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PAPER 3.1

Definition of Spouse under FLA and WESA

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DEFINITION OF SPOUSE UNDER FLA AND WESA

I. Overview

The bounds of the definition of the word "spouse" have been frequently tested and challenged in recent years, often resulting in an incremental expansion of the definition. This has had, and continues to have, significant impact on both family and estate law matters where the issue of spousal status is contested. In this presentation and paper, the authors review certain recent decisions on the definition of "spouse", and consider how the law in this may area may develop further.

II. Death of a Spouse; Maintaining and Continuing Your *Fla* Actions

A. After a Spouse Dies: Commencing a Family Law Action for Property Division under the *Family Law Act*

Section 150 of the WESA (claims that can be made against an estate) in addition to ss. 81 and 198 of the FLA.

s. 81 (FLA) - Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

s. 198 (FLA) - Time Limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,

(a) in the case of spouses who were married, the date

(i) a judgment granting a divorce of the spouses is made, or

(ii) an order is made declaring the marriage of the spouses to be a nullity, or

(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

B. Family Law Action Commenced before Spouse Dies

Rule 8-2 – Change of Parties, *Supreme Court Family Rules*

Party ceasing to exist

(1) If a party dies or becomes bankrupt, or a corporate party is wound up or otherwise ceases to exist, but the claim survives, the family law case may continue in spite of the death or bankruptcy or the corporate party having been wound up or ceasing to exist.

Effect of death

(2) Whether or not the claim survives, a family law case may continue in spite of either party dying between the verdict or finding on the issues of fact and the entry of judgment, but judgment may be entered despite the death.

Assignment or conveyance of interest

(3) If, by assignment, conveyance or death, an estate, interest or title devolves or is transferred, a family law case relating to that estate, interest or title may be continued by or against the person on whom or to whom that estate, interest or title has devolved or to whom that estate, interest or title has been transferred.

Change or transmission of interest or liability

(4) If, after the start of a family law case,

(a) a change or transmission of interest or liability of a party takes place or a person interested comes into existence, and

(b) it becomes necessary or desirable that

(i) a person not already a party should be named as a party, or

(ii) a person already a party should be named as a party in another capacity,

the court may order that the family law case be continued between the continuing parties and the new party.

C. Support Claims: Death of Payor Spouse

s. 170 (FLA) - Matters that may be provided for in support orders

170 In an order respecting child support or spousal support, the court may provide for one or more of the following:

[…]

(g) subject to section 171 (1) [support obligations after death], that a duty to pay **child support or spousal support continues after the death of the person having the duty**, and is a debt of his or her estate for the period fixed by the court.

s. 171 (FLA) - Support obligations after death

171 (1) Before making an order under section 170 (g) [matters that may be provided for in support orders], the court must consider all of the following factors:

(a) that the person receiving child support or spousal support has a significant need for support that is likely to continue past the death of the person paying child support or spousal support;

(b) that the estate of the person paying child support or spousal support is sufficient to meet the need referred to in paragraph (a) after taking into account all claims on the estate, including those of creditors and beneficiaries;

(c) that no other practical means exist to meet the need referred to in paragraph (a).

(2) If an agreement, or an order under section 170 (g), is made and the person having a duty to pay child support or spousal support dies, the person's personal representative may make an application, and the court may make an order, to

(a) set aside or replace with an order made under this Part all or part of the agreement, or

(b) change, suspend or terminate the order.

(3) If a person having a duty to pay child support or spousal support under an agreement or order dies and the agreement or order is silent respecting whether the duty continues after the death of the person and is a debt of his or her estate,

(a) the person receiving support may make an application under section 149 [orders respecting child support] or 165 [orders respecting spousal support], and

(b) if, on consideration of the factors set out in subsection (1) of this section, an order is made, the duty to pay child support or spousal support continues despite the death of the person and is a debt of his or her estate for the period fixed by the court.

D. Changing Nature of Spousal Relationships

1. Living Apart Together (LAT) Couples

From: Stats Can 2013 – Turcotte, Martin:

A number of people are in a stable relationship but do not live together, and are known as non-cohabiting or 'living apart together' (LAT) couples. How many people are in such a situation? Are they transitioning towards a different kind of life together or making a deliberate lifestyle choice?

- In 2011, 7% of people age 20 and over representing 1.9 million Canadians were in a LAT couple. This proportion was slightly lower than in 2001.
- Approximately 1 in 13 people are in a LAT couple.

- Young adults were more likely to be in a LAT couple. Among individuals age 20 to 24, nearly 1 in 3 were in a LAT couple (31%). This proportion was 17% among those age 25 to 29 and varied between 3% and 5% among those age 30 to 59.
- While only 2% of people 60 and over were in a LAT couple in 2011, this proportion was up slightly from 2001.
- More than 80% of young adults in a LAT couple wanted to live with their current partner one day, compared with less than 30% of people 60 and over.

