entitlement to the assets of the estate are impressed with a trust in his favour by way of constructive or resulting trusts, or an order for compensation for his contributions to the estate by way of quantum meruit.

BACKGROUND

- [9] Each of the parties has filed significant affidavit evidence in support of their respective positions: the plaintiff has filed 10 affidavits; the defendants have filed 9.
- [10] The affidavit evidence of the plaintiff establishes that he is 84 years old. Since the writ and statement of claim was filed on April 5, 2002, he has been declared incapable of managing his own affairs and on April 21, 2006, the Public Guardian and Trustee ("PGT") was appointed committee of the plaintiff's estate, pursuant to a certificate of incapacity, and now represents the plaintiff in this action pursuant to Rule 6(6). The plaintiff presently resides at Amhurst Private Hospital in Vancouver, a residential care facility. His old age pension and CPP monthly income amount to approximately \$1,200 per month.
- [11] As of the deceased's death in November 1999, the plaintiff and the deceased lived in the premises at 1747 E. 8th Avenue in Vancouver. The plaintiff continued living there until February 6, 2006, when he became incapacitated following a fall in which he broke his hip. It was after that that he was moved to Amhurst Private Hospital.
- [12] The will at issue was executed by the deceased on April 18, 1978 (the "Will"). It named the defendant, Zolton Szabados, the deceased's son, as the executor and sole beneficiary. Mr. Szabados was granted probate of the Will on January 25, 2000. As of probate, the house located at 1747 E. 8th Avenue valued at \$295,000 (1999 Assessment), \$394.62 savings, a \$3,000 Ford Escort motor vehicle, and household goods without value, were identified as the

deceased's assets. Liabilities consisted of a United Civic Savings Credit Union mortgage loan of \$77,792.19, and a loan of \$2,910.

- [13] On March 2, 2000 title to the premises was transferred to Mr. Szabados.
- [14] The deceased purchased the property in 1963 and the plaintiff asserts that for much of the 35 years between 1964 and the deceased's death in 1999, he and she lived together in a common-law relationship and he made substantial contributions to the home. The defendants assert that the relationship was no more than that of a landlord and tenant and the plaintiff has been amply compensated for any contributions he made towards the maintenance of the house.

THE PLAINTIFF'S EVIDENCE

- [15] During the time the plaintiff and deceased occupied the home, it was divided into suites and rented to various tenants. The evidence relied on by the plaintiff consists, in part, of the affidavits of former tenants of the home who describe the interactions and living arrangements between the deceased and the plaintiff, as well as the evidence of the plaintiff, and friends of the plaintiff and the deceased, attesting to their observations and understanding of the relationship over the years.
- [16] In particular, Stephen Kennedy, a tenant of the house between 1996 and 1999, attested that throughout his time at the house, the plaintiff and deceased "acted towards each other in my presence as though they were married". When he viewed the house before taking a suite, it was the plaintiff who "showed him around, explained everything to [him]", and it was the deceased who "took care of the business end". The plaintiff and the deceased occupied the downstairs area of the house throughout Mr. Kennedy's stay and he saw them doing things together "numerous times". He saw the plaintiff drive the deceased on outings and to do chores such as shopping. He often saw them in their section of the house having coffee at the kitchen table or watching television in the living room. He had dinner with them on "a couple of occasions" when the plaintiff did the cooking and cleaning while the deceased "basically told him what to do". Mr. Kennedy deposed in paragraph 7 of his affidavit as follows:

That overall from what I observed they treated each other with the kindness, affection and familiarity that from a Canadian perspective was characteristic of a couple relationship. I just took it for granted that they were a couple. There was nothing to lead me to believe otherwise. The impression I had lasted the whole three years that I lived there and nothing occurred that would diminish or change that impression. During the whole three years I lived in the House I do not recall an extended period of time that Steve and Margit were apart. It was interesting to me that Steve tended to do all of the things around the house, ie. cooking and cleaning while Margit did a lot of the handiwork. They both worked in the yard and kept it tidy. All in all, they provided a very pleasant and neat environment for me to live in.

- [17] Mr. Kennedy attested that he has no interest in the outcome of the litigation.
- [18] Robert Dolman was a tenant between 1996 and 1998 and he attested to substantially the same observations as Mr. Kennedy, noting that: "As far as I could tell [the plaintiff] did 90% of the cooking and most of the cleaning, laundry and yard work". Mr. Dolman further deposed that the deceased told him that when the house burned down in the early 1990's, the plaintiff left his job in construction where he was working out of town, and came back to rebuild the house, and when he was working out of town for an extended period, he would send his pay cheque to the deceased. Mr. Dolman attested that the plaintiff and deceased showed him a tree they planted when they first moved into the house about 40 years before. He deposed that the plaintiff did more and more for the deceased "towards the end", as she became "virtually helpless".
- [19] Edit Sarkadi was a friend of the plaintiff, and of the deceased who had been a "long time friend of [Ms. Sarkadi's] mother". Edit Sarkadi lived with the plaintiff and deceased for a few weeks in June 1990 when she first came to Canada and "observed Istvan and Margit living together in a common-law relationship". She too attested she was told by the deceased that the plaintiff and a friend rebuilt the house when it was destroyed by fire in 1992 or 1993.
- [20] Ms. Sarkadi moved back into the house in 1997 for about a year and "observed [the plaintiff and the deceased] living together in the home and their relationship was very much the same as it was in the early 1990's." She deposed that the plaintiff contributed money for groceries for both of them and drove the deceased to appointments, etc. Ms. Sarkadi recalled the deceased often talked about her relationship with the plaintiff.
- [21] Sandor Nanasi described himself as a long time friend of the plaintiff and also a friend of the deceased. He first met them in the late 1970's when "they were living together in a home located at 1747 E. 8th". He attested he "never had any reason to doubt that they were a couple" in the "more than 20 years that he observed them together". He deposed in paragraph 8 as follows:

I recall that in the late 1990s Margit started to suffer from fatigue. She was extremely tired and at some point she became ill. During these years, I continued to visit the House regularly and it was Istvan who provided constant care to Margit. Istvan attended to Margit's every need. He also did all the cooking, cleaning and running of the House. I also recall that during this same period Margit was in and out of Vancouver General hospital. I visited Margit in the hospital and each time that I did, Istvan was sitting by Margit's side. Istvan remained faithful and devoted to Margit until the day she died.

