

CANADA / JUDGMENT

Thauberger Estate (Re)

2025 BCSC 760

COURT

Supreme Court of British Columbia

DECIDED

24 April 2025

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2025 BCSC 760 Thauberger Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thauberger Estate (Re),

2025 BCSC 760

Date: 20250424

Docket: V240007

Registry: Vancouver

In the Matter of the Estate of William Alexander Thauberger, deceased

- and -

Docket: S05704

Registry: Abbotsford

Between:

Brian Walker

Petitioner

And

The Estate of William Alexander Thauberger,

Robert Edward Widnall, Robert Edward Widnall as an Executor for

the Estate of William Alexander Thauberger, and Barbara Schwartz

Respondents

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

P. Singh

Counsel for the Respondents:

G.A. Laughlin

Place and Date of Hearing:

Abbotsford, B.C.

January 21, 2025

Place and Date of Judgment:

Abbotsford, B.C.

April 24, 2025

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[1] There are two competing applications before me.

- [2] The first is brought by Barbara Schwartz ("Barbara") in Vancouver proceeding V240007 and seeks a declaration that she is the spouse of William Alexander Thauberger ("William"), deceased, that a document dated May 10, 2001 is the valid Will of William, and a variety of relief flowing from such findings.
- [3] The second is brought by Brian Walker ("Brian") in Abbotsford proceeding S05704 for possession of a Burnaby property owned by and registered in the name of William.
- [4] The matter is essentially a dispute between Barbara, who would take William's estate upon a finding that she is his spouse and/or that the May 10, 2001 document represents his testamentary intention, and certain familial relatives of William - a sister and various nieces and nephews - who could take his estate upon intestacy in the absence of a spouse.
- [5] Brian states that he appears and is authorized to speak for all the potential intestate family beneficiaries.

EVIDENCE SUMMARY AND REVIEW

- [6] William died on May 16, 2023 at the age of 95 years. He never married and had no children.
- [7] He had two brothers and two sisters. Only one of his siblings, Elizabeth, survives to this date. Two of his nieces and three of his nephews remain alive. Brian is the son of William's deceased sister, Elenora.
- [8] William and Barbara met in 1959 and commenced a romantic relationship that lasted approximately three to four years until the early 1960s. During that time period, he lived in Toronto and she lived in the areas of Buffalo, New York and Ann Arbor, Michigan. Although living in separate cities and countries, they spent significant time together.
- [9] Eventually, they drifted apart. Barbara married in or about 1964. She divorced in 1990.
- [10] In the mid-1990s - Barbara says in June 1996 - they reconnected, perhaps at the instance of Barbara's sister. William was then living in Burnaby and Barbara in Florida. They spoke by phone, corresponded, and, shortly thereafter, resumed their romantic relationship.
- [11] William travelled to Florida and spent weeks or months with Barbara there in the autumn and winter. During those periods, they would also drive to North Carolina to visit Barbara's sister, and to New England as William loved to photograph the vibrant colours of autumn there.
- [12] Barbara travelled to Burnaby and spent summer months there with William at his home, usually staying from June to late August.
- [13] In 2002, Barbara moved to New Hampshire. William normally stayed with her there from mid-September to late October or early November and then returned in mid-December through to early/mid-February.
- [14] Barbara's summer visits to Burnaby continued throughout.

- [15] They enjoyed an annual cruise from Vancouver to Alaska and back.
- [16] In total, it appears that they spent approximately one-half of each year together and living physically in the same location, be it Burnaby, Florida, or New Hampshire and its surrounds. When together, they shared all the various domestic tasks and financial obligations.
- [17] In addition to this time sharing a physical residence, they maintained a consistent relationship by telephone during periods when they were apart - she called him every Wednesday and he called her every Sunday. When he found himself in hospital for health concerns including skin cancer and gout, they spoke with each other daily. When Barbara was in hospital for a month with hip problems, William maintained her house and visited her in hospital daily.
- [18] They exchanged correspondence consistent with their being in a close, intimate relationship. Photos provided show them together and appearing as a couple.
- [19] She referred to him as her "significant other".
- [20] Barbara swears, and I accept as a fact, that throughout the years they maintained an exclusive sexual relationship with each other.
- [21] I reject the allegation that a somewhat flirtatious paragraph in a lengthy e-mail between William and another woman in 2021 was anything more than an off-hand comment between friends of long standing.
- [22] In addition to the above evidence of their relationship, on May 10, 2001 William drafted a handwritten document which read:

To whom it may concern:

Should anything happen to me I leave all of my assets and personal possessions to my sweetheart Barbara Ward Schwartz 1 (727) 584-4628.

