

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schwab Estate v. Warriner*,
2023 BCSC 220

Date: 20230214
Docket: S213675
Registry: Vancouver

Between:

**Kimberlea Dawn Masters, in her capacity as Administrator of the Estate of
Raymond Johann Schwab**

Plaintiff

And

Diana Mary-Anne Warriner also known as Diana Warriner

Defendants

- and -

Docket: P183470
Registry: Vancouver

In the Matter of the Estate of Raymond Johann Schwab

Before: The Honourable Justice Winteringham

Reasons for Judgment

Counsel for the Plaintiff:

D.A. Hobbs
M. McGarry

Counsel for the Defendant:

M. Menkes

Place and Date of Trial:

Vancouver, B.C.
November 21–25, 28–29, 2022

Place and Date of Judgment:

Vancouver, B.C.
February 14, 2023

Table of Contents

I. OVERVIEW	4
II. PROCEDURAL HISTORY.....	6
III. POSITION OF THE PARTIES	7
IV. LEGAL FRAMEWORK.....	11
A. Marriage-Like Relationship.....	11
B. Express or Resulting Trust	13
1. Express Trust	13
2. Resulting Trust	13
C. Undue Influence	16
D. Credibility	17
V. EVIDENCE	18
A. Plaintiff's Evidence	19
1. Events before Mr. Schwab met Ms. Warriner	19
2. Events after Mr. Schwab met Ms. Warriner	23
3. N.S.....	25
4. S.S.....	29
5. Jasbir Bains	31
6. Michael Chase	35
7. Additional evidence from Ms. Masters	38
B. Hearsay Statements.....	41
1. Principled Exception	41
2. Business Records Exemption	44
3. October 20, 2015.....	46
4. June 28, 2016.....	47
5. August 24, 2016	48
6. January 14, 2018.....	48
7. September 22, 2018	49
8. Police records.....	50
C. Defendant's Witnesses.....	50
1. Anita Schwab.....	50
2. Brittany Schwab.....	52
3. Ms. Warriner's Evidence.....	57

a) Relationship with Mr. Schwab 57

b) Mr. Schwab’s Health 62

c) Documentary Evidence of Date of Co-Habitation..... 64

d) Proceeds from Sale of House 68

e) Purpose of the \$350,000 Transfer..... 71

f) RS Contracting Invoice 77

g) Ms. Warriner’s Chilliwack Property..... 77

VI. CREDIBILITY FINDINGS..... 78

VII. ANALYSIS 84

A. Spouses Under WESA..... 85

B. Express or Resulting Trust 88

 1. Was the handwritten note an express trust?..... 88

 2. Did the transfer of \$350,000 constitute a resulting trust?..... 88

C. Undue Influence 91

D. Remedy..... 94

E. Punitive Damages 96

VIII. CONCLUSION AND ORDERS 98

I. OVERVIEW

[1] Two children lost their dad, Raymond Johan Schwab, to a fentanyl overdose on October 8, 2018. Mr. Schwab was 47 years old. N.S. was 11 years old and S.S. was nine years old when their father died.

[2] The dispute relates to the distribution of Mr. Schwab’s estate. Mr. Schwab did not have a will.

[3] The children’s mother, Kimberlea Masters and Mr. Schwab separated in 2014. Ms. Masters was granted administration of Mr. Schwab’s estate.

[4] Mr. Schwab started seeing Diana Warriner after his separation from Ms. Masters.

[5] Ms. Warriner claims she was Mr. Schwab’s spouse at the time of his death. She seeks a declaration from this Court that she is a spouse of the deceased pursuant to s. 2(1) of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, [WESA]. Ms. Warriner also seeks an order revoking the grant of administration of Mr. Schwab’s estate to Ms. Masters (granted March 6, 2019), and she seeks an order granting administration of the estate to her.

[6] The first issue is whether Ms. Warriner and Mr. Schwab were living in a marriage-like relationship for a period of two years as contemplated under *WESA*. The plaintiff contends Ms. Warriner was not a spouse because the relationship was not marriage-like until just a few months before Mr. Schwab’s death.

[7] The second issue relates to a transfer of \$350,000 from Mr. Schwab to Ms. Warriner in the days before his death.

[8] Five weeks before he died, Mr. Schwab sold his home and received just over \$800,000 from the sale.

[9] Additionally, on October 4, 2018, four days before he died, Mr. Schwab delivered a bank draft in the amount of \$350,000 to Ms. Warriner.

[10] Ms. Masters pleads that Ms. Warriner is holding the funds either in an express trust for the benefit of Mr. Schwab's children, or in a resulting trust for the benefit of the estate. Additionally, Ms. Masters claims that the transfer should be declared void because it was made under undue influence. Ms. Masters pleads that Ms. Warriner's conduct warrants punitive damages. Ms. Warriner denies these submissions, and asserts that Mr. Schwab made the transfer to pay her back for her years working to support the family.

[11] I start by setting out the procedural background. I will then turn to the legal framework applicable to determine:

- a) whether this was a marriage-like relationship pursuant to *WESA*;
- b) whether the handwritten note constituted an express trust;
- c) alternatively, whether the transfer of the funds created a resulting trust;
and
- d) whether Ms. Warriner exerted undue influence.

[12] I will also set out the well-known principles governing credibility assessments in a case such as this.

[13] I will next set out the evidence in detail. To that end, the parties take the position that the Court must engage with the minutiae of the evidentiary record in order to find facts necessary to resolve the legal issues presented.

[14] For the reasons below, I find that Mr. Schwab and Ms. Warriner were not spouses within the meaning of *WESA*. Further, I award Mr. Schwab's estate \$350,000 in damages and \$50,000 in punitive damages against Ms. Warriner. I also dismiss Ms. Warriner's application regarding the administration of the estate.

II. PROCEDURAL HISTORY

[15] On March 6, 2019, Ms. Masters was appointed administrator of Mr. Schwab's estate on the basis she is the parent and guardian of the children who are Mr. Schwab's heirs.

[16] On March 22, 2019, Ms. Warriner filed a Notice of Application seeking, among other forms of relief, an order revoking the grant of administration to Ms. Masters ("First NOA"). On May 31, 2019, Ms. Warriner filed a second Notice of Application seeking similar relief as in the First NOA, but adding a term relating to the disposition of Mr. Schwab's remains ("NOA").

[17] In August 2019, the parties¹ attempted to summarily resolve their dispute. Justice Gomery was not satisfied that the issues were suitable for summary determination, largely because of the need to resolve material issues requiring a credibility assessment. In Reasons for Judgment, *Schwab Estate (Re)*, 2019 BCSC 1478, Gomery J. stated at para. 6:

For the reasons that follow, I am of the view that the issue of Ms. Warriner's status as a spouse – that is, whether the relationship became "marriage-like" before or after October 8, 2016 – raises a triable issue that cannot be decided on this application. While the trial of that issue is pending, it is appropriate that Ms. Masters remain the administrator of the estate, subject to some constraints on what steps she may take as administrator.

[18] Justice Gomery also directed how the litigation was to proceed.

[19] With respect to the administration of the estate, Gomery J. stated at paras. 29–30:

[29] The estate is simple enough that there is not much to do for the time being. Apart from the potential claim against Ms. Warriner, it consists of an automobile valued at \$54,800 and two bank accounts valued at approximately \$73,000. The automobile is in storage and the parties agree that it should be sold.

¹ At the trial, the parties had retained different lawyers than those who acted for them during the proceedings before Justice Gomery.

[30] In my view, the cost and prejudice to the parties and beneficiaries of the estate will be minimized if the administration remains with Ms. Masters pending further order of the court, subject to the following conditions:

- a) Except as provided in this order, Ms. Masters will not deal with estate assets without Ms. Warriner's written consent or leave of the registrar on notice to Ms. Warriner;
- b) Ms. Masters may sell the automobile and deposit the proceeds into the estate bank account;
- c) Ms. Masters may file tax returns and pay any amounts owing to governments on account of taxes;
- d) Ms. Masters may pursue a resulting trust claim against Ms. Warriner on behalf of the estate as provided in these reasons, but Ms. Masters will have to apply to court, in advance, for leave to use estate funds to pay legal expenses incurred by her on behalf of the estate.

[20] At para. 32, he specified that the following issues be tried:

- a) First, was Ms. Warriner the spouse of Mr. Schwab at the date of death?
- b) Second, does Ms. Warriner hold \$350,000 or any part of \$350,000 received on October 4, 2018 on a resulting trust for Mr. Schwab's estate?

[21] Justice Gomery concluded pleadings were required for the resulting trust issue and directed that a Notice of Civil Claim be filed. In addition to discovery directions, Gomery J. directed that that the two issues be tried together (subject to the direction of the trial judge).

[22] At the trial, the parties agreed that Ms. Masters would first present her case followed by Ms. Warriner. However, the evidence tendered was intended to address the legal issues raised by both the NOCC and the NOA.

III. POSITION OF THE PARTIES

[23] I note at the outset that Ms. Masters does not have, and does not assert, a claim against Mr. Schwab's estate in her own right.

[24] Regarding the spouse issue, the plaintiff takes the position that Ms. Warriner was not a spouse within the meaning of *WESA*. That is because, the plaintiff

submits, Ms. Warriner and Mr. Schwab had not lived in a marriage-like relationship for a period of two years, as required by the statute.

[25] Ms. Warriner claims that she and Mr. Schwab were spouses within the meaning of *WESA*. She takes the position that they were in a marriage-like relationship well longer than the two years stipulated by *WESA*. She claims they commenced cohabitation by at least September 2015, Mr. Schwab declared Ms. Warriner to be his spouse on applications for benefits (in October 2016) and she received a marriage proposal from Mr. Schwab in January 2017. She submits that the Court should have little difficulty finding a marriage-like relationship when considering the totality of the evidence.