2. Polyamorous Relationships

From: *Polyamory in Canada: Research on an Emerging Family Structure* by John-Paul Boyd, M.A., LL.B. (2017 Vanier Institute of the Family):

Polyamory: The practice or condition of participating in more than one intimate relationship at a time. It is usually not related to religion and it is unrelated to marriage.

> [I]n just three weeks we received 547 valid responses to a survey on polyamory advertised primarily through social media. 1 More than two-thirds of respondents (68%) said that they are currently involved in a polyamorous relationship, and, of those who weren't, two-fifths (39.9%) said that they had been involved in such a relationship in the last five years. More than four-fifths of respondents said that in their view the number of people who identity as polyamorous is increasing (82.4%), as is the number of people openly involved in polyamorous relationships (80.9%). (Boyd)
>
> If the prevalence of polyamory is indeed increasing, a significant number of our most important social customs and institutions will need to evolve. This will require a reconsideration of how we think of parenthood and how we distribute the liabilities parenthood entails. It will also have an impact on how we demarcate those committed adult relationships that attract legal entitlements and obligations and those that do not, as well as how these entitlements and obligations are distributed among more than two people. (Boyd)

a. Polyamory Decisions:

i. *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767 (CanLII)

The three Petitioners in this case, Oliva, Eliza and Bill had been living together in a committed polyamorous relationship since 2017. Bill and Eliza's relationship began in 2013, predating their relationship with Oliva. Eliza and Bill had conceived a child by way of sexual intercourse and were the only ones registered as the legal parents of the child. The Petitioners sought a declaration of parentage in order to have Oliva declared a legal parent in order to have all three Petitioners registered as the Child's legal parents.

Decision re: Polyamorous relationships and families:

- [68] For the reasons set out, I find that there is a gap in the FLA with regard to children conceived through sexual intercourse who have more than two parents. The evidence indicates that the legislature did not foresee the possibility a child might be conceived through sexual intercourse and have more than two parents**. Put bluntly, the legislature did not contemplate polyamorous families. This oversight is perhaps a**

reflection of changing social conditions and attitudes, as was found to be the case in A.A. and C.C., or perhaps is simply a misstep by the legislature. Regardless, the FLA does not adequately provide for polyamorous families in the context of parentage. (emphasis added)

- [92] Clarke is being raised in a loving and supportive family by three highly capable parents. For the reasons discussed above, and considering the authorities and evidence presented, I exercise my parens patriae jurisdiction and declare that Olivia is Clarke's legal parent. I direct the British Columbia Vital Statistics Agency to amend Clarke's birth registration accordingly, so that Olivia is named as Clarke's legal parent, alongside Bill and Eliza.

ii. *B.D.G. v. C.M.B.*, 2016 BCPC 97 (CanLII)

This is a relocation case. C.M.B., the mother of two young children, seeks an order allowing her to move the children from Nanaimo, British Columbia to Edmonton, Alberta. Their father, B.D.G., opposes her application. In addition to deciding whether or not to allow the relocation sought I must address the matters of parental responsibilities and parenting arrangements. The mother and father had been involved in polyamorous relationships. The mother wanted to dissociate from the polyamorous lifestyle post-separation and wanted the children to not be exposed to it any longer.

- [126] Furthermore, there is no evidence that being raised in a polyamorous family has had a negative effect on either G.G. or P.G.. The evidence is that both boys are well-adjusted and happy and have good friends who sometimes stay over. B.D.G. and the boys' respective mothers are open with the parents of the boys' friends about their polyamorous lifestyle. This has not been an issue.
- [212] C.M.B. argues that, in this case, it is clear that the family violence was inextricably linked to gender biased roles in the polyamorous relationship and to a related inequality of power in the relationship. I do not accept this argument. I find that there were no gender biased roles in the polyamorous relationship and that there was no and is no inequality in the relationship between B.D.G. and C.M.B..
- [220] Nevertheless, having considered all of the evidence and having applied the relevant law, I have decided that it would not be in A.Q.G. or S.G.'s best interests to permit their mother to relocate them from Nanaimo to Edmonton.

III. Further Resources

In preparing this paper, the authors reviewed the following CLE BC papers from prior conferences. The authors recommend these papers as further resources:

1. "Death Is Not the End (Of a Family Law Claim)", Paper 6.1 *Hot Topics in Family Law: Navigating the Financial Landscape*, June 2018, by Anna Laing
2. "Family Law Considerations in Estate Disputes", Paper 4.1 *Estate Litigation Basics 2018*, April 2018, by Anna Laing and Amanda Winters

3. "Strange Bedfellows: Polyamorous Relationships and Family Law in Canada", Paper 4.1 *Interplay Between Aging, Death and Divorce*, March 2017, by John-Paul E. Boyd

IV. Case Law Summaries

Below are summaries of recent cases considering the definition of "spouse" or equivalent terms under the following legislation in BC and Canada:

- *Cremation, Interment and Funeral Services Act (BC)*
- *Estate Administration Act (BC)*
- *Family Law Act (BC)*
- *Family Law Act (Ontario)*
- *Family Law Reform Act (Ontario)*
- *Immigration and Refugee Protection Act (Federal)*
- *Wills, Estates and Succession Act (BC)*

There is also one case concerning the validity of a marriage contract under common law principles.