I leave absolutely nothing to my relatives Fred Thauberger or his son Fred Jr. or Betty Anne Chalmers or Robert Ucik because they broke into the family home (here) and absconded with jewellery, appliances, furniture, beds etc. Moreover, they never paid their share of the taxes to Rev. Canada. They hired a shifty lawyer who became one of the beneficiaries of the estate even though he was clearly in a conflict of interest. [Emphasis in original text.]

- [23] It is not contested that this document is written in William's handwriting. It is not signed by William and is not witnessed by anyone.
- [24] William prepared this document approximately five years into his resumed relationship with Barbara. That relationship continued and, by all indications, grew stronger and more committed over the next 22 years until William's death in 2023.
- [25] William and Barbara's relationship was also observed by others who provided evidence.

Robert Widnall

- [26] Mr. Widnall was a friend of William's for approximately 30 years. They worked together at the post office and met for breakfast daily before starting their shifts. When William retired, they continued to meet but only once per week. They lived four blocks apart and visited each other's homes regularly. Mr. Widnall was present when William fell and broke his hip - the injury which ultimately led to William's death.
- [27] He describes that William and Barbara "presented as a committed, long-term and exclusive couple". He confirms, in general terms, the annual visiting or co-habiting schedule. He confirms their twice per week phone schedule. He observed them holding hands and showing affection in public and notes that William referred to Barbara as "sweetheart".
- [28] Upon entering William's house after his death, Mr. Widnall discovered a safe which had been smashed open. He indicates not knowing what, if anything, was missing from the safe but he did locate the handwritten May 10, 2001 document referred to above. He also observes that the only other person, to his knowledge, who had keys to the house was Fred Thauberger Jr.
- [29] Acting on Barbara's authority, Mr. Widnall applied for a grant of administration with will annexed in November 2023 based upon the handwritten May 10, 2001 document found in the broken safe. This application was made through and with the assistance of counsel. William's various relatives were not notified of the application.

Virginia Holderness

- [30] Ms. Holderness is Barbara's sister.
- [31] She speaks of William and Barbara's early relationship and of playing a part in renewing that relationship in the mid-1990s. She confirms their commitment to each other and, in particular, William's commitment to Barbara and her other family members in times of crisis and even death. She notes times when William would call her to have her check on Barbara if she was sick.
- [32] She notes that Barbara had little social life when William was not around; she waited for him to arrive and then they would "go out" and socialize together.

Lynda Kerr

- [33] Ms. Kerr was a long-time friend of William's having met as members of the Burnaby Photographic Society ("BPS") in about 2012/2013.
- [34] She swears that William often spoke of Barbara. She met Barbara in 2012 or 2013 at a BPS year-end picnic and subsequently at a number of BPS events over the years. From her observations, she considered them to be spouses.

- [35] She confirms in general terms the frequency and duration of William's trips to the eastern USA and Barbara's time in Burnaby each year.

Laura Olufsen

- [36] Ms. Olufsen was William's work supervisor in the 1980s and 1990s and lived two doors away from him in Burnaby. She notes that Barbara was William's emergency contact and his designated beneficiary for the employees' mandatory \$100,000 life insurance.
- [37] Again, she confirms in general the annual living arrangements which William and Barbara enjoyed and swears to her observations as to the closeness of their relationship. She relates an incident when William told her that marriage wouldn't add anything to their relationship and might, in fact, cause problems given their different citizenship and residences. He told her that he saw no reason to change something that was working well.

Kevin King

- [38] Mr. King is a friend of William's and has been since 1978. They fell out of contact but resumed their friendship in or about 2009/2010.
- [39] He also confirmed knowledge of William's extended trips to the eastern USA. He did not actually observe Barbara visiting in Burnaby, but heard of such visits from William.
- [40] The main evidence presented on behalf of the family beneficiaries was provided by Brian Walker, Frederick Donald Thauberger ("Fred Jr."), and Wendy Joan Molstad.