[26] Regarding the express trust issue, the plaintiff relies on an undated handwritten note to prove an explicit expression of Mr. Schwab's intention to create a trust for his children. Ms. Masters submits that she has proven the existence of an express trust and has provided sufficient evidence to establish the three certainties:

- a) certainty of the settlor's intention to create a trust;
- b) certainty of the property subject to the trust; and
- c) certainty of the object or beneficiaries of the trust.

[27] In the alternative, Ms. Masters takes the position that Ms. Warriner holds the \$350,000 transfer on a resulting trust for the estate. She submits that the presumption of a resulting trust arises because Mr. Schwab transferred these funds to Ms. Warriner gratuitously to invest on his behalf and/or to protect against claims from Ms. Masters. She submits that the presumption should apply as Ms. Warriner has:

- a) not presented credible evidence that the funds were actually to repay outstanding debts he had incurred both to her and to others; and
- b) failed to rebut the presumption by proving the transfer was otherwise a gift.

[28] Finally, Ms. Masters contends there is ample evidence supporting a finding of undue influence or raising the presumption of undue influence. In particular, she points to evidence of Mr. Schwab’s vulnerabilities as a result of his active substance use disorder at the time the funds were transferred. In this context, she asks the Court to examine Ms. Warriner’s manipulation and find that she persuaded him to stay away from his long-term banker who was trying to impart some conservative advice about investing the substantial sale proceeds.

[29] Ms. Masters submits that the banking records corroborate her theory of undue influence. To that end, she points to the fact that the residence was by far Mr. Schwab’s most valuable asset. In fact, besides his vehicle this was really his only asset. Mr. Schwab spent a substantial portion of the sale proceeds within weeks of receiving the proceeds. The parties agree that the money went to pay Mr. Schwab’s mother, a private lender (Alpine Credit), Ms. Warriner, Ms. Warriner’s mother, Ruth Zimmer, and a “drug dealer” by the name of “Andy”. Thereafter, Mr. Schwab delivered the \$350,000 bank draft to Ms. Warriner. Mr. Schwab did not have independent legal advice regarding the transfer of the funds nor did Ms. Warriner have power of attorney for Mr. Schwab.

[30] All of this demonstrates undue influence, according to Ms. Masters.

[31] Ms. Warriner testified that she told Mr. Schwab she would take care of his children should anything happen to him. Ms. Masters submitted that this was a lie and she mislead Mr. Schwab about caring for his children. She has done anything but care for the children and broke her stated promise that she would do so. She has not provided anything to the children since Mr. Schwab’s death.

[32] Ms. Warriner presents a picture that is dramatically different than the one painted by Ms. Masters. She testified that the couple began living together in about April 2015 or September 2015. In October 2016, Mr. Schwab placed her on his employer’s benefits package, declaring Ms. Warriner to be his spouse. She says this was a loving marriage-like relationship where she did all that she could to support Mr. Schwab. She described working full-time and supporting Mr. Schwab so that he

could work part-time and be a caregiver to his children. She also described a hope that they would have children of their own. She takes the position that the evidence simply corroborates what she described. That is, Mr. Schwab owed her back for her years of financial support and that is what the funds were used for, to pay back his debts.

[33] With respect to the express trust claim, Ms. Warriner says that other reasonable inferences can be drawn from the undated handwritten note, including the fact that it was written much sooner than August/September 2018. She says that the plaintiff has failed to prove an express trust.

[34] Regarding resulting trust, Ms. Warriner submits that the evidence shows only that the money was used in accordance with Mr. Schwab's instructions to her and that there was ample evidence of consideration. She says she has rebutted any presumption that she was holding the funds in trust for Mr. Schwab and/or his estate.

[35] In her closing submission, Ms. Warriner submitted that the presumption of advancement applies in the circumstances. That is because, Ms. Warriner submits, they were spouses and the sale proceeds constituted joint assets as between spouses.

[36] Ms. Warriner denies the allegation of undue influence. She says the plaintiff's evidence on this point, and others, is not credible. Again, she describes a loving relationship and denies she manipulated or coerced Mr. Schwab in the manner suggested or at all. Ms. Warriner submits that there is "no smoking gun" and that the plaintiff has failed to identify any evidence of undue influence by Ms. Warriner.

[37] The plaintiff seeks an order that Ms. Warriner and Mr. Schwab were not spouses at the time of his death as defined under *WESA*. She also seeks an order that the \$350,000 transferred by Mr. Schwab to Ms. Warriner is held by Ms. Warriner in an express trust for the benefit of Mr. Schwab or his two children or in a resulting trust for Mr. Schwab's estate. In the alternative, Ms. Masters seeks an order that the

\$350,000 transfer from Mr. Schwab to Ms. Warriner is void on the basis of undue influence and she is liable to repay the \$350,000 to his estate. Finally, she seeks punitive damages for Ms. Warriner's breach of fiduciary duty as trustee of the funds that she held in trust for the children and Mr. Schwab. She submits that this is a case where Ms. Warriner's misconduct was malicious, oppressive and high-handed such that it offends a sense of decency.

[38] Ms. Warriner seeks an order dismissing the claim against her.

IV. LEGAL FRAMEWORK

[39] I start by setting out the legal principles governing the various issues that I must determine.

A. Marriage-Like Relationship

[40] *WESA* prescribes the manner in which an estate is to be distributed when a person dies without a will. Section 21 provides that if a person dies without a will leaving a spouse and descendants then the estate is to be distributed to those persons subject to the preferential interest of the spouse.

[41] Under s. 2 of *WESA*, two persons will be spouses if, at the time of death of one of the persons, they were married or had lived in a marriage-like relationship for at least two years.

[42] In *Jones v. Davidson*, 2022 BCCA 31 at para. 21, the Court of Appeal highlights the fact that there is no specific definition of a marriage-like relationship, nor should the analysis be constrained by a checklist approach, since such relationships are no longer defined by financial dependence, sexual relationships, or the mingling of property and finances: see also *Coad v. Lariviere*, 2022 BCCA 222, at para. 127. In *Austin v. Goerz*, 2007 BCCA 586 at para. 58, the court cited *Yakiwchuk v. Oaks*, 2003 SKQB 124 at para. 10:

[10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property- in others, spouses keep their property and finances totally separate

and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their “spouse” by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some “spouses” do everything together - others do nothing together. Some “spouses” vacation together and some spend their holidays apart. Some “spouses” have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a “spousal relationship” exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of “public” declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to “be together”. Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people “ease into” situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.

[43] Furthermore, the court in *Weber v. LeClerc*, 2015 BCCA 492 at paras. 23–24, explained the importance of considering the parties’ intentions against the objective evidence:

[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”.

[44] Ultimately, the determination of a “marriage-like relationship” is contextual and involves the consideration of subjective intentions and objective evidence on a wide assortment of characteristics or indicia: *Jones* at para. 24.

B. Express or Resulting Trust

1. Express Trust

[45] The parties focused their submissions on the concept of resulting trust. I have done the same. For completeness, I set out the general legal framework governing express trusts.

[46] Referred to as the “three certainties”, all three essential features must be present in order to establish an express trust:

- a) certainty of the settlor's intention to create a trust;
- b) certainty of the property subject to the trust; and
- c) certainty of the objects or beneficiaries of the trust.

[47] As noted by Justice Ballance in *Langley, Bevans and Julson v. Brownjohn*, 2007 BCSC 156 at para. 42, there is no requirement that the word “trust” or “trustee” or that other special or technical language be used in order to create a valid trust. What is critical is the substance of the arrangement, not the form.

2. Resulting Trust

[48] The presumption of resulting trust, a is a rebuttable presumption of law that applies to most gratuitous transfers: *Pecore v. Pecore*, 2007 SCC 17 at para. 24. Equity presumes bargains, not gifts. Thus, it is presumed that a transferor intended to convey only legal title to a transferee who did not provide consideration and that the transferee holds the beneficial interest in the property in a "resulting trust" in favour of the transferor. The transferee must therefore return the property to the transferor upon request: *Pecore* at paras. 20 and 24.

[49] The party who obtained the benefit of the transfer must rebut this presumption: *Pecore* at para. 24. Typically the transferee, must prove on a balance of probabilities the transferor intended a gift at the time of the transfer: *Pecore* at

paras. 25 and 43. The presumption of resulting trust can also be rebutted with evidence of the transferor's contrary intention: *Pecore* at paras. 24 and 43.

[50] In *Weaver v. Weaver Estate*, 2019 BCSC 132, Justice Horsman, after reviewing the jurisprudence, stated, at para. 62:

If the evidence establishes, on a balance of probabilities, that the transferor's actual intention was to gift the property, then the presumption has been rebutted. It is the intention of the donor at the time of the transfer that is the governing consideration. To rebut the presumption of resulting trust, the donee must show not only that a gift was intended, but that the donor has done everything necessary to transfer the property to the donee and render the transfer legally binding: *McKendry v. McKendry*, 2017 BCCA 48 [McKendry] at para. 31.

[51] In *Fuller v. Fuller Estate*, 2010 BCCA 421, the Court of Appeal confirmed that the court should only rely on the presumption of resulting trust where there is insufficient evidence to establish the transferor's actual intent at the time of the transfer:

[47] The effect of the presumption only becomes evident after all the evidence, both direct and circumstantial, on the surrounding circumstances in which the transfer was made, has been weighed. Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate [citations omitted]...

[52] Regarding evidence proving the transferor's intention with of after-the-fact conduct, Justice Rothstein stated the following in *Nishi v. Rasca Trucking Ltd.*, 2013 SCC 33, at para. 41:

[41] Evidence that arises subsequent to a gratuitous transfer can be admissible to show the true intention of the transferor (*Pecore*, at para. 59). However, it is the intention of the transferor at the time of the transfer that is determinative. The difficulty with subsequent evidence is that it may well be self-serving or the product of a change in intention on the part of the transferor (*Pecore*, at para. 59).

[53] In summary, where a gratuitous transfer is challenged, the presumption of resulting trust arises and it falls to the surviving transferee to prove that the transferor intended to gift the asset at their death. Otherwise, the asset will be

treated as part of the transferor's estate to be distributed according to their will:
Pecore at para. 53.