A. "Marriage Like Relationship" under BC Cremation, Interment and Funeral Services Act

- *Cremation, Interment and Funeral Services Act*, S.B.C. 2004, c. 35

s.1: Definitions

> "**spouse**" means a person who
>
> (a) is married to another person, or
>
> (b) *[Repealed 2011, c. 25, s. 320.]*
>
> (c) has lived with another person in a marriage-like relationship for a period of at least 2 years immediately before the other person's death;

- ***Vinepal Estate (Re),* 2018 BCSC 806**

  The petitioner applied for an order giving her control of the disposition of the remains of the deceased, relying on s. 5 of the Cremation, Interment and Funeral Services Act (CIFS), which provides an order of priority for control over the remains. The deceased's father opposed the application because the petitioner wanted to provide the deceased with a Muslim funeral, allegedly according to the deceased's wishes, but the father is Sikh and believed his son to be Sikh.

  The issue is whether the petitioner was the "spouse" of the deceased: they were not married but the petitioner argued they lived in a "marriage like relationship" for at least two years before the deceased's death, as per s. 1 CIFS. The evidence indicated that the parties were cohabiting at the petitioner's mother's home, and they had a joint bank account and joint credit card. The Court considered the Molodowich factors regarding "marriage-like relationships" and found, on the balance, that the petitioner was the deceased's "spouse".

B. "Common Law Spouse" under BC *Estate Administration Act**

**This Act dealt with intestate estates prior to the coming into force of the Wills, Estates and Succession Act on March 31, 2014.*

- *Estate Administration Act,* R.S.B.C. 1996, c.122 [REPEALED]

s. 1: Definitions

"common law spouse" means either

(a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or

(b) a person who has lived and cohabited with another person in a marriage-like relationship for a period of at least 2 years immediately before the other person's death;

"**spouse**" includes a common law spouse;

- ***Austin v. Goerz*, 2006 BCSC 2055, aff'd 2007 BCCA 586**

This case raised the issue of whether a deceased, who was already married, could also be in a common-law relationship under the *Estate Administration Act (EAA)*. The deceased began a relationship with Goerz after separating from his wife, but no order of divorce was ever granted. The deceased lived with Goerz, in a committed and loving relationship, until the time of his death.

The Court held that Goerz was the deceased's "common law spouse" at the time of his death, confirming that a person could be in a marriage-like relationship with someone other than his wife, despite lacking the legal capacity to marry. Moreover, the Court found that the absence of financial dependence is not conclusive that a relationship doesn't qualify as a "common-law spouse" under the *EAA*.

C. "Spouse" under *BC Family Law Act ("FLA")*

- *Family Law Act,* S.B.C. 2011, c. 25

s. 1: Definitions

"**spouse**" means a person who is a spouse within the meaning of section 3;

s. 3: **Spouses and relationships between spouses**

s. 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.

s. 3(2) A spouse includes a former spouse.

s. 3(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.

s. 3(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.

- ***Weber v. Leclerc*, 2015 BCCA 492, leave to appeal to SCC refused, 2016 CarswellBC 1105**

The parties disputed whether they were "spouses" under the *FLA*, based on a period of cohabitation. The summary trial judge found that the parties' relationship was "marriage-like" and declared them to be spouses under the statute. Leclerc emphasized the parties' lack of financial interdependence and argued she never would have considered marrying Weber.
On appeal, the Court noted that the parties referred to 3 cases regarding the definition of "spouse" from 1986-2007, which is a considerable period of time with respect to an expression like "marriage-like relationship", as social norms change considerably. The Court reviewed the case law surrounding "marriage-like relationships" and relevant factors (including those in *Molodowich)*, but did not consider any single factor to be determinative, including financial interdependence. Moreover, an intention to transform the relationship into a marriage was not necessary in a "marriage-like" relationship.
Leclerc also argued that the factors set out in *Molodowich* is nothing more than a checklist which do not adequately analyze the nature of the relationship; the Court agreed a checklist approach is not helpful, but found 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. On the balance, the Court found that the trial judge did not err and was entitled to conclude that the relationship was marriage-like.