Brian Walker

- [41] Mr. Walker is one of William's nephews - his mother was Elenora, one of William's sisters, now deceased.
- [42] He identifies William's property as being the former family residence of "the beneficiaries" until William bought it in 1982, and indicates that Mr. Widnall is currently in possession of that property.
- [43] Mr. Walker indicates that William's hospital contact was identified as "a relative who lives in Kelowna", implying that to be Fred Jr.
- [44] He says that the hospital records indicate that William lived "alone", that Elizabeth dealt with funeral arrangements, and that Fred Jr. "was in constant touch with the Deceased while he was alive" but provides no details as to what that means or how he gained that knowledge.
- [45] He notes the application for administration with will annexed and questions the validity of the May 10, 2001 document and its effect. He confirms that the family beneficiaries did not get notice of the application. They became aware of the application because Elizabeth searched Court Services Online for probate applications and discovered that an application had been made.

[46] None of the family beneficiaries had, to that point in time, or thereafter, taken any steps towards the administration of William's estate.

[47] Mr. Walker notes the absence of photographs of Barbara or Mr. Widnall on William's social media platforms.

[48] He says that he was granted brief access to William's house by court order and found many items missing and an absence of any women's clothing.

[49] Interestingly, he also says at para. 27 of his affidavit:

Mr. Widnall has possession of the Property since around two months after the Death of the Deceased and the Beneficiaries believe that Mr. Widnall concealed the executed will of the Deceased.

[50] No mention or evidence of the existence of any executed will has ever been made in these proceedings, save for this one occasion in Mr. Walker's affidavit.

Wendy Joan Molstad

[51] Ms. Molstad is Fred Jr.'s wife.

[52] She speaks of their "strong relationship" with William since 2012 and refers to emails in 2020 when Fred Jr. was apparently helping William with some work around his house and other emails regarding William's cancer treatments. She relates Fred Jr.'s involvement in overseeing an insurance claim in respect of flooding which occurred at the house. The work was commenced just before and continued a short time after William's death.

[53] Ms. Molstad points to various records which reflect that William lived alone in Burnaby: his house was in his name alone, his van was insured only for him, his bank and utility accounts were each in his name alone.

[54] She outlines assistance which she provided to William as his health deteriorated during and after 2020. She alleges that William had written "love letters" to numerous other women. She implies that some other person must have gained access to the house and removed items and documents.

[55] She describes Barbara as a "friend" but no more and indicates that their "visits" were only once per year for about three weeks. She says that she visited William often and never saw any signs of a woman's presence in his house.

[56] She questions and basically rejects any and all evidence supporting a spousal relationship between William and Barbara. Much of this and other parts of her affidavit are clearly more argument than evidence.

Frederick Donald Thauberger

[57] Fred Jr. is another of William's nephews.

[58] He essentially confirms and repeats much of the contents of his wife Ms. Molstad's affidavit.

[59] He does provide additional evidence regarding work which he did for William on his property such as building a handrail, removing trees and shrubs to level the backyard, repairing a fence, gate and outdoor stairs, repairing a gutter on the garage, and providing shopping services during COVID-19.

THE LAW

Spouse/Marriage-like Relationship

[60] "Spouse" is a defined term in s. 3 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]:

3(1) A person is a spouse for the purposes of this Act if the person

- (a) is married to another person, or
- (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years, or
 - (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.

(2) A spouse includes a former spouse.

(3) A relationship between spouses begins on the earlier of the following:

- (a) the date on which they began to live together in a marriage-like relationship;
- (b) the date of their marriage.

(4) For the purposes of this Act,

- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[61] The question of whether a relationship is "marriage-like" is a question of mixed fact and law. It involves an assessment of the parties' subjective intentions and of the objective evidence produced.