[54] Thus, if indeed there was no consideration, Ms. Warriner is required to show that, at the time of the transfer, Mr. Schwab intended to give her both legal and beneficial ownership of the funds.

[55] I will say more about this later in these reasons. However, at this point, I pause to address Ms. Warriner's position that the presumption of resulting trust is not triggered in the present case because the funds were not gratuitously transferred to her. She says that the funds were transferred for consideration.

[56] Again, Ms. Warriner takes the position that the transfer was largely a repayment of a debt owed to her by Mr. Schwab. That is a factor, she submits, that must be considered in the overall determination of the issue relating to a resulting trust.

[57] In light of the parties' position, I have been careful to examine the evidence and, in particular, when certain events occurred and whether there is evidence of consideration that should be taken into account in the analysis.

[58] Ms. Warriner also submits that the presumption of a resulting trust does not apply, rather the presumption of advancement applies. When there is a gratuitous transfer between spouses and there is unclear intention for the transfer, then it is presumed to be a gift and the onus falls the transferor to prove it was not a gift: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at paras. 50 and 77.

[59] The plaintiff warns against relying on the defendant's proposed analysis. In large part, the plaintiff submits that the authorities on which the defendant relies are family law cases. And here, the analysis is to be governed by *WESA*, not the *Family Law Act*, S.B.C. 2011, c. 25.

[60] I will address this argument below.

C. Undue Influence

[61] Undue influence is an equitable doctrine used to protect persons from victimization at the hands of others. Equity will set aside transfers brought about by undue influence: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 368, 1991 CanLII 69.

[62] In *Stewart v. McLean*, 2010 BCSC 64, Justice Punnett considered undue influence. At para. 92, he noted that the presumption of undue influence arises for gratuitous transfers when a plaintiff establishes that the potential for influence exists or existed in the relationship. In *Geffen* at 377, Justice Wilson provided a definition of influence:

It seems to me rather that when one speaks of influence one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power.... To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.

[63] Justice Punnett also referred to *Longmuir v. Holland*, 2000 BCCA 538, at para. 71, where Justice Southin defined undue influence as “influence which overbears the will of the person influenced so that in truth what she does is not his or her own act.”

[64] To rebut the presumption of undue influence, Punnett J. stated the following in *Stewart* at para. 97:

[97] To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own “full, free and informed thought.” *Geffen* at 379. A defendant could establish this by showing:

- a) No actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
- b) The donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
- c) The donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);

- d) The donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29); or
- e) Undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

Another relevant factor may be the magnitude of the benefit or disadvantage (*Geffen* at 379; *Longmuir* at para. 121).

[65] See also Justice Lyster's recent summary of the law regarding undue influence in *Campbell Estate (Re)*, 2022 BCSC 2184 at paras. 213–217.

D. Credibility

[66] The parties challenge the credibility and reliability of each of the witnesses that testified. The plaintiff submitted the Court should be cautious when assessing Ms. Warriner's evidence. The plaintiff attacked the veracity of Ms. Warriner's contention that this was a marriage-like relationship. Similarly, Ms. Warriner contends that the children's evidence should not be accepted because neither was a credible witness. She also challenges Ms. Master's testimony and alleges that Ms. Masters doctored some of the documents tendered in evidence.

[67] In light of the parties' submissions regarding credibility, I have kept in mind the well-known principles governing the court's credibility and reliability assessment.

[68] When assessing the truthfulness of the testimony of any interested witness, I am to be guided by the words articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (C.A):

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

[69] Justice Dillon provides a helpful summary of the factors to be considered when assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

[186] Credibility involves an assessment of the trustworthiness of a witness'[s] testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet*

(*Township*) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of [the witness's] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness'[s] evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness'[s] testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[70] The burden of proof in a civil dispute such as this is a balance of probabilities. Where there is conflicting testimony, “the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred”: *F.H. v. McDougall*, 2008 SCC 53 at para. 49.

[71] I have taken these principles into account as I assess the evidence.

V. EVIDENCE

[72] The parties tendered a collection of documents and entered into a document agreement about the use that could be made of the documents. In addition, the parties relied on hearsay statements from Mr. Schwab. I will deal with the admissibility of some of those statements shortly.

[73] For the plaintiff's case, Ms. Masters and the children testified. The plaintiff also called Jasbir (“Jazz”) Bains, one of Mr. Schwab's closest friends and someone who had known him for about 25 years. Finally, Michael Chase testified. He is a CIBC banker who served the Schwab family for many years. Mr. Chase had met Mr. Schwab a few years before his death. Mr. Chase testified about the movement of the sale proceeds through Mr. Schwab's bank account and ultimately to Ms. Warriner. He also testified about his attempt to meet with Mr. Schwab in an effort to provide investment advice for the sale proceeds.

[74] Ms. Warriner testified. She also called Mr. Schwab’s sister, Anita Schwab and Anita’s daughter, Brittany Schwab. Mr. Schwab’s sister and niece both testified that Ms. Warriner moved into Mr. Schwab’s residence in September 2015. They also described a loving and marriage-like relationship. Ms. Warriner tendered a number of banking documents to prove, among other things, her assertions about monies Mr. Schwab owed to her and to others, including a contractor.

[75] The parties rely on out-of-court statements in the form of business records and Mr. Schwab’s utterances to others. I address the legal principles and admissibility of this evidence later in these reasons.

A. Plaintiff’s Evidence

1. Events before Mr. Schwab met Ms. Warriner

[76] Mr. Schwab and Ms. Masters began living together in the summer of 2006 and resided in a home on Chelsea Crescent in Surrey, BC (“Chelsea Crescent Property”). They had two children, N.S. and S.S.

[77] As their family grew, Mr. Schwab and Ms. Masters wanted to purchase a larger home and found a home at 16426 85th Avenue in Surrey (“85th Avenue Residence”). Ms. Masters testified about the purchase of the 85th Avenue Residence.² Ms. Masters explained that they sold the Chelsea Crescent Property and purchased the 85th Avenue Residence. The purchase price of the 85th Avenue Residence was reduced because it had contained a marijuana grow operation and required remedial work.

² Title searches for the 85th Avenue Residence were tendered as an exhibit at the trial to show the ownership history. The 2012 title search showed Johann Schwab (Raymond Schwab’s father) as the registered owner. The registered owner of the 85th Avenue Residence was changed to Ursula Schwab in August 2015 (as executor of Johann Schwab’s estate). In August 2017, title was transferred to Ursula Schwab in her own right and immediately thereafter, to Mr. Schwab.

[78] Ms. Masters believed that they used the proceeds from the sale of the Chelsea Crescent Property and then Mr. Schwab's father "topped up" the balance for the purchase of the 85th Avenue Residence.

[79] Before their separation, Ms. Masters described Mr. Schwab as an amazing father, loving and caring, very family oriented, and devoted to his children. She testified that he loved to be active and would take the children camping, crabbing, and would do various outdoor activities with them. She described their home as a place to gather with friends and family.

[80] During the early stages of their relationship, Mr. Schwab was a maintenance worker for Air Canada. He hurt his ankle in a boating accident and was required to go on disability for a period of time as he awaited surgery. While he was recuperating, Air Canada shut down their Vancouver operations and another company took over the operations. In late 2012 or the beginning of 2013, the Vancouver operations were shut down and Mr. Schwab lost his employment.

[81] Ms. Masters testified that when Air Canada closed their operations in Vancouver, Mr. Schwab received some form of pay-out. He put the funds in an RRSP, initially naming Ms. Masters as the beneficiary. After their separation, he removed Ms. Masters as the beneficiary and named the children.

[82] From time to time after their separation, Mr. Schwab withdrew funds from this RRSP.

[83] After Mr. Schwab lost his job and to help with the family's financial needs, Ms. Masters worked as a cashier at Costco and then worked at Save-On-Foods.

[84] Ms. Masters testified forthrightly about "recreational" drug use during her relationship with Mr. Schwab. She stated that when they first met, the couple enjoyed partying quite a bit, both using illicit substances. After they had the children, she described their lifestyle as "weekend warriors" where they were a "great family, Monday through Friday," and then on the weekends, she and Mr. Schwab consumed illicit substances and alcohol.

[85] According to Ms. Masters, the relationship was tumultuous at times, but particularly in its final years. Though they were committed to raising their young family together, their weekend partying sometimes ended with police involvement. Based on my understanding of her evidence, Ms. Masters has been sober since the end of 2015 and has not used alcohol or drugs for several years.

[86] She testified that Mr. Schwab became depressed and resentful when he was unable to work, while awaiting surgery and later, laid off. She believed his substance use increased during this time and “domestic violence became part of [their] story”.

[87] She said, “I slowly watched him change as a person.”

[88] Mr. Bains testified about Mr. Schwab’s drug use from 2006 through 2018. Mr. Bains was a friend of Mr. Schwab for over 25 years. They met playing baseball and spent a lot of time together, particularly before Mr. Bains moved to Alberta in 2011 or 2012. Mr. Bains testified that Mr. Schwab did not start abusing drugs until he met Ms. Masters in 2005 or 2006. Mr. Bains was not impressed by Ms. Masters and believed that she exacerbated Mr. Schwab’s once casual use of illicit substances.

[89] Ms. Masters testified about involvement of the police and Ministry of Children and Family (“MCFD”) in 2013 and 2014. She testified that things really started to deteriorate at the beginning of 2014. However, based on the police records presented, it seems 2013 was also a difficult year where Mr. Schwab committed criminal acts requiring police and MCFD involvement.

[90] Mr. Schwab was convicted of uttering threats on July 11, 2013 (relating to an incident that occurred on June 6, 2013). He was sentenced to a period of probation with conditions that he not consume alcohol or other intoxicating substances and that he attend counseling for alcohol abuse and anger management.