- ***G. (B.D.) v. B. (C.M.),* 2016 BCPC 97**

CMB, mother of two children, sought an order allowing her to relocate, but the father BDG opposed the application. The trial judge decided CMB was not permitted to relocate and imposed a parenting schedule on the parties; an appeal was allowed and new trial ordered, but the parties maintained the parenting schedule.
The parties have never been married, therefore the *FLA* provisions governs relocation of children. Section 46 of the FLA provides criteria to be considered when there is no written agreement or court order respecting parenting arrangements; Division 6 applies if there is a written agreement or court order. In this case, the Court applied s. 46, considering CMB's reasons for wanting to move and the factors set out in s. 37(2) of the *FLA*. The Court held that no court order presently applied to the parties, because an order which varies a trial order which is subsequently overturned on appeal would no longer be in effect. Based on a review of all the considerations, the application was denied and parenting arrangements were put forth by the Court.

- ***Nicoll v. Webster*, 2018 BCSC 547**

The claimant filed a Notice of Family Claim seeking an equal share of the increase in value to the respondent's residential property over a 2-year period, during which he alleges they lived together in a "marriage-like relationship". Respondent acknowledges she was dating the claimant but says he was a tenant and the relationship was not "marriage-like".

The claimant's daughter would stay 4 days a week at the residence, and the claimant would perform various housework and yardwork, but the claimant never introduced the respondent to his child's mother. The parties also did not mingle their finances. In the last year of the 2-year period, the claimant began a relationship with someone else. When the claimant fell behind on rental payments, the respondent asked him to leave and he agreed. After the claimant failed to pay $15,000 that he agreed he owed (for car and rental payments during the period), the respondent initiated an action in small claims court, before the claimant filed this Notice.

The issue before the Court was whether the parties were "spouses" under the *FLA*, in that they "lived in a marriage-like relationship" for a continuous period of at least two years. On review, the Court found that the parties' relationship did not achieve "marriage-like" status; at best there was dating with cohabitation defined through a Residential Tenancy Agreement. There was intimacy and interaction between friends and family, but they lived their lives separately and independently (*e.g.* taking separate vacations), and there was no co-mingling of finances or other expenses, no mutual purchase of assets, and no long-term plans or commitments.

- ***C.F.M. v. G.L.M.*, 2018 BCSC 815**

The issue was whether the claimant was a "spouse" as defined in s. 3 of the *FLA*. To succeed, the claimant needed to establish that she lived in a marriage-like relationship for a continuous period of two years. The parties began dating in late 2011, and the respondent proposed in December 2015. In Spring 2016, the claimant moved into the respondent's residence, but the relationship abruptly and permanently ended in April 2017. The respondent argues they were in an "on- again/off-again" dating relationship whereas the claimant says it was an exclusive common law relationship.

Under the *FLA*, the "marriage-like" commitment must be combined with sufficient evidence of two years of continuous cohabitation. Evidence shows the parties maintained separate residences and often travelled alone, and that the respondent was unfaithful. No doubt the respondent was contemplating a long-term commitment when he proposed and she moved in. But on the totality of the evidence, the parties did not live together in a marriage-like relationship at any time prior to the proposal, and it is common ground that they did not live together in such a state for a continuous period of at least two years after that date; the claimant was held not to be a "spouse".

- ***Dey v Blackett*, 2018 BCSC 244**

This was an action for division of property and spousal support based on a "marriage like relationship … for a continuous period of at least two years" within definition of "spouse" in s. 3 of the *FLA*. In the alternative, the claimant advances an unjust enrichment claim, based on her efforts during their domestic relationship, both financial contributions and services provided.

The objective evidence in this case showed the parties had no common financial resources and did not consult each other on important matters. Additionally, the claimant had only one document on which she had used the respondent's address. However, the claimant did spend every night at the respondent's residence after a certain date and moved her day-to-day clothing and personal effects there on that date (rather

than in stages). Moreover, the respondent told the claimant's father he wanted to be a part of the family.

The Court considered whether there was a "marriage-like relationship", taking a "holistic approach" (per *Austin v Goerz*) and reviewing the *Molodowich* factors. Financial dependence is no longer determinative, and the intentions of the parties are considered important. However, in weighing the various factors, it is also an error to give undue emphasis to the future plans of a couple, in contrast to the current realities of their respective situations (*Takacs*). At para. 215, the Court also reviewed recent cases that discussed events leading to the finding of a marriage-like relationship (*e.g.* allowing a mother to move into the home; buying and living in a home after a marriage-like commitment ceremony; opening a joint bank account; etc.). In total, the Court was unable to find that a marriage-like relationship existed between the parties, rather the claimant became a sort of live-in girlfriend, with plenty of hope for the future, but the intention to live in a relationship similar to marriage of lengthy, indefinite duration was never reached.

- ***Volovsek v Donaldson*, 2019 BCSC 1820**

This case raised the novel question of whether a person in a marriage-like relationship owes the other person a fiduciary duty with respect to the disposition of his assets on death. The deceased was in relationship with Volovsek from 1989 until his death in 2015. Before his death, the deceased transferred all his assets into two alter-ego trusts and made a will – the effect was to distribute his estate to his siblings and Volovsek in equal shares. One of the deceased's motives in this course of action was to avoid the possibility of a wills variation claim by Volovsek.