[62] In *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376, 1980 CanLII 1537 (O.N.S.C.), the Court provided an extensive "checklist" of factors relevant to a consideration as to whether parties were in a marriage-like relationship:

16 I propose to consolidate the statements just quoted by considering the facts and circumstances of this case with the guidance of a series of questions listed under the seven descriptive components involved, to varying degrees and combinations, in the complex group of human inter-relationships broadly described by the words "cohabitation" and "consortium":

(1) SHELTER:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

(2) SEXUAL AND PERSONAL BEHAVIOUR:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

(3) SERVICES:

What was the conduct and habit of the parties in relation to:

- (a) Preparation of meals,
- (b) Washing and mending clothes,
- (c) Shopping,
- (d) Household maintenance,
- (e) Any other domestic services?

(4) SOCIAL:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) SOCIETAL:

What was the attitude and conduct of the community towards each of them and as a couple?

(6) SUPPORT (ECONOMIC):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) CHILDREN:

What was the attitude and conduct of the parties concerning children?

To the foregoing must be applied the following caveat of Mr. Justice Blair in the Warwick case [Warwick v. Ontario Minister of Community and Social Services (1979), 5 R.P.L. (2d) 325]:

"The extent to which the different elements of the marriage relationship will be taken into account must vary with the circumstances of each case."

[63] In Weber v. Leclerc, 2015 BCCA 492, the Court of Appeal commented:

- [7] It is noteworthy that the cases span a considerable period of time - a significant factor in terms of an expression like "marriage-like relationship". Social norms surrounding marriage have changed considerably over the years, and it should not be surprising that, along with those changes, evaluations of what relationships are "marriage-like" have also evolved.
- [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".
- [25] Ms. Leclerc argues that approaches like that taken in Molodowich v. Penttinen are nothing more than "checklists", and do not adequately analyse the nature of a relationship. While I agree that a checklist approach is not appropriate, it is my view that cases like Molodowich are helpful as indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship.
- [28] Ms. Leclerc also emphasizes her evidence that she would never have considered marriage to Mr. Weber or anyone else. It seems to me that such evidence is of very limited importance. No one suggests that Ms. Leclerc was married to Mr. Weber, nor that they contemplated getting married. It was the quality of their existing relationship that was important in this case, not their intentions to transform it into a marriage.

- [64] It is also clear that parties may maintain separate residences while at the same time being in and found to have been in a marriage-like relationship. This was addressed by Justice Steeves in *Richardson Estate (Re)*, 2014 BCSC 2162:
- [38] There is the issue of the two properties in Surrey and on Gambier Island. According to the disputant, this means there was an absence of co-habitation because a marriage-like relationship requires living together, not merely visiting each other's residence.
- [39] There are previous cases where this has been the basis for a finding against a marriage-like relationship. There are, for example, the decisions in *[Chowdhury] v. Argenti*, 2007 BCSC 1207 at para. 57 and *Kirkwood v. MacMillan*, 2008 BCSC 91 at para. 15.
- [40] I note in *[Chowdhury]* the relationship was a same sex one and one party had been a "closet homosexual". On his death his friends were "stunned" to learn that fact. In addition, the relationship came to an end in 1996 and the death of the deceased was in 2003. Madam Justice Allan concluded that the deceased had "no intention" of ever allowing the other party, the plaintiff, to move back in (para. 51). In the subject case, it is clear that the applicant and Mr. Richardson presented themselves as a couple over a number of years and the community of Gambier Island accepted them as an exclusive couple. This is different from, for example, another case where the parties were not accepted as a couple: *Janua v. Lachocki et al*, 2001 BCSC 1702 at para. 71.
- [41] In *Kirkwood* there were separate residences and separate finances (para. 3). The residences were "distinctly separate" (para. 14). In addition there was no co-mingling of finances, no shared debts or expenses or assets and the evidence of the plaintiff was that she spoke of "her home to the clear exclusion of the deceased" (para. 14). Here, there is evidence that Mr. Richardson did not refer to "our place" for either Gambier Island or Surrey. However, there is no evidence that he clearly excluded her from the Gambier Island residence and, indeed, he was building a new house there (albeit over a long time) with a kitchen for Chinese cooking. Further, the evidence in the subject case includes sharing of expenses and co-mingling of finances and benefits.
- [42] Other decisions make it clear that there can be cohabitation for the purposes of determining a marriage-like relationship in two residences. Mr. Justice Groves usefully set out the law on this point in *Campbell*:
- [82] In their submissions, both counsel focused on the extent to which the relationship between the parties could be characterized as "marriage-like" prior to their marriage. In doing so, both counsel seemed to suggest that a finding of a marriage-like relationship necessarily includes a finding that the parties were also "cohabiting" ...
- [83] With this in mind, I am satisfied that for the purpose of these proceedings, my conclusion that the parties were in a marriage-like relationship as of January 2004 encompasses a finding that the parties were cohabiting as of that time.