[91] In June 2014, he was charged with assault (relating to incidents that occurred on September 16, 2013 and June 4, 2014), uttering threats (relating to an incident that occurred on September 17, 2013) and breaching the probation order (relating to the September 16, 2013 events). He was released on a recognizance of bail on

June 10, 2014, with conditions that included: restricting contact with Ms. Masters; limiting contact with his children to that permitted by the family court proceedings; and, prohibiting the consumption of alcohol.

[92] Mr. Schwab was again charged with breaching the terms of his recognizance regarding events that occurred on July 27, 2014. He was released on a recognizance of bail dated August 1, 2014. This time, in addition to no-contact conditions, he was court-ordered to reside at a treatment facility operated by VisionQuest Recovery Society.

[93] It seems this was the first and only time Mr. Schwab participated in a residential treatment program. Mr. Bains testified that he thought Mr. Schwab had successfully “kicked” his addiction, noting an improvement in his overall health after he completed residential treatment.

[94] After Mr. Schwab completed the program at VisionQuest, he resided with his parents at 6560 140th Street, Surrey. During this time, Ms. Masters and the children resided at the 85th Avenue Residence.

[95] Mr. Schwab and Ms. Masters thereafter entered into a separation agreement, dated for reference April 9, 2015. The recitals indicate that “the parties commenced cohabitation in or about the summer of 2006 and separated most recently (and for the final time) in June 2014.”

[96] The separation agreement contemplated Mr. Schwab paying Ms. Masters a lump sum of \$100,000 for “all of her claims for retroactive spousal, child and other support and maintenance of every type and kind whatsoever” by April 21, 2015. Ms. Masters was required to vacate the 85th Avenue Residence “forthwith”, paying for all outstanding gas and hydro bills up to April 15, 2015.

[97] The separation agreement recognized that the parties intended to share parenting of N.S. and S.S. and thus neither would make a claim for child support (subject to a material change in circumstances).

[98] Pursuant to the separation agreement, Ms. Masters moved out of the 85th Avenue Residence, she believed at the end of April 2015, and Mr. Schwab moved in thereafter.

[99] Ms. Masters purchased a townhouse that was situated close to the 85th Avenue Residence, described as being one block in the other direction from the children’s school. The \$100,000 pay out to her was in contemplation of this purchase and was intended to support her and the children and the anticipated shared parenting arrangement.

[100] Ms. Masters was cross-examined about her agreement to let Mr. Schwab have 50% of the parenting time—particularly, in light of her evidence about his drug use. Her response was compelling. She testified that he had gone to treatment, they had a co-parenting arrangement in the months leading up to the preparation of the separation agreement. She added that “we both had ministry involvement during this year and things were running smoothly.”

[101] For the balance of 2015, Ms. Masters testified that the shared-parenting arrangement went well. Though there was still a no-contact order in place, the parents were able to communicate through counsel and third parties (such as family). She testified the parent with the children was to drop them off at school on Friday morning and then the other parent would pick them up from school on Friday afternoon.

[102] She stated it “was a good year between Ray and I” and he was on his best behaviour. She believed that he was trying to win her back and they had days where they spent time together. However, at the end of 2015, Ms. Masters started dating someone else and this seemed to negatively impact the parenting relationship.

2. Events after Mr. Schwab met Ms. Warriner

[103] Though she was unable to provide a specific date, Ms. Masters testified that she met Ms. Warriner for the first time at a gathering at the 85th Avenue Residence in 2015. This gathering was after she had moved out of the 85th Avenue Residence.

Ms. Masters was dropping off the children to spend time with their father and Ms. Warriner was there with a friend, Anna, and about twelve others. Ms. Masters testified that she went inside for about 10–15 minutes and then left.

[104] Ms. Warriner testified that she met Mr. Schwab at a gathering at his home in February 2015. This date seems unlikely because Mr. Schwab did not move back into the 85th Avenue Residence until late April or May 2015. That said, the body of evidence tendered suggests that the two met sometime in the spring or summer of 2015.

[105] N.S. and S.S. testified about the time they spent with their father after their parents separated. The children testified about their observations of the time Ms. Warriner was at the 85th Avenue Residence.

[106] I am mindful that both were young, N.S. was not quite eight years old when Mr. Schwab moved back into the 85th Avenue Residence and S.S. would have been almost six years old.

[107] As the two children testified, it was evident that they do not currently have a close relationship with Ms. Warriner. For the reasons set out more fully below, I have found that they never had a close relationship. In my view, a single birthday card with loving sentiments from young children proves only that at a single moment in time, sentiment was expressed, perhaps with the encouragement of their father. The card by itself reflects a small moment in time in their overall relationship with Ms. Warriner.

[108] I will set out the children’s evidence in some detail. However, I say at the outset that I have carefully examined their evidence because it was obvious to me that they both harboured resentment towards Ms. Warriner (though they were at all times polite and respectful in their presentation to the Court). This is not surprising considering the loss of their father. And so, I have examined the controversial aspects of their testimony with care.

[109] At the same time, I did not get the impression that they were aligned with their mother as suggested by counsel. Indeed, N.S. currently resides at his older sister's home, having moved out of his mother's place before the trial. He adamantly denied counsel's suggestion that he was simply telling the Court what his mother told him to say.

[110] With those remarks in mind, I turn to N.S.'s evidence.

3. N.S.

[111] I say at the outset that I found N.S. to be thoughtful in his testimony. He was mature and answered the questions only after contemplation.

[112] N.S. was 11 years old when his father died. He was 15 when he testified at the trial. He was asked to describe the time that he spent at his father's home during the last three and a half years of his father's life, starting in 2015.

[113] N.S. testified that he spent one week at his mother's and then the next week at his father's. He testified that they lived within a block of one another. Every Friday he and his sister would switch with the other parent.

[114] N.S. believed that his parents had a healthy relationship and that they wanted to establish stability for him and his sister.

[115] He recalled meeting Ms. Warriner in 2015, after his parents separated. He remembered being in his father's living room when he first met her, though he did not recall the details. He said that he believed she would come over to visit once or twice or maybe three times during a typical week at his fathers.

[116] N.S. described about the same amount of interaction with Ms. Warriner from 2016 to 2018.

[117] He did not believe she ever moved into the 85th Avenue Residence. He saw some of her personal belongings while he was there, including clothing and make up in the bathroom. He thought she had enough clothes to fit into "like a drawer –

maybe two.” When asked about other belongings, N.S. testified that he did not think she brought anything else to the home.

[118] On the point of furniture and other household items, the body of evidence presented suggests otherwise. I accept that at some point, Ms. Warriner moved a dining room table set and some other household pieces into the 85th Avenue Residence. I accept that Ms. Warriner had a greater presence at the 85th Avenue Residence than that described by N.S.

[119] With respect to other relationships, N.S. believed his father also saw a woman named Brigitte and that they would sometimes do things together with her. From the evidence, it was unclear when Brigitte spent time with Mr. Schwab and the children.

[120] N.S. believed Ms. Warriner lived in Richmond, BC, with her mother and brother. He had not been inside her Richmond home, but testified his father sometimes picked her up with her dogs. He recalled the four of them—being his father, Ms. Warriner, S.S. and him—going to a park near her house in Richmond.

[121] N.S. testified that the four would usually go out for their meals. He recalled Ms. Warriner preparing meals maybe three times. N.S. was involved with baseball, but he said Ms. Warriner never took him on her own to games or practices. He remembered Ms. Warriner coming with his father to a few games.

[122] N.S. also remembered seeing her a few times at his grandmother, Ursula Schwab’s, house. He said that he maintained a good relationship with that side of the family even after his parents separated.

[123] Sadly, N.S. witnessed his father consuming drugs. He said that he mainly saw him doing this in the bathroom connected to the master bedroom. He said he saw tinfoil and saw his father light the tinfoil. He testified that it was “not an uncommon thing – almost everyday I’d see that.” He said his father’s drug use was more common when Ms. Warriner was there and that he believed both were doing

drugs—usually in the master bedroom. He “sometimes saw [his dad using] when he was alone.”

[124] N.S. did not see his father inject drugs, but believed he saw needles in the house.

[125] N.S. was cross-examined about the veracity of this evidence. It was suggested to him that he would have told his mother if he saw his dad and Ms. Warriner doing drugs. Despite being challenged about Ms. Warriner’s drug use, N.S. maintained his evidence on this point.

[126] Though Ms. Warriner denied ever doing drugs in front of the children, she candidly admitted that she and Mr. Schwab consumed cocaine—typically on the weekends.

[127] I have no hesitation in accepting N.S.’s evidence about his observations of drug use. The totality of the evidence establishes that Mr. Schwab was actively using drugs in the years following his attempt at recovery. Though he seems to have improved somewhat in 2015, MCFD was back involved in the years following, to the point of instituting child protection safety plans. I will say more about Mr. Bains’s evidence, but say at this point that I accept N.S.’s testimony that he saw his father consuming drugs, sometimes with Ms. Warriner and sometimes alone.

[128] N.S. was present when his father proposed to Ms. Warriner in January 2017. His father had told him about ten minutes before the actual proposal and asked him to hold onto the ring. He did not have any conversation with his father about his plans to marry Ms. Warriner. This is not surprising considering he would have been nine years old at the time.

[129] I also accept that N.S.’s time with his father was interrupted on several occasions between 2016 and 2018. That is, his father was not permitted to exercise his parenting time because of MCFD involvement. On this point, N.S. agreed that there were several months when he was not allowed to see his father, at least without supervision. N.S. admitted that his memory about parenting time was foggy.

He knew that his father was not allowed to see him for a period of time, but he did not remember how long this lasted. He believed one such interruption in the parenting schedule was shortly before his dad died.

[130] During the interrupted parenting times, N.S. would not have been able to witness his father with Ms. Warriner and the living arrangements between them.

[131] N.S. testified that after the 85th Avenue Residence was sold he and S.S. stayed in hotels with their father and that Ms. Warriner was with them most of the time.

[132] I will address N.S.’s testimony about police involvement. N.S. testified that he recalled at least three incidents where the police had been called in response to altercations between his father and Ms. Warriner and that the police would typically tell Ms. Warriner “to go home”.