- [22] Tony Hun described himself as a friend of the plaintiff who visited the house during the late 1980's at least 7 or 8 times to play cards with the deceased and others. It was his understanding that the plaintiff and deceased were living together as husband and wife.

[23] In an affidavit sworn November 10, 2006, Tova Kornfeld, the plaintiff's former counsel, deposed that she took instructions from him in April 2002 through her father who spoke Hungarian. According to Ms. Kornfeld, the plaintiff informed her of facts substantially more supportive of the plaintiff's contention of a common law relationship than evidence he gave at an examination for discovery. Ms. Kornfeld's evidence was not tendered as proof of its truth, but rather to address the issue of the plaintiff's capacity at his examination for discovery.

THE DEFENDANTS' EVIDENCE

[24] The defendants' opposition to the plaintiff's assertion that he lived in a lengthy common-law relationship with the deceased, rests in part on a number of affidavits sworn by family members reflecting their observations of the relationship between the plaintiff and the deceased, on the deceased's apparent characterization of the relationship, as well as on certain facts and documents evidencing the plaintiff and the deceased's apparent respective contemporaneous states of mind in relation to the nature and extent of their relationship. The defendants also relied on certain answers to questions posed to the plaintiff at his examination for discovery held on May 19, 2004.

[25] In particular, the defendants relied on the following questions and answers from the examination for discovery:

Q Mr. Somodi, you will agree with me that every year that you filed income tax returns, on the returns that your counsel has now provided to me you described yourself as single?

Ms. Kornfeld: He has to look at them. He hasn't seen them yet.

Ms. Thiele: Yes. Well, that has to be translated. All right.

A Yes, because that's - that's what she wanted. She meaning Margit Kolvek.

Q And why did she want that, according to you?

The Witness: Because she never - never say nothing nobody.

Ms. Kornfeld: Answer that in - answer that in Magyar, please.

A Nothing else.

Ms. Kornfeld: Could you ask it to him again.

A I was a kind of small friend for her. That's how she treated me.

Ms. Thiele:

Q Sorry. Did you say the word "small friend"

The Witness: Yeah.

Q What do you mean by small friend?

A Nothing else. I just gave her money and I was her friend, ah, just for the money. She was lucky to get that house because the house had belonged to her female friend.

The Witness: And she want -

Ms. Kornfeld: Magyar. Magyar rule.

The Witness: Irma got married Richard Meier.

A Irma got married and paid the rent. She gave the money to Margit Kolvek for the rent and for the payments regarding the house so that she can keep the house.

The Witness: Yeah. Yeah.

A Yes, that's it.

Q Did you consider that you - your relationship with Mrs. Kolvek was like man and wife although not formally married?

A She kept everything as a secret. She didn't want anybody else to know about it.

Q Did you consider you were living with Mrs. Kolvek like a man and wife although not formally married?

A That's how I - that's how I considered it. But she didn't. She wanted to keep this as a secret. She didn't want anybody else to know about it.

Q Did she ever tell you that she considered you like her husband?

A Never. Never. She wanted to keep this as a - she wanted to keep this confidential.

Q But did she ever tell you that she considered you to be like her husband?

A No, never.

Q Did she ever in public where other people could see kiss you?

A No, never.

Q Did she ever in public when others could hear call you - use endearments? Call you sweetheart or honey?

A No. She always addressed me by my name.

Q Did she ever tell you she loved you?

A No.

Q Did you ever tell her you loved her?

The Witness: Yeah.

A that's what she took advantage of, that I was a fool for her.

Interpreter: Crazy for her, sorry.

Q And what did she say when you told her you loved her?

A Nothing. She was just laughing at me and she didn't say anything.

Q Did you ever tell anyone that you were living as man and wife although not formally married with Mrs. Kolvek prior to her death?

A No. No, I didn't dare to say so because she wanted to keep this confidential.

Q Do you know whether she ever told anyone that she was living with you as man and wife although not formally married?

A No, never. She always wanted to keep this confidential and she didn't want anybody to know that I belonged to her.

Q Did you ever tell anybody you were having sex with her?

A I didn't tell anybody because -

The Witness: - nobody's business. I don't need to tell somebody I was living her.

Q Do you know if anybody else at all ever knew that you were having sex with Mrs. Kolvek?

A Nobody. Because - because this is not the business of any other people.

Q But you were living in a house that had other tenants. Do you know whether any of the other tenants ever knew that you were spending the night in her bedroom?

A No, nobody.

Q Do you know if Mrs. Kolvek ever told her doctor that you were having sex?

A I - I'm not aware of that.

Q Do you know whether Mrs. Kolvek was having sex with anybody else while she was also having sex with you?

A Could you repeat the question, please.

Q Sure. Do you know whether Mrs. Kolvek was having sex with anybody else in the same time period where she was also having sex with you?

A I don't know anything about that.

Q Were you always faithful to Mrs. Kolvek during the time period you knew her?

Ms. Kornfeld: You had better -

Ms. Thiele:

Q Were you always - sorry. Did you ever have sex with any other person during the time period in which you were having sex with Mrs. Kolvek?

A With nobody else never.

Q Does he recall when he first had sexual intercourse with Mrs. Kolvek?

The Witness: 1960. Only small bedroom and two feet wide wood bench there, and she sleep that old bench. No bed. And I sleep with her for that bench.