Volovsek argues that the deceased was entitled to do estate planning, but had a duty to advise her in advance of his plan – if she had known she would have separated from the deceased to trigger a right to division of family property. Thus, she claims entitlement to what she would have been entitled to had she separated from him and initiated a claim under the *Family Law Act*.

The issue of whether the parties lived in a marriage-like relationship informs the issue of whether fiduciary duties were owed, so the Court considered whether a marriage-like relationship existed. The parties did not live together and did not mingle finances; the deceased also stated to others that he valued his freedom and didn't want to be married. On the balance, no marriage like relationship was found. The Court further stated there was no precedent for finding an *ad hoc* fiduciary duty between spouses not to dispose of assets and no other basis for a fiduciary claim.

- ***Han v. Dorje*, 2021 BCSC 939**

This is an application to amend pleadings, such that there is no finding of whether or not the parties are spouses. Rather, the Court considered whether, in these circumstances, the claim was bound to fail or whether it out to be determined by the Court on full evidence.

The claimant applied to amend her notice of family claim to seek spousal support from the respondent, a high lama of the Karma Kagyu School of Tibetan Buddhism. At issue is whether she lived with the respondent in a marriage-like relationship, based on events that occurred remotely or virtually. The question before the Court was: can a secret

relationship that began online and never moved into the physical world be like a marriage?

The parties had never lived together, and met only four times during a two-month meditation retreat at a monastery in NY. The first meetings were public. The third was in the claimant's room, when the claimant alleges she was sexually assaulted by the respondent. The final in-person meeting was when she informed the respondent she was pregnant with his child, in the presence of his bodyguards. Claimant argues that what began as a non-consensual sexual encounter evolved into a year-long loving relationship, although it was almost entirely via text message. Specifically, she alleged that the marriage like relationship commenced after they ceased seeing one another. The respondent argues he only provided some emotional and financial support to the claimant, but for the benefit of the child.

In reviewing the *Molodowich* factors, the Court held that the only real factor of relevance here was economic support. However, the Court found that the trial judge was entitled to attach a broader significance to that financial support than child support alone. The Court held that the facts alleged gave rise to a reasonable claim, and the question should be answered by a trial judge after hearing all the evidence. Moreover, the text messages discussed marriage, trust, honesty, finances, mutual obligations and possible plans. Although the Court noted that the claimant's claim was novel and likely weak, it granted leave to amend the claim. In so doing, the Court noted that during the pandemic many relationships were entirely virtual, signaling that it is likely we will see further claims of this nature.

D. "Spouse" under *Ontario Family Law Act & Family Law Reform Act*

- *Ontario Family Law Act*, R.S.O. 1990, c. F.3

s. 1: Definitions

"**spouse**" means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

"**cohabit**" means to live together in a conjugal relationship, whether within or outside marriage;

s. 1(2): Polygamous marriages

In the definition of "**spouse**", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

s. 29: Definitions for Part III – Support Obligations

"**same-sex partner**" [Repealed 2005, c. 5, s. 27(4).]

"**spouse**" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children's Law Reform Act*.

- *Ontario Family Law Reform Act*, R.S.O. 1980, c. 152

s.1: Definitions

> "**cohabit**" means to live together in a conjugal relationship, whether within or outside marriage;
>
> "**spouse**" means either of a man and woman who,
>
> (i) are married to each other,
>
> (ii) are married to each other by a marriage that is voidable and has not yet been voided by a judgment of nullity; or
>
> (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year.
>
> s.14: Definitions for Part II – Support Obligations
>
> "**spouse**" means a spouse as defined in section 1 and in addition includes,
>
> (i) either of a man and woman not being married to each other who have cohabited
>
> (A) continuously for a period of not less than five years, or
>
> (B) in a relationship of some permanence where there is a child born of whom they are the natural parents,
>
> and have so cohabited within the preceding year, and
>
> (ii) either of a man and woman between whom an order for support has been made under this Part or an order for alimony or maintenance has been made before this Part comes into force.

- ***Molodowich v Penttinen*, 1980 CarswellOnt 274, [1980] O.J. No. 1904**

The applicant and the respondent were not married and had no children, but the applicant sought to establish she was a "spouse" under the definition in s. 14(b)(i) *Family Law Reform Act*, 1978 (Ont.), c. 2 (*FLRA*), to proceed in a separate application before the Court.

The definition of "spouse" in the *FLRA* required the parties to have "cohabited", and defined "cohabit" as "live together in a conjugal relationship". The Court then reviewed relevant case law and prepared a series of relevant questions consolidating the requirements, under the following seven components in the "complex group of inter-human relationships broadly described by the words 'cohabitation' and 'consortium'": shelter; sexual and personal behavior; services; social; societal; support (economic); and children. The Court noted that the extent to which these different elements of the marriage relationship will be taken into account must vary with the circumstances of each case. In this case the parties were held to be spouses, as the relationship was not based on a mere economic arrangement, as alleged by the respondent.