[133] The police records tendered do not support this testimony—except for the incident at the Pacific Inn in September 2018. Though it is unclear why the police attended on that occasion and the outcome of their investigation, it is clear that the police did attend and detained Mr. Schwab. The children were present and Ms. Masters was required to come and pick them up. Though N.S. did not observe all of his father’s interactions with the police on this day, I accept unequivocally that he saw the police detain his father. I also accept that this incident arose, at least in part, because of illicit drug possession.

[134] I find that N.S. was correct when he described the incident at the Pacific Inn. Taking into account N.S.’s age and the somewhat chaotic times with his father over the years, I have not relied on his evidence of other police encounters involving Ms. Warriner.

[135] N.S.’s evidence about Ms. Warriner’s presence (and that she was with them most of the time) in September 2018 is revealing. That is because the independent evidence demonstrates that Mr. Schwab and Ms. Warriner had entered a “marriage-like” relationship by September 2018. They had prepared a joint application to rent a

condo in White Rock, BC in September 2018 and had submitted a joint credit application to Alpine Credit in May 2018. That N.S. was now seeing Ms. Warriner “most of the time” when he was with his father in the months leading up to his death is consistent with this independent evidence.

4. S.S.

[136] S.S. testified similarly to N.S. She was 13 years old when she testified and would have just turned nine when her father died. She is currently living with Ms. Masters.

[137] After her parents separated, S.S. testified that she “lived at both houses – fifty/fifty” and then started living at her mother’s house more.

[138] S.S. believed she met Ms. Warriner when she was in grade three or so. Based on the totality of the evidence I have accepted, I have found that S.S. first met Ms. Warriner before she was in grade three. Her father was having people over one weekend and Ms. Warriner came over. Thereafter, she said that Ms. Warriner would come over a couple of times a week while S.S. was with her father and the frequency increased over time.

[139] That said, S.S. did not believe that Ms. Warriner ever lived at the 85th Avenue Residence. She believed Ms. Warriner had her own house in Richmond. Though S.S. agreed that Ms. Warriner slept over a “couple of times a month when I was there” and that Mr. Schwab called Ms. Warriner his girlfriend. S.S. testified that when Ms. Warriner slept over, she would go to work the next day. She said Ms. Warriner moved her personal belongings “back and forth.”

[140] Ms. Warriner did not take S.S. to school or to extracurricular activities. S.S. testified that either her mother or father would drive her to her activities. She recalled Ms. Warriner going to only one of her baseball games.

[141] Just before he died, S.S. described a conversation with her father about real estate. She testified that he told her he wanted to get into real estate. She did not

elaborate on this discussion or provide any further details about her father’s wishes about real estate. She was pressed in cross-examination for details and she was not able to provide any.

[142] During cross-examination, S.S. was asked whether she liked Ms. Warriner and she said she did. In terms of the amount of time she spent with Ms. Warriner, she believed she had been to her house in Richmond four or five times. She did not recall meeting Ms. Warriner’s mother or brother, but said she remembered going to her house because they went to see her dogs. She said mostly she played with Ms. Warriner’s dogs when she went to the Richmond house.

[143] S.S. knew that her father’s parenting time was interrupted on occasion. She testified that she saw him doing drugs in his bathroom and saw burnt tinfoil in the house. She described it as a “messy schedule.” She remembered her mother having to collect her and her brother a few times during her dad’s parenting time, including after the Pacific Inn incident. However, she did not remember speaking with a social worker or the details of what had occurred between the adults.

[144] S.S. agreed that her dad seemed happy with Ms. Warriner. Though she was unable to provide a point of reference, S.S. agreed that Ms. Warriner was coming over “a little bit more” as the years went on.

[145] S.S. was cross-examined about her dad’s behaviour after he sold the 85th Avenue Residence. She testified that, “he acted off – he wasn’t himself – he was different.”

[146] In all, I found S.S. to be an honest witness. She testified as best as she could about events involving the adults around her. She and her brother were clearly loyal to their father, someone they obviously loved. Indeed, Ms. Masters stated as much during her cross-examination. Despite Mr. Schwab’s issues with drugs and the tumult substance use brings to loved ones, N.S. and S.S. very clearly valued and loved their father and the time they had together.

5. Jasbir Bains

[147] I have earlier described some of Mr. Bains’s evidence, particularly as it related to the time when he interacted with Mr. Schwab while he was still living with Ms. Masters.

[148] I address now Mr. Bains’s interaction with Ms. Warriner. Again, Mr. Bains described himself as knowing Mr. Schwab for over 25 years. He also testified that he knew the Schwab family “really well” and that he spent time at Ursula Schwab’s home when he was in town, saying that he spent a lot of time with Mr. Schwab’s parents.

[149] Even after he moved to Alberta, Mr. Bains said that he communicated regularly with Mr. Schwab. He testified that they spoke on the phone bi-weekly and would see each other three, four or five times per year.

[150] He testified that he first met Ms. Warriner at Mr. Schwab’s house. He described Ms. Warriner and her friend, Anna, coming to the house. He said his first impression was not great stating, “I didn’t get a good vibe from her because she showed up with drugs – the three of them were doing cocaine, Anna, Diana and Ray.” Mr. Bains stated that he remembered Ms. Warriner pulling the cocaine out of her pocket. He said that he had some drinks, the others did cocaine and Ms. Warriner ended up going back to her place and Anna spent the night with Mr. Schwab.

[151] During cross-examination, Mr. Bains was not challenged about his observations on this night. That is despite Ms. Warriner’s denial that she brought cocaine to Mr. Schwab’s residence and that Mr. Bains saw her pull cocaine out of her pocket—retorting that Mr. Bains was lying.

[152] I accept Mr. Bains’s description of his first encounter with Ms. Warriner and his observations of her involvement with drugs. Mr. Bains had no reason to distort the truth on this point. Ms. Warriner also conceded that she and Mr. Schwab used cocaine on the weekends.

[153] Mr. Bains believed he interacted with Ms. Warriner four or five times over the years. He described one or two encounters with her at a pub when she was with Mr. Schwab. He also recalled seeing her in August 2018 when Mr. Schwab was holding a garage sale at the 85th Avenue Residence.

[154] Mr. Bains described Mr. Schwab's appearance on that occasion. He said he was so disappointed to see him down to 185 pounds. Mr. Bains said it was depressing because it appeared "they were selling stuff out of the garage to support their habit." Mr. Bains testified that he had fresh fish with him and gave Ms. Warriner one of the fish. He told her to "feed him" because he had lost so much weight.

[155] Around the same time, August 2018, Mr. Bains described a conversation he had with Mr. Schwab at a pub. Mr. Bains said he and Mr. Schwab were to meet at a pub and Mr. Schwab was over an hour late. Mr. Bains testified this was unusual because in the 25 years of friendship the two were never late for one another. When Mr. Schwab arrived, he "looked like hell – skinny." Mr. Bains said he started "laying into him" and asked him if "he was using all the time." He told him this is not recreational use anymore and asked to look at Mr. Schwab's arms. Mr. Schwab complied. Mr. Bains candidly admitted that he was not a medical professional and stated he did not see needle tracks. Mr. Schwab told him they were only "smoking it". Mr. Bains testified that that "was a sad day."

[156] Mr. Bains testified about conversations he had with Mr. Schwab about the sale of his house and, in particular, what Mr. Schwab was planning with the sale proceeds. I will address the ultimate admissibility and reliability of this evidence later in these reasons after addressing the legal principles regarding hearsay. For now, I simply recite the evidence on this point.

[157] Mr. Bains said the conversation occurred "right around the sale of his house" and the sale of the 85th Avenue Property completed in late August 2018. Mr. Bains asked him why he was even selling his house and suggested that he better do something with the proceeds. Mr. Bains expressed concern that Mr. Schwab was

going to “blow all this money” and he was trying to help him. From his conversation with Mr. Schwab, Mr. Bains testified to the following:

- a) Mr. Schwab was afraid of [Ms. Masters] wanting the money; and
- b) Mr. Bains suggested he give the money to someone else, someone he trusted, like his brother-in-law or his mother or go to CIBC where the family had a long and trusting banking relationship.

[158] Mr. Bains testified that Mr. Schwab told him about his debts. In his testimony, Mr. Bains described the conversation this way:

It was a half a million dollars – I know he got 900,000. I don’t know what happened to the rest of it – I know he owed some money – he told me he owed some money. But it was a big chunk of change there [...] I wanted him to do the right thing [...] so I’m trying to push him to give it to someone he could trust.

[...]

He owed some money. He borrowed some from his mother. He owed someone from wherever he was getting his drugs from. Before, the drugs revolved around payday and after that he wouldn’t do it. By the looks of him, this was a regular thing by looking at his weight [...] complete addict at that point.

[Underlining added.]

[159] Mr. Bains was asked whether Mr. Schwab told him anything else about his estate plan. He responded by saying he could not recall the details, but stated Mr. Schwab referred to Ms. Warriner’s brother and Mr. Schwab recited a story about the brother making an inordinate amount of money. He was not challenged about this conversation.

[160] Mr. Bains testified that Mr. Schwab had mentioned transferring money to Ms. Warriner:

He mentioned it when we had that conversation when he wanted money about investing it with her brother – who was going to make him whatever amount of money – he had talked about that. I think [Ms. Masters is] going to want it as well – even though he told me he already given her money previously – they bought her a condo – he and his dad – and had some sort of agreement with her, that was it she’s done.

[161] Regarding the sale of the house, he testified that he knew “[Mr. Schwab] was afraid of [Ms. Masters] wanting it and hiding it.”

[162] Mr. Bains testified that he told Mr. Schwab not to put the money in Ms. Warriner’s account. Rather, he suggested that he should trust his sister’s husband or his mother or anyone else with the money.

[163] During cross-examination, Mr. Bains was not challenged on this conversation he had with Mr. Schwab. He was cross-examined about his knowledge of other debts and he testified that he did not recall whether Mr. Schwab mentioned having other debts.