[84] I have already described that the law is clear that living under one roof is not a prerequisite to finding that two individuals were living in a marriage-like relationship. In *Roach*, for example, the parties were deemed to be "spouses", and thus living in a marriage-like relationship, for a period of time where they maintained separate residences. Therefore, if an individual can be "living with another person in a marriage-like relationship" while maintaining separate residences, I am of the view that parties can "cohabit" albeit in separate residences. In my view, there is essentially no difference between using the words "living with" as opposed to "cohabiting with" under s. 1 of the FRA [Family Relations Act].

[85] "Cohabitation" is defined in *Black's Law Dictionary* (9th ed.) as "the fact or state of living together, especially as partners in life, usually with the suggestion of sexual relations". This is similar to the definition of "cohabit" under s. 1(1) of the Family Law Act, R.S.O. 1990, c. F.3 [FLA] (Ontario's equivalent to the FRA), which reads: "cohabit" means to live together in a conjugal relationship, whether within or outside marriage".

[86] Desmarais J. in *Boothe v. Gore*, [1996] O.J. No. 4376 at para. 11, 20 O.T.C. 207 (Ct. J. Gen. Div.), considered s. 1(1) of the FLA and confirmed that "cohabit" means to live in a "marriage-like relationship". Similarly, in *Wheatley v. Wheatley*, [1949] 2 All E.R. 428 at 430 (K.B.D.), Goddard C.L.J. held:

The cohabitation of two people as husband and wife means that they are living together as husband and wife, ... They are living together, not merely as two people living in one house, but as husband and wife.

[87] These authorities suggest that the focus of the inquiry is on whether the parties were in a "marriage-like" relationship. Based on such a finding, in my view and as supported by these authorities, I am satisfied that the parties in this case were "cohabiting" as a marriage-like couple by January 2004.

[43] Similarly, in *Ingrouille*, at para. 98, a finding that one party had farmed and maintained a dual residence were considered of modest weight (along with mailing addresses, tax returns and other matters) in the analysis of whether there was a marriage-like relationship.

[44] And our Court of Appeal adopted the following statement from another decision of Mr. Justice Groves (*Roach v. Dutra*, 2010 BCCA 264, para. 17; citing *McColl v. Scott*, 2001 BCSC 1109 at paras. 18-19):

Clearly the words "live together" must be read in the context of the entire section where it talks earlier about living with another person in a marriage-like relationship for a period of two years. To suggest that if parties are by reasons of, say, health, hospitalization, overseas attendance in the military or for general work purposes, as is the case here, temporarily separate that the "spousal definition clock", for lack of a better term, then starts running, would result in numerous couples essentially ceasing to be spouses as a result of this temporary separation. The legislature in my view would have to make that intention clear.

If for all purposes mere physical separation ends a "marriage-like" relationship, clear wording to that effect would be required. The general purpose of the Family Relations Act is to recognize spouses who make a commitment to one another and to apportion support consequences of that commitment between them upon relationship breakdown. The legislation requires that they live in a marriage-like relationship of at least two years. To say that all marriage-like relationships involve continuous cohabitation, that a temporary interruption for health or work reasons in that continuous cohabitation ends a spousal relationship, is not in my view what the legislature intended.