Q Prior -

The Witness: We slept on this small bed on the bench, both of us.

Q Did you have any dates with Mrs. Kolvek? By that I mean going out to dinner or doing the traditional things one might do on a date.

A Never. Never. I accompanied her to bingo because she went to bingo every - every night.

The Witness: Every night. And when she take me with her -

Ms. Kornfeld: Magyar rule.

The Witness: She took me to bingo.

A And I also won the jackpot, \$2,000.

The Witness: And I gave it to her.

A And I gave her the whole amount of money, the \$2,000. And I never saw a penny back.

Ms. Thiele:

Q Did that happen more than once?

A Many times.

Q Did you have any romantic excursions together? That is like dates other than going to bingo?

A Nothing. Nothing. Never.

Q When you had sex, did you ask her or did she ask you?

A Ah, I took the initiative. I wanted all the time. She never wanted.

Q Is it fair to say that often she refused you?

A It happened. This happened too.

Q Were you ever invited to share her bed and simply cuddle or sleep and not have intercourse?

A No, because she never wanted me.

Q Did you ever give Mrs. Kolvek any cards or letters indicating a romantic or intimate relationship between you?

A No, never.

Q Did she ever give you anything in writing indicating a fondness or romantic relationship with you?

A No, nothing. Nothing.

Q Did you give her any birthday or Christmas gifts?

A No, nothing.

Q Did she give you any birthday or Christmas gifts?

A No, nothing.

Q Did she invite you to come with her to any special family events as her date in the period that you lived in her house?

A No.

Q Did you ever say to Mrs. Kolvek before she died: I think you haven't been fair to me. Are you going to take care of me when you die?

A No.

Q Did you ever ask Mrs. Kolvek how she had arranged her affairs upon her death?

A No.

Q Did Mrs. Kolvek ever say to you: I will take care of you when I die?

A Never.

Q And how long did that take you?

A Good six weeks I guess to finish with the house, with frames.

Q You said it took you six weeks to do this work?

Ms. Kornfeld: He said to finish the framing for the house. He said that.

The Witness: After - after the gyprock guy, he finish with the gyprock inside the house.

Ms. Thiele:

Q How many weeks in total did you work at this particular project?

A I don't know that exactly.

Q Can you give an estimate?

A Eight weeks or seven weeks.

Q Would it be possible more than two months? Eight weeks?

Q How long did it take you to build the cover for the sundeck?

The Witness: A couple of days I finish with all joists. So she can, again, nail it together, a whole thing. And she think after cut it off, tear it down.

Q Is there anything else that you can remember in terms of large projects at the house?

The Witness: I only put - only for big job on the concrete around the house. I put the concrete form and put up the - finishing the concrete - all around the house and the backyard.

Q And how long did that take you?

A A couple of days of framing. I finish all around and the backyard and put the concrete in and started the concrete. Finishing the concrete like pour the concrete. He bring the concrete and finishing the concrete, the concrete guy.

Q Sorry. Do I understand you that somebody else came in and finished it?

The Witness: Certainly concrete guy. He coming and pour the concrete and he finishing the concrete.

Q So you built the frames to put the concrete in?

Ms. Kornfeld: Forms.

Ms. Thiele:

Q Forms?

The Witness: Yeah, the forms. The concrete guy bring the concrete and he finishing the concrete, put on concrete and finish the concrete.

Q Does that picture show what you mean by the concrete?

The Witness: No. No, I don't know.

Ms. Kornfeld: Which concrete do you mean?

The Witness: Outside. The concrete all around the house on outside, the concrete.

Ms. Kornfeld: Well, in -

The Witness: The backyard.

Ms. Thiele: That's - that looks to me like concrete in the backyard. Here. Let's try this one. It looks like the same place at a different angle.

Q All right. And how long did it take you to make the frames?

Ms. Kornfeld: Forms.

Ms. Thiele: Forms, sorry.

The Witness: Couple days.

A It took two days.

Q He took two days?

A It took two days.

[26] The affidavits relied on by the defendants consist of three of Mr. Szabados' own (August 14, 2006, November 7, 2006, and February 22, 2007), one from his son, Mike Szabados, sworn October 27, 2006, one from his son Zoltan Szabados Jr., ("Zoltan Jr.") sworn November 10, 2006, one from his step-daughter, Virginia Antilla, sworn November 2, 2006, and one from Zoltan Jr.'s wife, Janine Szabados, dated November 10, 2006. There was also a notarized statement from Wendy Warner, a friend of a deceased daughter of Mr. Szabados named Barbara.

[27] To a significant extent, the affidavits relied on by the defendants reflect how the deceased presented the plaintiff to her family members.

[28] In his first affidavit Mr. Szabados deposed that when his mother bought the home in 1963, the plaintiff was already a tenant. He described the plaintiff as a friend who helped the deceased in the latter years of her life. Mike Szabados swore that in 1983, when he was about 14, he would travel to Vancouver from Pender Harbour, where he lived with his family, to see movies and stay with the deceased. He deposed the plaintiff lived in a suite upstairs while he stayed with the deceased in the downstairs suite. When he invited the deceased to his high school graduation in 1987, he asked if she would bring the plaintiff. According to Mike Szabados, she responded to the effect "no, he is just a renter". Mike Szabados lived with his grandmother from 1988 to 1993 and for the first two years, he "shared the downstairs space with [his] sister Barbara, her friend Wendy [Warner] and [his] grandmother, [while] the plaintiff lived upstairs."

[29] When the house was burned, the deceased gave the tenants including the plaintiff, \$1,000 to find other places to live. Mike Szabados deposed that the plaintiff ended up moving in with him and the deceased in rental accommodations, but each had his and her own bedrooms. He attested that he did not see the plaintiff doing any home maintenance or cleaning. He deposed that he lived with the deceased again between May and December of 1995 part-time on Tuesday and Thursday nights while Edit Sarkadi was living there. He deposed that Edit assisted with the cooking and the cleaning and assisted in painting the inside of the house.