[164] Mr. Bains testified that he saw Mr. Schwab with women (he named three) other than Ms. Warriner after Ms. Masters had left the 85th Avenue Residence.

[165] Mr. Bains said he saw Mr. Schwab four to five times a year even after he moved to Alberta. Mr. Bains was specifically asked about the time frame of 2015–2018 and whether it appeared to him that someone else had moved into the 85th Avenue Residence. The exchange went as follows:

Q: Did you ever observe that anyone else had moved in?

A: No. No. It was just Ray’s stuff. I would sometimes spend the night in a spare room. I would usually have a few drinks. I didn’t observe anyone else’s belongings there.

[166] I refer to an incident that Mr. Bains described when he had shown up at the 85th Avenue Residence. He knocked on the front door and was let in by N.S. and S.S. He was told that Mr. Schwab and Ms. Warriner were in the master bathroom. Mr. Bains said he eavesdropped on the couple’s conversation and they were talking about losing their parents. He testified that he could not say for certain whether they were doing drugs while in the locked room. However, he testified the next time he came to visit, “the kids weren’t there anymore – he wasn’t allowed to see them anymore.”

[167] Mr. Bains testified that he would go to Mr. Schwab's parents' home for meals. His evidence was that Ms. Warriner was never there when he was there for dinner.

[168] Mr. Bains described a telephone conversation he had with Mr. Schwab after Mr. Schwab had received the sale proceeds from the house. Mr. Schwab phoned him because the bank had placed a hold on the money and Mr. Schwab wanted the money that day. Mr. Bains was going to ask a cousin of his who worked at CIBC about the hold. However, approximately two hours later, Mr. Schwab called to say that "it's okay – I got some money."

[169] Mr. Bains described the sad decline of his friend. He said the loss of his job at Air Canada, the loss of his father, and then the loss of parenting time was "not good for him."

[170] He did not know that Mr. Schwab had proposed to Ms. Warriner in January 2017. He testified that he believed he would have been the best man had there been a wedding, but said that Mr. Schwab never told him he was going to marry Ms. Warriner. Regarding Ms. Warriner's relationship with Mr. Schwab, Mr. Bains said that he saw them arguing. He said that Mr. Schwab did not call Ms. Warriner his spouse or wife or partner or anything like that.

[171] In all, Mr. Bains testified that he did not see Ms. Warriner "much at all" during his visits with his friend.

6. Michael Chase

[172] The Schwab family had a long history at the CIBC Kennedy branch. Mr. Chase testified about his relationship with Mr. Schwab and the family's history banking with CIBC. He described Mr. Schwab as the son of a regular customer, Ursula Schwab. Mr. Chase did not see Mr. Schwab as frequently as his mother, but had some interaction with him in 2016, 2017 and 2018.

[173] Mr. Chase testified that he first met Mr. Schwab in May or June 2016. He described his interactions with him thereafter.

[174] In early January 2017, Mr. Schwab contacted the branch asking to withdraw funds from his RRSP. Mr. Chase recorded the following:

Jan 3, 2017 [Mr. Schwab] asked to set up a financial hardship withdrawal from his PPS L-RRSP federal. I double checked and it is allowed once per calendar year with a follow up within 30 days. To a maximum amount. Assuming [Mr. Schwab] makes \$12242 like he did in 2015 in 2017, his max withdrawal is \$19496.26. I have prepared the forms. He is to pick up and get notarized and then return.

[175] Mr. Chase testified that Mr. Schwab came into the branch the next day to pick up the forms.

[176] On April 28, 2017, Mr. Chase noted that Mr. Schwab inquired about borrowing funds from the bank because he was interested in buying a business that installed hardwood floors. Because of his low earnings, Mr. Chase told him that he would need a strong co-signor for the bank to lend the funds.

[177] Mr. Chase's next contact with Mr. Schwab occurred in early January 2018 when Mr. Schwab again sought to withdraw money from his RRSP. Mr. Chase recorded the following information:

Jan 15, 2018: I met with [Mr. Schwab] today at 11:30 and he was in to process a financial hardship withdrawal from LIRA PPS. He is expecting to earn \$8400 approx this year, no real ongoing work except at Rogers Arena as show hand.

I filled in the forms that he needs to take to notary to get notarized and then return. He has no spouse.

Asking for \$2355.60 withdrawal, moderate to high risk tolerance.

[...]

PPS review. He grew \$16000 since last January 1st and that almost fully replaced all the withdrawal from last year.

However I did mention that if he keeps withdrawing now he will not have enough funds for retirement. He is looking to sell his home and flip ppty reno and improve next home and flip to help add income. No word on the flooring business.

[Underlining added.]

[178] Mr. Chase described his interaction with Mr. Schwab in the summer of 2018. Mr. Chase testified that he spoke with Mr. Schwab on August 16, 2018. It seemed

this contact related to a discussion about an “overage” in the account. Mr. Schwab advised that he would have it covered by August 30, 2018 because he was selling his home—completing on August 28, 2018. Mr. Chase made the following note:

He will want to set up 2 new accounts for his kids \$5000 in each and a separate account for himself. Perhaps a TFSA?

He also needs to give \$100,000 back to his mom Ursula. Thus we will need to meet at the end of the month.

[179] The bank’s records show that Mr. Schwab came into the bank on August 31, 2018, and “he deposited a cheque for 802K from proceeds of sale of home. 682K deposited to an account and 100K transferred to his mom Ursula as he owed her for these funds. Appt booked to discuss more option for the funds.”

[180] Mr. Chase did not know what happened to the \$120,000 balance of the \$802,000.

[181] On September 5, 2018, Mr. Chase left a message for Mr. Schwab because he had not attended for an appointment they had scheduled. Mr. Chase left a message about rescheduling the appointment. Based on Mr. Chase’s notes, Mr. Schwab called him back to reschedule the meeting for the following week but “he still needs to confirm with significant other, Diane.”

[182] On September 7, 2018, Mr. Schwab came into the branch because there was a hold on the funds and he wanted it removed. Mr. Chase noted that “he met Diana”. He also noted that he confirmed an appointment with Mr. Schwab for the following week. Mr. Chase testified that this had not been a scheduled meeting and that Mr. Schwab had just walked into the branch for the purpose of having the hold removed. Mr. Chase said he only met Ms. Warriner briefly.

[183] Mr. Chase noted that Mr. Schwab cancelled the rescheduled meeting for September 12, 2018. The appointment was rescheduled for the following week.

[184] On September 19, 2018, Mr. Chase noted that the clients canceled the appointment scheduled for that day and “[the clients] to reschedule.” Mr. Chase had

noted that this appointment was to “discuss plans for fund [...] set up small account for his kids benefit like an RESP.”

[185] On September 27, 2018, Mr. Chase followed up with Mr. Schwab to book a time to meet.

[186] On October 9, 2018, Mr. Chase tried once again to connect with Mr. Schwab. He testified that he was obviously not aware of what had happened. He said the call was initiated because he “noted a large chunk of money was withdrawn” and he wanted to have a discussion with Mr. Schwab about what the plans were. He said he was surprised by the account activity stating that “over the space of just over one month, [Mr. Schwab] managed to spend a fair amount of money.” He testified that he was able to see the draft for \$350,000 and the amount of spending was quite alarming. He stated, “we didn’t know where it was all going.”

[187] During his testimony, Mr. Chase reviewed the transactions from Mr. Schwab’s bank account showing the movement of a portion of the funds. Regarding the \$350,000, Mr. Chase noted that this bank draft was made out to “Diana Warriner” and the bank draft was drawn at a Langley branch. Mr. Chase testified that he was surprised by the bank draft and was not notified about it until after Mr. Schwab had died.

7. Additional evidence from Ms. Masters

[188] Before turning to the defendants’ evidence, I will address a few more points raised by Ms. Masters’ testimony.

[189] In her direct examination, Ms. Masters revealed her criminal record. She testified that in the early 2000s, when she was 21 or 22 years old, she pleaded guilty to fraud. She testified that the incidents related to cheque-kiting and involved a former boyfriend.

[190] She was asked about her observations of Ms. Warriner at the 85th Avenue Residence. She testified that she observed Ms. Warriner at the home, but did not

see her all that often, particularly in 2016. She described the relationship between Mr. Schwab and Ms. Warriner as “casual.” She said this description was based on her observation that Ms. Warriner’s time with Mr. Schwab was not consistent. She testified that “he was a bachelor with his kids. He kept to himself the weeks he had his children.”

[191] Ms. Masters testified that Ms. Warriner’s presence increased in late 2017 and up to the time of his death.

[192] Ms. Masters testified that she was the parent primarily responsible for taking the children to their various activities, including baseball. She testified that she was typically assigned as the “team parent” and so would be at all of the games. She recalled seeing Ms. Warriner at only one of the baseball games.

[193] Ms. Masters believed that Ms. Warriner lived at her own home in Richmond during 2015–2017. She testified that this belief was based on their involvement with MCFD and Ms. Warriner had represented that her address was in Richmond. Ms. Masters also referred to conversations with Mr. Schwab. She stated that on one or two occasions, “when I would drop the children off, I would ask if [Ms. Warriner] was here and he responded, no, she’s at her residence.”

[194] Arrangements were made for the children to see their father at Ursula Schwab’s residence for Thanksgiving in 2018. The children had not seen their father since the incident at the Pacific Inn, so Ms. Masters organized herself to drop off the children so they could see him. It sounds like there was some disagreement between the two as they negotiated parenting time over Thanksgiving. Ms. Masters ultimately agreed that he could see the children so long as his family was there. When she arrived at Ursula Schwab’s residence, Ms. Masters said there was a disagreement about Mr. Schwab driving N.S. in his new car.

[195] She testified that after Mr. Schwab died, she was trying to assess his estate. She received advice to locate whatever documents she could. She knew he had organized a storage bin when he moved from the 85th Avenue Residence. She went

to the storage locker and found some paperwork in the storage bin. She located a note in what she believed to be Mr. Schwab's handwriting. The note is undated and states the following:

Make a will

A guardian or trustee to take care of funds for [N.S. and S.S.] if I croke

CIBC Michael Chase. Monday 2:00 p.m.