- [45] Returning to the evidence, the applicant worked in Surrey and owns a home there and Mr. Richardson worked on Gambier Island and owned a home there. They are each the owner of the respective properties. Ms. Stamford, a resident of Gambier Island, has deposed that it is difficult to find work on Gambier Island and "almost impossible for women." Many working couples have to deal with this and one spouse working off the island is "an understandable reality." Ms. Stamford's husband works off the island and they are sometimes separated for weeks. The applicant has deposed that she had work and family commitments, including two sons, and she needed to live and work in Surrey. For his part, Mr. Richardson had a very good job on Gambier Island and he looked after his parents there.
- [46] The evidence is also that the applicant and Mr. Richardson traveled back and forth between Gambier Island and Surrey, with the applicant being more often on Gambier Island. The respondent's truck would be noticed at the Gambier Island ferry terminal and residents of the island would know he was off-island and with the applicant. As well, it is not seriously in dispute that the applicant and Mr. Richardson had an exclusive and intimate relationship in both locations and each contributed to the two residences.
- [47] Taken over all, I conclude that the applicant and Mr. Richardson structured their relationship so that they could work in two locations and look after their respective families in those locations. As reflected in the above authorities, that is consistent with a marriage-like relationship.
- [65] While certainly not exhaustive, I find these authorities provide significant and sufficient guidance for an enquiry into whether the relationship between William and Barbara was a marriage-like relationship.
- [66] On the evidence presented, I find that:
- the relationship was long-standing, lasting nearly 25 years, and each of them considered that relationship to be permanent and life-long;
 - the parties physically cohabited in the same houses, albeit that those houses were on opposite ends of the continent, for approximately one-half of each and every year except when COVID-19 and late-in-life health issues intervened;

- during these times of cohabiting, they presented themselves to the public as a committed couple in every sense of those words;
- when physically living in the same house, they slept together and maintained an intimate and sexual relationship which was exclusive;
- they undertook virtually all domestic tasks cooperatively during times when they were physically living in the same house;
- when not actually and physically living in the same house, they maintained a committed schedule of telephone contact at least twice per week with each of them taking separate responsibility for one call to the other on either Wednesday or Sunday each week;
- they supported each other during times of health difficulties save for certain explainable and understandable exceptions;
- they engaged in social activities as a couple and were seen that way by their friends and acquaintances; and
- while they had little contact with William's family, particularly as a couple, William had a very positive and supportive relationship with Barbara's family.

[67] I find that this relationship was in fact a committed, marriage-like relationship of long standing and that William and Barbara were spouses as that term is defined in s. 3 of the FLA. Barbara is and remains a spouse relative to and for the purposes of the provisions of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].

[68] I am not persuaded that the evidence of the petitioner/relatives in any way negatives this finding. Their evidence is of involvement with William in a limited sense and for a limited period late in his life. I do not accept their evidence regarding their doubts about the relationship between William and Barbara. I find such evidence to be speculative, self-serving and essentially without corroborative support.

Testamentary Instrument

[69] I now proceed to consider the May 10, 2001 document.

[70] Prior to the enactment of the WESA, there was no provision under the then-existing legislation allowing a court to grant relief from non-compliance with the legal requirements for the creation of a legal will.

[71] The WESA now provides the court with such jurisdiction and discretion in s. 58:

58 (1) In this section, "record" includes data that

- (a) is recorded or stored electronically,
- (b) can be read by a person, and

- (c) is capable of reproduction in a visible form.
- (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 a deceased person,
 - (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or
 - (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
- (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
 - (a) as the will or part of the will of the deceased person,
 - (b) as a revocation, alteration or revival of a will of the deceased person, or
 - (c) as the testamentary intention of the deceased person.
- (4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.
- [72] There is no question that the May 10, 2001 document presented to the Court does not meet the requirements of s. 37 of the WESA which provides as follows:

How to make a valid will

37(1) To be valid, a will must be

- (a) in writing,
- (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as the will-maker's signature, in the presence of 2 or more witnesses present at the same time, and
- (c) signed by 2 or more of the witnesses in the presence of the will-maker.
- (2) A will that does not comply with subsection (1) is invalid unless
 - (a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
 - (b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or
 - (c) it is valid under another provision of this Act.