[30] He attested that the plaintiff did not attend family functions. He further deposed that he "was amused at how indignant [the deceased] would become at the suggestion that he was anything more than a renter."

- [31] Mike Szabados "believed" that the plaintiff and the deceased shared expenses to save money and share chores "from time to time". He saw no indications of affection between the plaintiff and the deceased.
- [32] Ms. Antilla attested that the deceased was a "courageous, strong-willed woman" who told her after her divorce that she was "determined to live without a husband."
- [33] Ms. Antilla saw the plaintiff and the deceased together in 1992 when the plaintiff drove the deceased to visit Mr. Szabados. She described the plaintiff as "a greasy looking older man, smoking" and the deceased as "a study in contrast". She asked if the plaintiff was the deceased's boyfriend. The deceased "was horrified and replied he was only a tenant a welfare case who spent his days watching television."
- [34] Zoltan Jr. deposed that he lived with his grandmother between 1976 and 1980 during which time the plaintiff lived in his suite upstairs with three other tenants. Occasionally the deceased would take extra food upstairs to the plaintiff. The plaintiff paid rent for his room. It was his opinion that the deceased did not want the plaintiff to move in to the rental accommodations that she moved to when the house burned down. In the new house, she planned for a separate bedroom and bathroom for the plaintiff upstairs and "said to [Zoltan Jr.] that she didn't want [the plaintiff] around her anymore." He deposed that he was aware the plaintiff played cards and watched television with the deceased "as the only television was on the main floor". He was also aware that the plaintiff drove the deceased to do errands and for other reasons.
- [35] Zoltan Jr.'s wife, Janine Szabados, deposed that when she and Zoltan Jr. visited the deceased, the plaintiff was never present and would be upstairs in his room. He did not attend her wedding to Zoltan Jr. "even though we sent him an invitation" as the deceased said he "was just a tenant" and would not let him come to the wedding. She did not see the plaintiff present at any family gatherings or in any family pictures where everyone was together.
- [36] In her notarized statement, Wendy Warner indicated that she lived in the house with her friend, Mr. Szabados' now deceased daughter, Barbara Szabados, from September 1987 to November 1988 and saw no sign that the plaintiff was in a common-law relationship with the deceased. She described it as "nothing but a friendship because of the shared nationality". Wendy Warner was present while the deceased was in Europe in 1988 and her friend Barbara Szabados renovated the house. Many people were involved, but not the plaintiff. The deceased was not happy with the renovations when she returned from Europe and told Barbara she would have to share the upstairs facilities with the plaintiff because "she was not going to have him coming downstairs to her suite."

[37] Mr. Szabados appended to his February 22, 2007, affidavit, a statement dated May 6, 2002, written by his now deceased daughter, Barbara. In it, she said "I think grandma had an odd relationship with Steve (the plaintiff). I don't know how they met or what form their relationship took when they first met each other. I think she tolerated him more than anything. I'm sure that over the years they developed some sort of relationship. They were certainly never married. They did not have a common-law relationship."

[38] In a statement dated March 19, 1989, made in relation to the renovations which she carried out at her grandmother's house while her grandmother was in Europe, Barbara Szabados wrote as follows:

My Grandmother had a bedroom downstairs as well. Her boyfriend lived upstairs in a bachelor suite of his own and she spent the majority of her time with him in this suite. She used the bedroom downstairs for resting or for time away from her boyfriend. She did not use the cooking facilities downstairs at that time, she and her boyfriend used his kitchen upstairs.

[39] Barbara Szabados also stated in that statement:

The [plaintiff's] money was to go into a bank account to pay for property taxes on the home and her car insurance and money she may need to be sent to Europe.

[40] In his second affidavit, the defendant, Mr. Szabados deposed that "over the years there have been numerous family celebrations including Christmas, Easter and family weddings" which the plaintiff did not attend. He did not witness the plaintiff or the deceased ever to exchange gifts. He deposed that he did not see the plaintiff visit the deceased in the hospital "or show any interest in the funeral arrangements".

[41] Mr. Szabados deposed that his mother's attitude towards the plaintiff was that of tenant and friend, but not in any way as a common-law, husband, or boyfriend.

[42] In his third affidavit, the defendant deposed that a trial set for June 7th, 2004, was adjourned on the basis of discussions at a pre-trial conference held May 21, 2004, and his "understanding of what our agreement was". As to that understanding, he deposed at paragraph 14 as follows:

At paragraph 12 of Ms. Kornfeld's Affidavit, she states "nothing was ever formalized in writing" regarding our Agreement. I had agreed to allow the Plaintiff to continue to reside in my mother's house until he was no longer able to do so, and I agreed that he could keep the rents for his own income. That was the entirety of our agreement, and I fulfilled that agreement. There was never a suggestion that I would pay out the Plaintiff when he left the home due to no fault of my own, and it is my opinion that if that was a term of our agreement, Ms. Kornfeld would have been certain to get that in writing, either in a written agreement or in a letter to my counsel.