- ***M v H*, [1999] 2 SCR 3 (S.C.C.)**

This case involved a constitutional challenge by a same-sex couple against the Ontario *Family Law Act* definition of a "spouse" in s. 29, which includes a person who is actually married and also "either of a man and woman who are not married to each other and have cohabited . . . continuously for a period of not less than three years". Section 1(1) defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage". The SCC agreed with the motions judge that this provision offended s. 15(1) of

the *Canadian Charter of Rights and Freedoms*, and was not saved by s. 1, upholding the judge's declaration that the words "a man and woman" were to be read out of the definition of "spouse" and replaced with "two persons".
The Supreme Court also affirmed the decision in *Molodowich*, as follows: "*Molodowich* sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal"."

E. "Conjugal Partner" under *Federal Immigration and Refugee Protection Act*

- *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

s. 12: A foreign national may be selected as a **member of the family class** on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

- *Immigration and Refugee Protection Regulations*, SOR/2002-227

s. 1(1): Definitions

"**common-law partner**" means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. ("*conjoint de fait*")
s. 2: Interpretation
"**conjugal partner**" means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year. ("*partenaire conjugal*")
"**marriage**", in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law. ("*mariage*")
s. 117(1): A foreign national is a **member of the family class** if, with respect to a sponsor, the foreign national is: (a) the sponsor's spouse, common-law partner or conjugal partner;

- ***AP v Canada (Citizenship and Immigration),* 2020 FC 906**

AP had obtained refugee protection in Canada, on the basis that he faced persecution in his home country due to his sexual orientation. AP established a relationship with a former classmate and friend, a woman; and a child resulted. The parties decided that AP would sponsor AM as a conjugal partner and their child to come to Canada. An immigration officer refused the application without an interview, and the Immigration Appeals Division (IAD) maintained the refusal. Based on a review of the applicable *M v H*

factors, the IAD concluded that the behaviour of the couple was inconsistent with a conjugal partnership under the *Immigration and Refugee Protection Act*.

On further appeal, the Federal Court found that different sexual orientations do not foreclose the possibility of establishing a committed relationship of some permanence. The IAD had particularly erred in finding that "...a homosexual man and a heterosexual woman are [not] able to meet the sexual component of conjugal partnership". Not all the *M v H* factors are necessary for a relationship to be considered conjugal and they may exist in varying degrees. Accordingly, the Court granted judicial review on grounds that the IAD unreasonably narrowed the scope of a conjugal partner to sexually romantic relationships, to the exclusion of other evidence demonstrating a committed relationship of some permanence.

F. "Spouse" under *BC Wills, Estates and Succession Act ("WESA")*

- *Wills, Estates, and Succession Act, S.B.C.* 2009, c. 13

s. 1: Definitions

"**spouse**" has the meaning given to it in section 2;

s.2: **when a person is a spouse under this Act**

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

(a) they were married to each other, or

(b) they had lived with each other in a marriage-like relationship for at least 2 years.

s. 2(2) Two persons cease being spouses of each other for the purposes of this Act if,

(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

2(2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,

(a) they begin to live together again and the primary purpose for doing so is to reconcile, and

(b) they continue to live together for one or more periods, totalling at least 90 days.

2(3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

- ***Connor Estate (Re)*, 2017 BCSC 978**

The deceased died without a will, and the applicant sought a declaration that he was the deceased's "spouse" under s. 2 *WESA* on grounds they "had lived with each other in a marriage-like relationship for at least two years". Evidence was presented to show that the parties continued an intimate and sexual relationship for over 20 years until the deceased's death in 2015, including taking vacations together, sharing passwords, etc. The applicant was married to another woman when he began a relationship with the deceased, and was married until his separation in 2012 and divorce in 2015; he did not

tell his wife about the deceased. The applicant and the deceased never lived together; but the Court attributed that to the deceased's hoarding illness.

On review, the Court opined that the evidence was overwhelming that the applicant and the deceased had a loving and intimate relationship for over 20 years that was far more than mere friendship: they loved each other, were faithful to each other, communicated with each other almost every day when they were not together, considered (and presented) themselves to be "husband and wife" and were accepted by all who knew them as a couple. The Court noted that the presence or absence of any particular factor cannot be determinative of whether a relationship is "marriage-like".

Moreover, although a married person does not have legal capacity to enter into a "common-law marriage", such capacity is not a pre-requisite for a "marriage-like relationship" under *WESA*. Thus, the Court declared that the applicant was the deceased's "spouse" within the meaning of s. 2 *WESA*.

Significantly, the Court held that to be living "with each other" in a marriage like relationship, the parties did not need to be co-resident.