- (3) The requirement under subsection (1)(a) that a will be in writing is satisfied if the will is in electronic form.
- (4) An electronic will is a will for all purposes of this Act and any other enactment.
- [73] In *Hadley Estate (Re)*, 2017 BCCA 311, Justice Dickson spoke for the Court of Appeal:
- [33] British Columbia was a "strict compliance" jurisdiction prior to passage of the WESA. Under s. 4 of the Wills Act, R.S.B.C. 1996, c. 489, testators were obliged to comply strictly with execution and attestation formalities for creating a will for it to be valid. The same was true for revoking, altering or reviving a will: Wills Act, ss. 14, 17, 18. These formal requirements sometimes led to a will-maker's testamentary intentions being defeated for no good reason. As a result, the British Columbia Law Institute recommended the introduction of a dispensing power to relieve against the consequences of non-compliance with testamentary formalities as part of a general reform of wills and estate administration law: BCLI, *Wills, Estates and Succession: A Modern Legal Framework* (BCLI Report No. 45, June 2006) at xiv.
- [34] Section 58 of the WESA is the legislative response to the BCLI recommendation. Remedial in nature, it confers a broad discretion on the court to order that a "record or document or writing or marking on a will or document" be fully effective, despite non-compliance with the statutory requirements. Although s. 58 cannot be used to uphold a will that is substantively invalid, it permits the court to cure issues of formal invalidity in prescribed circumstances
- [74] Justice Dickson then went on to address testamentary intention:
- [35] For an order to be granted under s. 58 of the WESA, the court must be satisfied that a document represents the testamentary intentions of the deceased person. However, unlike the curative provisions in some provinces, s. 58 does not require a minimum level of execution or other formality for a testamentary document to be found fully effective. Regardless of its form, if the court grants an order under s. 58(3), the document may be admitted to probate.
- [75] As discussed in *Estate of Young*, 2015 BCSC 182, s. 58 is very similar to Manitoba's curative provision and thus the leading appellate authority on its meaning is *George v. Daily* (1997), 143 D.L.R. (4th) 273, 1997 CanLII 17825 (M.B.C.A.). *George* and several other Manitoba authorities are reviewed in *Estate of Young*, which review need not be repeated. Their import is summarized at paras. 34-37:
- [34] As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact-sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first is an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions, as that concept was explained in *George*.

- [35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death. A deliberate or fixed and final intention is not the equivalent of an irrevocable intention, given that a will, by its nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.
- [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: *Sawatzky* at para. 21; *Kuszek* at para. 7; *Martineau* at para. 21.
- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: *George* at para. 81.
- [76] In the later case of *Goehly Estate (Re)*, 2023 BCSC 248, Justice Ross cited *Hadley* with approval and, at para. 36, listed several questions considered in *Jakonen Estate (Re)*, 2022 BCSC 2261, as being of assistance in determining testamentary intent:
- Was the document made by the deceased or was it made by a third party?
 - Where was the document found and in what conditions?
 - Was the document signed or is there evidence of compliance with the formal requirements for a valid will?
 - Is the document titled?
 - Is the language of the document dispositive, and does it have an air of finality?
 - Does the document provide for a rational distribution?
 - Is it consistent with other evidence of the intentions of the deceased?
- [77] The May 10, 2001 document was made by William and there is no dispute that it is written in his hand.
- [78] It was found in or in the immediate area of a breached safe in William's home. This is a reasonable storage container and location for important documents such as those relating to final testamentary wishes.
- [79] It is not "titled" but is headed "To whom it may concern" and immediately refers to the disposition of William's belongings "should anything happen to me".

- [80] The document clearly has the air of finality. It is simple and focused in its wording and intent.
- [81] It provides for a rational distribution of William's estate. When he wrote the document, he had been in a romantic and intimate relationship with Barbara for some five years. He referred to her as his "sweetheart" and both named her in full and provided a contact phone number for her.
- [82] The disposition provided for in the document is consistent with the evidence of William's intentions at the time of the writing. Over the course of the following 20 years or more, the evidence supports the conclusion of a continuing and deepening relationship between William and Barbara.
- [83] On the basis of the evidence presented, I find that the May 10, 2001 document represents the testamentary intentions of William and I order that it be fully effective as though it had been made as his will.
- [84] Barbara may apply for a grant of administration with will annexed and may appoint or nominate a person to make such application on her behalf as sought in her application.
- [85] The Notice of Dispute filed by Fred Thauberger on January 20, 2024 in file V240007 (Vancouver Registry) is hereby cancelled and ordered removed.
- [86] The petition of Brian Walker, filed in the Abbotsford Registry under number S05704, is dismissed.
- [87] If counsel wish to address the issue of costs, they may do so in writing, filed within 30 days and consisting of no more than three pages of submissions each. In the absence of such submissions, all parties shall bear their own costs.

"Caldwell J."

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