- [43] Mr. Szabados attested that he was "surprised" when in July of 2006 he received a letter from the plaintiff's then counsel requesting he pay a substantial sum to the plaintiff because he understood there was an agreement reached in July 2004, of which, he upheld his part. He attested that he would have proceeded with the trial had he believed that there was no final agreement reached.
- [44] In general opposition to the plaintiff's claim, Mr. Szabados attested that the plaintiff "did assist Bill Lucas in doing some of the rebuilding" after the house was burned in 1992. His mother paid Mr. Lucas and it would have been Mr. Lucas' responsibility to pay the plaintiff. He attested that the plaintiff and deceased did not share a room and did not "even stay the night in each other's room".
- [45] The defendant attested his mother was "well educated and very strong willed" and the plaintiff was "the last person she needed to cater to her needs". He deposed that his mother described herself as widowed, rather than common-law on her tax returns and the plaintiff described himself as single on his tax returns, according to his evidence at his examination for discovery.
- [46] The plaintiff did not help with significant renovations to the home which the defendant undertook in 1997, or which his daughter Barbara undertook in 1987. The defendant deposed that the plaintiff was "uninterested" in designing new plans for the home in 1992 after it burned down. He attested after rebuilding, the "plaintiff was terrified of fire and insisted on living on the ground floor." The deceased "reluctantly agreed" and he and she lived in separate rooms on the same floor. The defendant deposed that the deceased continuously charged the plaintiff rent.

EVENTS AFTER MARGIT KOLVEK'S DEATH

- [47] After the deceased died, the plaintiff remained in the house. Mr. Szabados transferred the Ford Escort into the plaintiff's name on February 25, 2000. He made attempts to persuade the plaintiff to leave the house so that he could sell it, offering several possible alternatives, including buying a condominium to rent to the plaintiff, having the plaintiff move in with Mr. Szabados's son, or renting a home to him near Mr. Szabados's own home in Pender Harbour.
- [48] The plaintiff continued to pay rent and collect and remit rental payments from the other tenants to Mr. Szabados until April 2002 when he commenced this litigation. As a result, the defendant caused notices of eviction to be served on all the tenants including the plaintiff. In August of 2002, an agreement was reached whereby the plaintiff would pay his rent and arrears of rent through his then counsel and Mr. Szabados would collect the other rents directly from the tenants. The plaintiff made 2 or 3 payments, until October 2002, but thereafter stopped. He continued collecting rents from the other tenants and did not remit them to the defendant, Mr. Szabados. In the result, between October 2002 and February 2006, Mr. Szabados has received no income from the house while paying the mortgage

payments, property taxes, and house insurance. Since 2003, the plaintiff has been paying utilities and telephone. This matter was originally set for a 5 day trial on June 7, 2004. That trial was adjourned on the footing that the plaintiff would remain in the home and would continue to collect the rents and pay the utilities and Mr. Szabados would pay the mortgage, taxes and insurance. The plaintiff remained in the home until he was injured and removed by ambulance on February 6, 2006, to St. Paul's Hospital.

- [49] When he was taken to St. Paul's hospital, he required surgery. To enable that surgery to be performed, Mr. Szabados's son, Morgan Szabados, who was asked by the defendant to check in on the plaintiff's condition, signed a consent for treatment, identifying himself as the plaintiff's grandson.
- [50] It was following that injury and surgery that the PGT became the committee of the estate of the plaintiff and that he was placed in Amhurst Hospital.
- [51] After the plaintiff left the house, it stood empty. Mr. Szabados deposed that it was in a significant state of disrepair, which, he attested, required approximately \$20,000 in repairs.
- [52] Mr. Szabados also asserted that the plaintiff received the benefit of rental income from the house between October 2002 and February 2006, amounting to \$43,765 while the defendant made total expenditures of \$38,681 in mortgage payments, property taxes, and insurance.
- [53] The plaintiff's present income is \$1,238.33 per month from his Old Age Pension and the Canada Pension Plan. He has no assets. His account with the PGT is \$-1,485.96. His income allows him to provide for his care facility costs, his committee fees to the PGT, his Pharmacare deductible, and for \$100 per month for the rest of his living needs. His ability to enjoy outings and to experience various amenities such as a private television, meals out, a newspaper subscription, as well as to meet his basic needs of clothing, medical and dental care are thus significantly limited or precluded. As well, it appears he has a daughter in Hungary with whom he has had little or no contact, whom he is unable to afford to visit or have visit him without further resources.

PRELIMINARY ISSUES:

- [54] Before attempting to resolve the factual dispute between the parties as to the plaintiff's status and his contribution to the preservation or maintenance of the home, there are some preliminary legal issues to be determined.
 - (i) Was there a settlement of the action?
- [55] In his evidence, the defendant Mr. Szabados deposed that he believed matters were settled on the basis that the plaintiff would live in the house as long as he could, and would keep the rental income from the tenants to supplement his own income, while Mr. Szabados would pay the mortgage, property taxes, and home insurance, and the plaintiff's then lawyer would check on the plaintiff periodically to ensure he was able to care for himself. It was the defendants' position that the agreement precludes the plaintiff from being successful in this

action and in this application.

[56] In my view, the evidence adduced by the defendants falls short of establishing that an agreement was reached to settle the action. In the first place, there was no formal written agreement. There was no dismissal of the action, or consent order determining the issues. There were no releases sought or obtained. In the second place, on the defendants' own evidence, there was no final determination of how the property was to be dealt with while the plaintiff continued to live in it and the defendants considered whether to take out a reverse mortgage to reduce the financial burden of maintaining the house. While Ms. Szabados's belief that the matter had been settled was not perhaps unreasonable, the evidence falls short of establishing that the parties were *ad idem*. At best, the agreement reached formed the basis for an adjournment of a potentially expensive and unnecessary trial, but it did not finally resolve all the issues raised by the plaintiff's action.

(ii) The eligibility of the plaintiff to apply under the Wills Variation Act

[57] The defendants argue that even if I find the plaintiff was in a common-law relationship with the deceased, his action should be dismissed for two reasons: first, because the plaintiff has no standing to make a claim, and second, because the plaintiff's claim was made out of time.