Bring to Bank

- Tax 2015
- Separation agreement

Tomorrow:

- Piss test
- Call lawyer or go to court to get sep. agreement
- 2:00 p.m. go to Michael Chase. CIBC
- Call Port Moody c/s
- Call accountant

[196] This is the note Ms. Masters argues creates an express trust. I can infer from the note that it was created after the separation agreement was prepared and after the 2015 tax documents were completed. At various times, Mr. Schwab was required to submit to drug-testing so this entry does not pinpoint a time frame. I will say more about this in my analysis. However, at this point, I note only that the note would have been prepared between 2016 and the end of August 2018 when Ms. Masters observed the storage bin in Mr. Schwab's driveway.

[197] The following Revenue Canada documents for Mr. Schwab were presented:

Year	Reported Income	Declaration re Marital Status
2015	\$12,242.87	Single
2016	\$23,600.80	Separated

[198] Ms. Masters testified about a conversation she had with Mr. Schwab about the sale proceeds of the 85th Avenue Residence. She testified that Mr. Schwab told her he had sold the house and “how much he got for it.” He said he intended to pay his mom back. He also said he owed Andy a large sum of money. He told Ms. Masters that he intended to purchase a condo in White Rock with the money he had left over. His plan was to purchase a two-bedroom condo and then they had a discussion about whether he would need a third bedroom, because the children were getting older and could not share a room.

[199] Ms. Masters also presented some evidence in answer to Ms. Warriner’s evidence about Mr. Schwab’s debt including some money spent on renovations to the 85th Avenue Residence. Ms. Masters testified that the 85th Avenue Residence did not need any renovation work. That is because she and Mr. Schwab had done significant remedial work when they first moved in to deal with the remnants of the earlier marihuana grow operation.

[200] Before turning to the defendant’s evidence, I will deal with the hearsay issues presented in this case.

B. Hearsay Statements

[201] The Court must consider two types of hearsay evidence tendered in this case. The first relates to statements alleged to have been uttered by Mr. Schwab. The second relates to records kept by MCFD and the police.

[202] The parties each rely on out-of-court statements uttered by Mr. Schwab in the months leading up to his death. Counsel did not make submissions regarding the individual statements. Rather, they invite the Court to engage in an admissibility analysis regarding those statements. Counsel agree that the admissibility of each statement should be governed by the principled exception to the hearsay rule.

1. Principled Exception

[203] Of course, the hearsay rule provides that out-of-court statements are presumptively inadmissible to prove the truth of what was said, subject to the

traditional and principled exceptions: *R. v. Khelawon*, 2006 SCC 57. The rule is primarily concerned with an inability to test out of court statements through cross-examination. Therefore, the party leading the evidence must prove the twin criteria of necessity and reliability: *Khelawon* at para. 2.

[204] There is a distinction between threshold reliability, which concerns admissibility, and ultimate reliability, which concerns the degree to which the hearsay evidence is relied on or accepted. Both must be assessed in accordance with the principles in *Khelawon* and *R. v. Bradshaw*, 2017 SCC 35. Essentially, all relevant factors must be considered, including the presence of supporting or contradicting evidence: *Khelawon* at paras. 2 and 4.

[205] *Khelawon* and *Bradshaw* also discussed two types of threshold reliability. The first, referred to in *Bradshaw* as procedural reliability, is established where there is no real concern about the truth or accuracy of the out of court statement because adequate procedural safeguards were present at the time it was made (para. 31). A statement made under oath or affirmation at a preliminary inquiry are examples. The second type of reliability, substantive reliability, arises from the circumstances in which the statement came about or was made. It may be established where there are "sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy", or the statement was made in circumstances where cross-examination would add little or be unlikely to change it: *Bradshaw* at para. 22; *Khelawon* at para. 62.

[206] The SCC's most recent comment on the admissibility of hearsay pursuant to the principled approach is found in *R. v. Furey*, 2022 SCC 52. The SCC summarized and reaffirmed the existing framework:

This Court has recognized that necessity and reliability — making up the principled approach to hearsay evidence — “work in tandem”; in particular, “if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed” (*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 72). Indeed, “[i]n the interest of seeking the truth, the very high reliability of the statement [can] rende[r] its substantive admission necessary” (*Khelawon*, at para. 86, citing *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764).

However, this Court has never said that reliability becomes more flexible as necessity increases. While the indicia of reliability required to address specific hearsay concerns may vary with the circumstances of each case (*Khelawon*, at para. 78), threshold reliability must be established in every case. As this Court affirmed in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, “the threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents” (para. 32, citing *Khelawon*, at para. 49). Indeed, where this Court has considered the out-of-court statements of deceased declarants, we have consistently insisted on “circumstantial guarantee[s] of trustworthiness” (*R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 937-38), or “a sufficient substitute basis for testing the evidence” (*Khelawon*, at para. 105). Thus, in all cases, whatever may be the degree of necessity, such evidence must meet the requirement of threshold reliability in order to be admissible.

[207] Since Mr. Schwab is dead and cannot testify himself and there is no other apparent source for this highly relevant evidence, it is necessary to receive the evidence as hearsay: *R. v. Smith*, [1992] 2 S.C.R. 915, 1992 CanLII 79 at 934.

[208] In this case, Ms. Masters seeks to rely on the truth of various statements Mr. Schwab made to Mr. Bains, in particular the discussions at the pub and those relating to Mr. Schwab’s debt and his intentions for the house sale proceeds.

[209] I do not address the admissibility of statements Ms. Masters testified Mr. Schwab made to her relating to his relationship with Ms. Warriner. As I explain below, I did not rely on Mr. Schwab’s utterances to Ms. Masters about the status of his relationship with Ms. Warriner.

[210] I am confident that Mr. Schwab’s statements to Mr. Bains are substantively reliable. The statements were made in the context of an everyday, private conversation between close friends. These circumstances are an indicator of reliability as there is no reason for Mr. Schwab to lie to his friend about the matters discussed: *R. v. Pasqualino*, 2008 ONCA 554 at para. 43; see also *Modonese v. Delac Estate*, 2011 BCSC 82, at para. 94, aff’d 2011 BCCA 501.

[211] There is also independent, corroborating evidence which further supports the reliability of the statements. The bank documents and Mr. Chase’s evidence show that there was a hold on Mr. Schwab’s account that he asked CIBC to remove.

Mr. Schwab was also planning to meet with Mr. Chase at the time of the sale to discuss the use of the proceeds. It is also not in dispute that Mr. Schwab owed money to his mother, Ursula Schwab, and Andy, the “drug dealer”. Mr. Schwab also told Mr. Bains that he was contemplating transferring funds to Ms. Warriner, which he did. Mr. Bains discussed all of these matters with Mr. Schwab. This gives me further assurance that Mr. Schwab was not lying and that the statements have threshold reliability.

[212] As a judge sitting alone on this case, I have focussed on assessing the ultimate reliability of any hearsay declarations in the midst of analysing the evidence in its totality.

2. Business Records Exemption

[213] As I have said, the parties entered into a document agreement.

[214] I turn to the MCFD and police records. Ms. Masters submits these are out-of-court statements admissible under the business records exemption.

[215] Section 42(2) of the *Evidence Act*, R.S.B.C. 1996, c. 124 states that:

- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
 - (a) the document was made or kept in the usual and ordinary course of business, and
 - (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[216] Therefore, to be admissible for the truth of its contents, the record must have been made contemporaneously in the ordinary course of business. Additionally, “the fact to be recorded in the business record [must] have been within the observation of the person who had a duty to record the matter or who had a duty to communicate the matter to another in the ordinary course of business”: *W.N. v. C.G.*, 2012 BCCA 149 at para. 24.

[217] The parties referred to records from MCFD. The defendant complained about the reliability of these records because she says there are pages missing. In addition, she submits there are redactions made by Ms. Masters because she is the one who obtained these records and produced them for discovery. The defendant contends that she has altered these records and therefore the Court should exercise caution when relying on them.

[218] I have reviewed the records and considered them in the context of the whole of the evidence. I agree with the defendant that there are pages missing and that the records have been redacted. I also agree with the defendant that there are portions of the records that are not reliable because of the redactions.

[219] However, I do not find that Ms. Masters altered the records herself. As I understood the evidence, Ms. Masters obtained the records then produced them to the lawyer acting for her at the time. I accept her testimony that she did not delete or remove portions of the MCFD records.

[220] That said, I have identified the statements within the records on which I have relied. To be clear, I have not relied on the following entry:

Diana She apparently lives with her mother in Richmond.

[221] I have not relied on this entry for a number of reasons including:

- a) It is not possible to determine the date of the entry because the surrounding entries were redacted and it is impossible to assess the context in which this entry was made. There is a reference to June 26, 2017 but in my view, I would be speculating if I inferred that the date is connected to the above entry about Diana living with her mother;
- b) I cannot determine who provided this information to MCFD or who received it; and
- c) It is possible this entry is based on historical information.

[222] In sum, in my view this statement by itself is simply not reliable and I have placed no weight on it.

[223] I have not found the same concerns regarding other aspects of the MCFD records. In the paragraphs that follow, I identify the events recorded by the MCFD workers and I have considered these entries in my overall assessment of the evidence.

3. *October 20, 2015*

[224] The MCFD records describe interaction with Mr. Schwab on October 20, 2015. The MCFD records indicate that the social worker phoned Ms. Masters on this date and she reported that she and Mr. Schwab had separated approximately 18 months earlier and were sharing parenting time, one week on and one week off. She told the social worker that “[Mr.Schwab] had completed a court ordered rehab program and he had been doing well.” However, he had been “a little off” since his father’s death several months earlier.

[225] The record indicates that Ms. Masters described an incident where the children were returned to her three hours earlier than scheduled. It appeared that Mr. Schwab had been drinking, became aggressive and left when the police were called. Arrangements were made to interview the children. The social worker met with Mr. Schwab the following day, on October 21, 2015 at the district office.