- ***Mother 1 v. Solus Trust Co.,* 2019 BCSC 200**

  The deceased was murdered, and died intestate. He left five infant children, each with a different mother. Mother 1 lived in China but claimed to be Yuan's "spouse"; if correct, she would receive a "preferential share" plus half of the estate under *WESA.* If not, she would receive nothing, and the estate would be divided equally amongst his 5 children. The Court found that the deceased had concurrent or overlapping relationships with all 5 mothers, as well as numerous other women, although Mother 1 was not aware of the other mothers or children until after Yuan's death.

  The Court considered whether a "marriage-like relationship" is possible in circumstances where the deceased was in concurrent multiple relationships, and held that *WESA* specifically permitted such a finding. The Court reviewed the relevant factors under *Molodowich* for determining whether a "marriage-like relationship" exists, but noted that courts should avoid a "checklist" approach and take a "holistic" approach.

  Having reviewed the state of the law and the available evidence, the Court held that no marriage-like relationship existed or at least had been terminated when Yuan cancelled Mother 1's trip to Canada a few years before; he brought Mother 2 and her child to Canada instead, and did not return to China the two years before he died.

  Note: Mother 1 appealed this decision regarding the determination of her spousal status. Leave was recently granted to extend appeal deadlines, so we may soon see the Court of Appeal address this issue in more depth: 2021 BCCA 112.

- ***Turner v Stabeck*, 2020 BCSC 1553**

  Turner seeks declaration on summary trial that she was the "spouse" (under s. 2 *WESA*) of the deceased, who died suddenly and intestate. Turner and the deceased were unmarried but living together; the issue was whether they began the marriage-like relationship at least two years before the deceased's death. The defendant, the deceased's son, argued that Turner and the deceased began living together only 8-9 months before the deceased's death.

  On review of the case law, the Court found that cases regarding "marriage-like" relationships for purposes of the *WESA* turn on matters including the history of the

relationship, the intention of the couple, and how they presented themselves. Although there were some conflicts in the evidence, the Court was satisfied the evidence was sufficient to allow a finding of the facts of the relationship and to consider whether the relationship was "marriage-like".

The judge therefore examined the *Molodowich* factors and determined that Turner and the deceased were in a marriage-like relationship for at least two years preceding the deceased's death. Although they only moved in together 8-9 months prior, that represented the finalization of a plan they had formed and were working to achieve for over a year.

- ***Boughton v. Widner Estate*, 2021 BCSC 325**

  At the time of deceased's death, he was married to Widner and was also in a long-term marriage-like relationship with Boughton. He had two children with each woman, maintained two separate households, and paid for expenses of each. Boughton sought a declaration that she was a spouse of the deceased (per *WESA*).

  WESA expressly provides for more than one spousal share in the estate of an intestate (s. 22), but the question before the Court was whether *WESA* provides for the division of an estate as between two individuals who were in concurrent, subsisting spousal relationships with the deceased at the time of death. The plaintiff submits that *WESA* clearly provides such circumstances, but the defendant says permitting such an interpretation would be to sanction polygamy.

  Based on a review of history surrounding the *WESA* reform and legislative debate, the Court found that it was the considered intention of the Legislature to recognize individuals in a marriage-like relationship with an individual who was still married to someone else at the time of death under the *WESA*. Moreover, the Criminal Code prohibition against polygamy does not extend to conjugal relationships, cohabitation, marriage-like relationships, or adultery, only to multiple legal marriages. The Court granted the declaration that Boughton was a spouse, and that she and Widner are each entitled to half of the estate.

G. Termination of a "Marriage-Like Relationship" under *WESA*

- ***Berkenbos Estate (Re),* 2018 BCSC 1661**

  This case primarily deals with procedural issues under *WESA* and sets out the test for converting an application into an action. A Grant of Probate was issued to Berkenbos, the executor and beneficiary under the deceased's will. Another party, Grandmaison, applied for an order revoking the Grant, on grounds that he was the deceased's "spouse" when she died; and Berkenbos applied to convert the application into an action. In applying the test for conversion, the Court had to consider the complexity of the litigation, including the following legal issues: (1) whether the deceased and Berkenbos had separated from 2000-2002 and (2) who was the deceased's spouse at the time of her death in 2015. Under *WESA*, if the parties had separated in 2000 and not reconciled, Berkenbos would have ceased to be her "spouse".

  Berkenbos and the deceased were married; they never divorced but had unconventional relationship and lived apart after Berkenbos suffered a mental breakdown, ad believed

he was no longer married. He then travelled extensively for years, before returning and living on the same property with the deceased.

In 2001, the deceased brought a proceeding under the *Family Relations Act* (*FRA*), in an attempt to obtain control over their shared businesses. As part of that proceeding, she stated they had ceased cohabiting. Reapportionment of the family assets took place, but there was no divorce.

The deceased began dating Grandmaison around 2006, and maintained a relationship with him through her death in 2015. As noted above, Berkenbos also lived on a cottage on the deceased's property at the time of her death.