[58] At the time of the deceased's death, the WVA did not, as it presently does, provide for a claim to be advanced by a common-law spouse. In its present form, the applicable provisions of the WVA read as follows:

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

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

3 (1) An action must not be heard by the court at the instance of a party claiming the benefit of this Act unless

- (a) the action is commenced within 6 months from the date of the issue of probate of the will in British Columbia or the resealing in British Columbia of probate of the will,

- [59] As of the deceased's death, s. 2 of the WVA provided that a testator's "wife, husband or children" had the right to claim relief under the WVA, but did not give the same right to a person who was in "a marriage-like relationship". That changed with the decision of Scarth J. rendered on January 11, 2000, in *Grigg v. Berg Estate*, 2000 BCSC 36, 26 B.C.L.R. (4th) 348 [Grigg] in which he ruled that s. 2 of the WVA was unconstitutional by being discriminatory in violation of s. 15(1) of the Canadian Charter of Rights and Freedoms.
- [60] In his judgment, Scarth J. concluded that the appropriate remedy was to read into the WVA the definition of spouse contained in the Definition of Spouse Amendment Act, S.B.C. 1999, c. 29 (not then proclaimed in force) and to suspend the declaration that s. 2 was unconstitutional for one month to permit the Lieutenant Governor in Council to bring the Definition of Spouse Amendment Act into force.
- [61] The defendants' contention on the basis of the WVA is two-fold. First, it is submitted that the plaintiff had no standing under the WVA because at the time of the deceased's death, November 20, 1999, there was no provision for a common-law spouse to advance a claim.
- [62] In response, the plaintiff relies on Grigg as providing a remedy to the plaintiff under the WVA despite the absence of a provision for common-law spouses in the WVA. The plaintiff also relied on *Einfeld v. Bellrichard*, 2001 BCSC 92, 37 E.T.R. (2d) 34 in which the court approved of the current definition of spouse under the WVA in relation to an applicant who had applied for a remedy prior to the change in definition in the legislation. In that case, Hood J. wrote as follows:

Counsel agreed that the applicable definition of "spouse" is that contained in the Estate Administration Act which was "read into" the Wills Variation Act by Scarth J. of this court in *Grigg v. Berg Estate*

- [63] In my view, notwithstanding the fact that the deceased's death predated the decision of Scarth J. in Grigg, and the consequent amendment to the WVA on November 1, 2000, to include the right of a common-law spouse to bring an action, the plaintiff has standing and is eligible to bring this action. The effect of Scarth J.'s decision in Grigg had the same effect as amending the WVA and was premised on the precept that excluding a common-law spouse from the scheme of the WVA was discriminatory and unconstitutional. To deny the plaintiff the right to pursue a remedy under the WVA on the basis of a provision that has been held to be discriminatory and unconstitutional would be unsupportable, if I were to determine that he had a common-law relationship with the deceased.
- [64] In coming to that conclusion, I rely on the judgment of Shabbits J. in *Shaw v. Reinhart*, 2004 BCSC 588, 28 B.C.L.R. (4th) 349 ["Shaw v. Reinhart"] where he said at paragraphs 16 and 17:

Even if the defendants are correct in asserting that Mr. Justice Scarth's order did not strike down the offending legislation on January 11, 2000, but did so one month later, the best arguable position on the part of the defendants is that the plaintiff must first apply for the same declaratory judgment as had the plaintiff in *Grigg v. Berg*. In my opinion, it would be manifestly

unjust for the plaintiff's claim to be summarily dismissed on the basis that her rights should be other than those of the plaintiff in *Grigg v. Berg* and different from others in her position following Mr. Justice Scarth's order and following a subsequent change in legislation.

I grant the plaintiff leave to amend the pleadings to permit her to seek the same relief as was accorded the plaintiff in *Grigg v. Berg*.

[65] If appropriate, I would grant the same order as *Shabbits J.* in the present case.

[66] The second basis on which the defendants resist the plaintiff's right to bring an action under the WVA is that his action is barred by the limitation set forth in s. 3(1)(a) of the WVA in that the action was not brought "within 6 months from the date of the issue of probate of the will." The plaintiff's action was dated April 5, 2002, and filed April 9, 2002, over two years following the grant of probate. The defendants say that the plaintiff's contention that he was unaware that the deceased had left a will or omitted to provide for him, must be judged in light of the evidence.

[67] The defendants submit, in particular, it is significant that Mr. Szabados transferred the deceased's car to the plaintiff and that the plaintiff collected rent from the tenants and remitted it along with the plaintiff's own rent to Ms. Szabados for two years following the deceased's death. The defendants say that that is evidence from which the court should infer that the plaintiff knew the deceased had left a will and he was not a beneficiary and hence there is no justification for deferring the commencement of the limitation period.

[68] The plaintiff counters that the commencement of the limitation period is governed by the provision for notice under s. 112(1) of the Estate Administration Act, R.S.B.C. 1996, c. 122 which provides as follows:

112 (1) A court must not grant or reseal probate or letters of administration unless the applicant or the applicant's solicitor certifies that he or she has

- (a) mailed or delivered a notice to each person other than the applicant who, to the best of his or her knowledge, is
 - (i) a beneficiary under the will,
 - (ii) entitled on an intestacy or partial intestacy,
 - (iii) entitled to apply under the Wills Variation Act with respect to the will,
 - (iv) a common law spouse, or
 - (v) a surviving spouse who has been separated from a deceased spouse for not less than one year immediately before the death of the deceased, and
- (b) if there is a will, attached a copy of it to the notice.

- [69] It is the plaintiff's position that where the status of a common-law spouse is at issue, notice under s. 112(1) must be given and where it is not, the defendant is estopped from relying on the limitation defence provided for in s. 3(1)(a) of the WVA.
- [70] In *Shaw v. Reinhart et al*, supra, Shabbits J. concluded that where the status of a common-law spouse is at issue, notice under s. 112(1) of the Estate Administration Act must be given and failure to do so precludes reliance on the limitation period under s. 3(1)(a) of the WVA. In that case, Shabbits J. granted the plaintiff leave to amend her claim to seek to have the grant of letters probate set aside and "leave to amend to seek recovery of that, if anything, to which she was entitled under the Wills Variation Act ...".
- [71] On the basis of the reasoning in *Shaw v. Reinhart*, I would not give effect to the defendant's limitation plea in the present case.