Because the deceased had previously initiated a proceeding under the *FRA*, the Court faced the issue of whether the *FRA* or the *FLA* applied to determine whether Berkenbos and the deceased ever separated, *i.e.* which legislation would govern the triggering "event" under s. 2 *WESA.* The Court directed a trial on the issues.

- ***Robledano v. Queano*, 2019 BCCA 150**

  At issue in this case was whether a couple had terminated their marriage-like relationship prior to the deceased's death. The parties accepted that R and J were in a marriage-like relationship from 1985-2000 and from 2005-2010, but disputed whether the relationship terminated in 2010. Following an earlier separation, in 2010 there was a further breakdown in the relationship after which R and J never lived together again, although in 2011 they resumed having sexual relations and took a trip for their 25th anniversary. J had drafted a Will in favour of R, but it was not found upon her death, and revocation was presumed.

  On appeal, the Court held that the judge did not err in determining that R and J's relationship remained marriage-like at the time of the deceased's death. Whether there has been a termination under s. 2(2)(b) *WESA* is a mixed question of fact and law, and the provision provides an imprecise and flexible legal standard requiring a "judgment call" to be made by the judge. As the trial judge correctly identified the standard, and did not make any palpable and overriding error in applying it, deference to the trial judge's decision is required. Although it was argued that the presumption that J revoked her will was strong evidence the women ceased to be in a "marriage-like relationship", the Court disagreed.

- ***Knelsen Estate*, 2020 BCSC 134**

  Two petitions were heard together: (1) Ms. Wertz claimed to be the deceased's spouse under s. 2 *WESA*, and (2) the deceased's mother claimed Wertz was not the deceased's spouse and the deceased's two children were sole beneficiaries of the estate. Although the deceased and Wertz lived together in a marriage-like relationship for 12 years, the issue is whether that relationship had terminated, per s. 2(2)(b) *WESA*, prior to the deceased's death.

  The Court considered the test for termination under *WESA*, which is different for married or unmarried spouses. The standard for unmarried spouses is intended to be more flexible, and separation is not *per se* the test for termination of a marriage-like relationship (*Robledano).* The Court considered, in a broad and holistic manner, the express and implicit intentions of the parties as well as the objective evidence concerning the subsistence of the relationship, with a view to determining whether the evidence

showed that one or both parties had a settled intention to end the spousal relationship (recognizing that a period of separation may not be determinative). While the record showed a relationship in crisis, it suggested a struggle over the future over the relationship rather than a settled intention to terminated it. The Court was unable to conclude that the intention of either party was sufficiently clear to demonstrate a termination of the relationship, and so Wertz was held to be the deceased's spouse.

- ***Stacey Estate*, 2021 BCSC 397**
  Mr. Stacey died, leaving a military will. The question was whether the mother of his child, Ms. Cross, was his spouse at the time of his death. Mr. Stacey's mother opposed the application and submitted that the military will was revoked by operation of s. 56 *WESA*, because the parties terminated their "marriage like relationship" and ceased to be spouses.
  Stacey had a relationship and lived with Cross; they had a child together, then purchased and moved into a home together. Stacey executed a military will while living with Cross, appointing Cross as his executor and his mother as the alternate executor, with Cross as his sole beneficiary. Cross later moved out of the house and to a different city, to live closer to her parents, and Stacey died two years later. Cross asserted that the marriage-like relationship continued, as the parties continued to share a joint bank account and be jointly liable on the mortgage obligations, and would continue to see each other from time to time. Stacey's mother asserted that Stacey was seeing other women and that the parties had entered into agreements concerning child support, confirming they were living separate and apart.
  The Court had to consider whether the parties had "terminated their relationship", stating that this requires judges to consider the expressed and implicit intentions of each spouse, as well as the objective evidence concerning the subsistence of the relationship (*Robledano)*. In the Courts' view, the preponderance of evidence supported the conclusion that one or both of the parties intended to terminate their relationship when Cross moved out of the shared house.

H. Validity of a Marriage Contract

- ***SZ v XJ*, 2020 BCSC 1336**
  A claimant sought an order to annul her marriage on grounds that her husband was unable to consummate the marriage due to his impotence; she sought an annulment rather than a divorce on religious grounds. She argued that the marriage contract was void as a result of the husband's inability to complete an essential implied term of the contract, *i.e.* engaging in sexual intercourse. Pursuant to BC law, a marriage is voidable where a claimant has established their spouse lacks the capacity to consummate the marriage (*Sangha v. Mander* (1985)).
  The Court held that the claimant met her burden of establishing that her husband is, and was at the time of marriage, incapable of have sexual intercourse with her. Notwithstanding attempts during the marriage, the respondent was unable to perform, not through refusal but from some physical or psychological disability. Even if the respondent could perform sexual intercourse with someone else, this does not contradict

evidence that he is unable to perform for the claimant. Accordingly, the marriage contract was null and void.