DISCUSSION

- [72] I must now consider whether this case can be resolved under Rule 18A, and second, if so, what the appropriate resolution is.
- [73] The evidence before me presents two different views of the relationship that existed between the plaintiff and the deceased. The issue is whether those different portrayals are irreconcilably conflicting, and if they are, whether it is plausible to resolve that conflict on the basis of the affidavit evidence.
- [74] I have reviewed carefully the respective affidavit and discovery evidence presented by the parties and have come to the conclusion that although they offer different characterisation of the relationship at issue, they are essentially describing the same relationship, but from different perspectives.
- [75] I conclude therefore, that although on their face the affidavits of the plaintiff's witnesses appear to conflict with those of the defendant's witnesses, in fact they are reconcilable and do not prevent me from finding the facts necessary to determine this case in keeping with the provisions of Rule 18A and the principles set forth in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989) BCJ No. 103.
- [76] To the tenants in the house, Steven Kennedy and Robert Dolman, and to the friends and acquaintances of the deceased and the plaintiff, Edit Sarkadi, Sandor Nanasi, and Tony Hun, the deceased and the plaintiff presented a picture of companionship and a sharing of time, tasks and activities that is consistent with a personal, committed and encompassing relationship.
- [77] To the deceased's family, on the other hand, the picture which was presented was that of a relationship rooted in the plaintiff's long-term tenancy in the deceased's house, enhanced somewhat by a shared nationality and language and the convenience of the plaintiff's willingness to help with household tasks and chores.

- [78] It appears clear on the evidence that while the deceased fostered that limited view of her relationship to the plaintiff with her family members, she did not similarly affect the same posture with her daily contacts and friends, particularly, it seems in the latter years.
- [79] On the evidence before me, it appears, even though the deceased maintained to her family that her relationship with the plaintiff was essentially one of landlord and tenant, the family members inferred a closer relationship. The evidence shows that at various times members of the deceased's family invited the plaintiff to family events such as weddings or graduations, or asked the deceased if she wanted to bring him. Additionally, it is of some significance that the plaintiff's son Morgan described himself as the plaintiff's "grandson" in order to get him medical treatment when he broke his hip. While that description does not establish the existence of a common-law relationship between the plaintiff and the deceased, it is indirect evidence, as with the evidence of Mr. Szabados's overall treatment of the plaintiff, that he and his family accepted a responsibility towards the plaintiff that transcended the sort of treatment engaged by a tenant or a former tenant.
- [80] There is, additionally, evidence that the plaintiff, while perhaps continuing to pay rent also contributed his earnings to the deceased and to the maintenance of the house. That evidence comes from the affidavit of Ms. Sarkadi and that of Mr. Dolman, who related what he was told by the deceased. There is also the evidence that the plaintiff did a considerable amount of housework and yard work and assisted with the suite rental and, as well, helped rebuild the house when it burned down in the early 1990's.
- [81] The statements made by the deceased to Mr. Dolman are in my view admissible on the basis of the principled exception to the hearsay rule. The necessity of the statements is clear, and their reliability is established by the fact that Ms. Sarkadi and Mr. Dolman corroborate one another and are corroborated by the plaintiff in his discovery evidence to the effect that he gave money to the deceased. As well, the statements of the deceased were statements against interest and could be admitted as admissions.
- [82] I would also admit the statement of Barbara Szabados on that point in her statement of March 19, 1989, on the basis of its necessity and its reliability insofar as it is corroborated by the evidence of Dolman, Sarkadi and the plaintiff.
- [83] In his examination for discovery, held on May 19, 2004, Mr. Somodi did not present his relationship to the deceased as a mutual and encompassing commitment characteristic of a marriage-like relationship. Rather he portrayed the relationship as one in which he was more committed than the deceased, and in which she made little or no public acknowledgement of its nature. The plaintiff testified that the deceased regarded him as a "small friend" and she "kept everything as a secret, not wanting anyone else to know about it." He testified that apart from going to bingo, they went on no other "romantic excursions together" and did not exchange gifts or go to special family events together.

- [84] In her November 10, 2006 affidavit, in light of the plaintiff's subsequent declaration of incapacity in February 2006, Ms. Kornfeld, the plaintiff's former counsel, deposed that she believed he was "having capacity issues" at the time of his examination for discovery.
- [85] Counsel for the plaintiff submits that in light of the differences in his instructions in 2002 and his discovery evidence in 2004, his subsequent incapacity, and the evident confusion reflected in some of the plaintiff's answers to the questions on discovery, I should not regard the discovery evidence relied on by the defendant as reliable admissions against interest. The plaintiff submits I should admit and consider the whole of the examination for discovery on the basis of Rule 40(4) and the decision of McEwan J. in *Serdar Estate v. Srdanovic*, 2007 BCSC 223 [Serdar Estate].
- [86] Rule 40(4) reads as follows:
- (4) Where a witness is dead, or is unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction or his or her attendance cannot be secured by subpoena, the court may permit a transcript of any evidence of that witness taken in any proceeding, hearing or inquiry at which the evidence was taken under oath, whether or not involving the same parties to be put in as evidence, but reasonable notice shall be given of the intention to give that evidence.
- [87] In *Serdar Estate*, McEwan J., after considering the decision of Hood J. in *Seelig v. Schulli Estate*, (1992) 73 B.C.L.R. (2d) 279 (B.C.S.C.) ruling that Rule 40(4) did not apply to a transcript of an examination for discovery, and the decision of Lysyk J. in *Jessen v. Holloway Estate*, [1994] B.C.J. No. 1709 (B.C.S.C.) (QL) which considered *R. v. Khan*, [1990] 2 S.C.R. 531, as follows in paras. 32-33:

I am doubtful of the proposition that Khan makes Discovery admissible, and incline to the view that, Khan or not, Hood J. correctly assessed the position of the parties in the Seelig decision. In order to assess the relevance of what I was being asked to rule upon in this case, however, I reserved on the issue and, as Lysyk J. did in *Jessen*, admitted the transcript subject to a ruling.

Having done so, I find myself in a similar position in that, even if I were to admit the entire transcript - and the plaintiff certainly has no right to be selective - its influence on the issues would not be determinative. It would, if admitted, establish beyond any doubt that what the plaintiff says Mr. Serdar was saying about the Srdanovics is, in fact, what he was saying. At Discovery, Mr. Serdar also said repeatedly that he was in poor health and felt he was unable to keep the property. The transcript confirms that he intended to move to Rideau Manor but changed his mind because he did not like some of the restrictions.

- [88] In my view, whether or not 40(4) is applicable to discovery transcripts on the basis of Khan, *supra*, it would not apply in this case in which the plaintiff who seeks to admit the evidence is questioning its reliability because of the plaintiff's "capacity issues". The basis for the admission of evidence under Khan, is that it has indicia of reliability and is necessary. While the plaintiff may have established the necessity of the evidence through evidence of the

plaintiff's incapacity, it cannot be said, in the circumstances, to meet the criterion of reliability.

- [89] I have nonetheless reviewed the entirety of the examination for discovery pursuant to Rule 40(27)(d). In conducting that review, I conclude that the discovery evidence as a whole reveals a level of confusion, unresponsiveness and contradiction that detracts from the weight of the admissions against interest relied on by the defendants.
- [90] In my view, the discovery answers relied on by the defendant must be viewed with some caution in the context of all the affidavit evidence before me.
- [91] On balance, considering all of the admissible evidence, I am satisfied that the plaintiff and the deceased had a relationship that transcended that of landlady and tenant, developing into a relationship involving intimacy, shared tasks and expenditures, and ultimately, mutual support. While it is apparent that the deceased did not broadly acknowledge the nature of her relationship with the plaintiff and may have, for some time, viewed it as a relationship of convenience, I am satisfied that over time, it took on the dimensions of a common-law relationship as reflected in the evidence of Mr. Stevens, Mr. Dolman, Mr. Nanasi, Mr. Hun and Ms. Sarkadi and intimated in some of the evidence of the defendants.
- [92] In my view it is difficult to ascertain with precision when the relationship fully crystallized into a marriage-like relationship, but it is clear that it had various of the elements of such a relationship since the early to mid 1960's, and involved a degree of financial and emotional interdependence throughout the 1980's and 1990's.
- [93] I conclude that therefore that the plaintiff has established an entitlement to a declaration that he was the common-law spouse of the deceased within the meaning of s. 2 of the WVA. I am similarly satisfied that the Will failed to make adequate provision for the plaintiff and should be varied to provide an adequate, just and equitable provision from the estate of the deceased.
- [94] Here Mr. Szabados and his family, despite their belief, which I find to be held in good faith, that the plaintiff's relationship with the deceased did not ascend to the level of a marriage like relationship, have taken some steps to provide for the plaintiff by permitting him to remain in the house and collect and use the rents, while making the mortgage and insurance payments.
- [95] Mr. Szabados has also paid for repairs to the house since the plaintiff was required to move into a care facility. Those are factors which condition the moral obligation to provide for the plaintiff from the estate, but do not remove it.
- [96] In this case, the plaintiff seeks an award of one-half of the net value of the estate based on a mutually dependent relationship of more than 30 years, which saw the plaintiff make financial, emotional and physical contributions towards the deceased and her estate. As I have said, while I accept that throughout the deceased and plaintiff's relationship, there were present elements of a marriage-like relationship, I am not satisfied that it fully

crystallized as such until part way through the relationship beginning in the 1980's and carrying through to the death of the deceased in 1999. In assessing the question of what an adequate, just and equitable provision to the plaintiff would be, the judgment of Justice McLachlin (as she then was) in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 is the starting point. In that case, McLachlin J. identified the interest protected by the WVA as the adequate, just and equitable provision for the spouses and children of testators, and the principle of testamentary autonomy: paras. 16 and 17.

[97] In *Tataryn*, which involved a marriage of 43 years, Justice McLachlin concluded that s. 2 of the WVA did not confine the court's attention to "a needs based analysis" or the prevention of persons from "becoming a charge on the state", rather, it involved, as well, a moral obligation. In para. 28 she wrote as follows:

If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

[98] In considering the impact of the testator's moral duties towards spouse and children, in relation to which "concerns about uncertainty are usually addressed" McLachlin J. observed in para. 31:

For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits.

[99] McLachlin J. concluded in para. 33 as follows:

I add this. In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

[100] In *Frolek v. Frolek*, [1986] B.C.J. No. 1869 (S.C.)(QL), quoted by Bauman J. in *Picketts v. Hall Estate*, 2007 BCSC 133, Finch J. (as he then was) wrote:

it is not the purpose of the Wills Variation Act to enable an applicant to build up an estate of her own, but rather to ensure that she is appropriately maintained and supported during her lifetime.

[101] In this regard, after considering all the circumstances, I conclude the appropriate order is to award the plaintiff a life interest in 40% of the net value of the estate of the deceased, in other words, to award him the income from a sum representing that amount. Costs will be awarded against the estate and hence will be deducted from the assets before determining the net value to be divided. Upon the plaintiff's death, the principal amount of the plaintiff's life interest will revert to Mr. Szabados. In the proceedings before me, counsel for the defendants indicated that he wished to sell the house, which is the dominant asset of the estate. If that has changed, or if counsel otherwise wish to speak to the form of the order necessary to accomplish the award I have made, they have liberty to apply.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen

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