[226] The social worker recorded that Mr. Schwab provided some of his relationship history with Ms. Masters and Ms. Masters’ older daughter from a previous relationship. The worker recorded the following:

Raymond has a new woman in his life, Diana, who loves the children (she has no children of her own). They don’t live together.

Diana had been over on Friday night -- the children had gone to bed at around 9 pm. Diana had brought some beer over and Raymond estimates he had about 7 beers until he went to sleep at around 2 a.m.

[Underlining added.]

[227] The MCFD records show that the social worker put together a safety plan as a result of this incident. The MCFD records include a safety plan dated October 21, 2015, between the child welfare worker on the part of MCFD and Mr. Schwab. Based on the entry of the meeting with Mr. Schwab at the office with the social worker, I find that MCFD instituted a safety plan. The safety plan contained the following:

- a) Raymond will ensure that his children have the correct booster/child seat in the vehicle when he is driving;
- b) Raymond will ensure that he will not have any alcohol in his system when driving the children;
- c) Raymond will be sober when the children are in his care.

[228] This record is an example of MCFD's involvement with Mr. Schwab and his children. It also constitutes some evidence that Mr. Schwab indicated to the MCFD social worker that he and his new girlfriend, Ms. Warriner, do not live together.

[229] This record is from October 2015 and reflects a point in time after Ms. Warriner testified the two started living together. In other words, this evidence is inconsistent with Ms. Warriner's testimony that they started living together in September 2015.

4. June 28, 2016

[230] The MCFD records contain a safety plan dated June 28, 2016. This safety plan is again signed by Mr. Schwab and the social worker on behalf of MCFD. The safety plan contains the following:

- a) Raymond shall ensure that the children are always under the supervision of a responsible adult;
- b) Raymond agrees to provide drug and alcohol tests as requested by the Director;
- c) Raymond agrees not to consume alcohol while driving the children and will commit to sobriety while caring for the children;
- d) Raymond agrees for the Director to obtain information from the police regarding his contacts with the police.

[231] There is little other information to help contextualize this record.

5. August 24, 2016

[232] The MCFD records contain a safety plan dated August 24, 2016. This safety plan is signed by Ms. Masters, Mr. Schwab and Brittany (Mr. Schwab’s niece). The safety plan provides:

This is an agreement between Raymond Schwab, Kimberlea Masters and Brittany Schwab, MCFD:

- 1) Raymond Schwab will have access with the children [N.S. and S.S.] only in the supervision of Brittany Schwab. Raymond Schwab will not be under the influence of substances during his access;
- 2) Brittany Schwab will contact MCFD at [phone number] if Raymond Schwab is under the influence during his access with the children;
- 3) Raymond Schwab can contact the children anytime via telephone;
- 4) The children [N.S. and S.S.] will reside with Kimberlea Masters full-time;
- 5) Raymond Schwab will complete random drug screens for 3 weeks, starting September 25, 2016.

** MCFD may take more intrusive measures if above conditions not followed.

6. January 14, 2018

[233] MCFD’s next involvement was initiated by a call from the police.

[234] From the police records, it appears that Ms. Masters telephoned the police on January 14, 2018, because she was concerned that Mr. Schwab’s ability to care for the children was “compromised by drugs.” The police contacted Mr. Schwab and, in the police records, concluded that he was “fit to care for his kids.” The police updated MCFD accordingly.

[235] There are a number of entries in the MCFD records relating to Ms. Master’s 2018 report. This incident seems to have been precipitated by a report that Mr. Schwab and a woman were seen out late with the children and that Mr. Schwab appeared “out of it.”

[236] The social work telephoned Mr. Schwab and recorded her discussion, in part, as follows:

[Social worker] advised Ray that he has demonstrated minimal cooperation during MCFD INV and that a safety plan has been put in place with [Ms. Masters] as new reports continue to come in. [Social worker] advised Ray of details of safety plan. [Social worker] explained to Ray that a [Family Case Conference] has been set for 10:00 a.m. on Jan 22nd and to please invite Diana to attend since she is in/out/living in the home and Ray confirmed that Diana is his girlfriend. Social worker explained that at the case conference contact can be explored between Ray and the children. Ray plans to invite his niece to the meeting who supervised his contact in the previous safety plan.

[Underlining added.]

[237] The safety plan was signed by Ms. Masters and the social worker on behalf of MCFD and was dated January 15, 2018:

- 1) [Ms. Masters] will ensure that the children, N.S. and S.S. reside with her full-time.
- 2) [Ms. Masters] will ensure the children, N.S. and S.S. have no contact with their father, Raymond Schwab with the exception of telephone contact.

** MCFD may take more intrusive measures if the above conditions are not followed.

[238] This MCFD record is evidence of Mr. Schwab's ongoing issues with substance abuse. It also serves as some evidence of how he was presenting his relationship with Ms. Warriner, at least with regards to the social workers' documenting their interaction with Mr. Schwab.

7. September 22, 2018

[239] On September 22, 2018, Ms. Masters and child welfare worker on behalf of MCFD signed a safety plan with the following terms:

This agreement is between MCFD and [Ms. Masters] in regard to her children N.S. and S.S.

[Ms. Masters] agrees to ensure that Raymond has no access or contact with the children until otherwise approved by MCFD Social Worker;

[Ms. Masters] agrees to contact the district office social worker on Monday, September 24, 2018 to discuss further planning.

8. Police records

[240] The MCFD records do not reveal the basis for MCFD's involvement in September 2018. However, the police records do. On September 22, 2018, the police interacted with Mr. Schwab at the Pacific Inn in Surrey. Little detail is available from the police records about the circumstances or why the police were called. What is available shows that the investigating officer noted (in the typed portion of the police report) that Mr. Schwab was in possession of drugs (fentanyl/analog). As a result of their involvement, the police contacted Ms. Masters and MCFD. Ms. Masters came to the hotel and picked up the children.

[241] The safety plan of September 22, 2018 was created later that day.

[242] Overall, the MCFD and police records help establish the dates certain events occurred and MCFD's ongoing involvement though sporadic at times, with N.S. and S.S. The records also provide some evidence of statements made to MCFD about Mr. Schwab's relationship with Ms. Warriner.

C. Defendant's Witnesses

[243] Ms. Warriner testified and tendered documents, including financial records. Anita Schwab and Brittany Schwab also testified. I start with their evidence. I have referred to both by their first names. I do so not out of any disrespect to them, but to avoid confusion because they have a common last name.

1. Anita Schwab

[244] Anita is Mr. Schwab's sister and is 11 years his senior. She is also Brittany's mother. Anita testified virtually and I observed her to appear incredibly nervous throughout her testimony. It was difficult to determine the cause of her nervousness. However, I have reminded myself that a witness's credibility cannot be gauged solely on demeanour and the true test for witness credibility is its consistency with the probabilities affecting the case: *Faryna* at 357.

[245] Anita testified that she had a good relationship with her brother, though she agreed he was closer to their younger sister.

[246] She testified that she believed her brother and Ms. Warriner commenced their relationship in February 2015, though she was uncertain about the date. She agreed that she had difficulty remembering some of the dates.

[247] Twice, Anita corrected herself when she was asked to describe the relationship between Ms. Warriner and Mr. Schwab. For example, on one occasion during her testimony, she was asked to describe her observations from 2016 and to identify who was present at a Christmas gathering. She gave a list of people who were present, including “Kim and Ray.” She was then reminded that they were talking about Ms. Warriner, not Ms. Masters, and Anita corrected herself.

[248] In her direct examination, Anita testified that her brother and Ms. Warriner began living together in 2015. As I understood her testimony, Anita explained that she was over at the 85th Avenue Residence about once a week. She testified that she had an opportunity to observe Ms. Warriner’s living arrangements at the 85th Avenue Residence and that they were together.

[249] She was cross-examined about the nature of the relationship between her brother and Ms. Warriner. In particular, she was asked if she knew why they had not married despite the engagement some 18 months earlier. Her answer to this question was curious, stating she did not know why they had not married, but speculated it was because they were waiting to get in their own place. This answer appears to be at odds with her earlier testimony that they were already living together at the 85th Avenue Residence.

[250] She also testified that she had some knowledge about Mr. Schwab’s intentions with the sale proceeds of the 85th Avenue Residence. She believed that he intended to purchase something for “them” and that he wanted to take care of his children, “pay off the bills and make sure the kids are okay.” Anita expressed a concern that Ms. Masters was attempting to get “all of the money – even now.”

[251] Anita’s hope for the children was that her brother’s estate would pass to them. She testified that this is consistent with Ms. Warriner’s hope as well. Interestingly,

Anita did not know that Mr. Schwab had transferred \$350,000 to Ms. Warriner four days before he died. She seemed initially surprised by this information, but later stated that it was none of her business. She agreed that Mr. Schwab had not talked to her about giving Ms. Warriner this money.

[252] Anita testified about her knowledge of MCFD's involvement with Mr. Schwab and the children. She did not know very much about MCFD's involvement. She was able to say very little about her own daughter's role in the supervision of Mr. Schwab's parenting time. Though she had some knowledge about Mr. Schwab's substance use disorder, police interactions and employment, she seemed detached from his ongoing struggles with substance abuse, the basis for MCFD's involvement with the children, and/or Mr. Schwab's future plans with Ms. Warriner.

[253] I did not find Anita's testimony to be reliable. Many witnesses struggle with dates solely because of the passage of time. However, in this case, when pushed to provide some details during her cross-examination, she was unable to. Again, she had only a vague recollection of her daughter's role as a supervisor of Mr. Schwab's parenting time. Several times, she stated she knew certain things because her "mother talked." It seemed to me that some of her testimony was based on what she was told by her mother (or others) and not observations she had made on her own.

[254] For these reasons, including her vague recollection about many of the details and lack of knowledge about Ms. Warriner and Mr. Schwab's future intentions, I have not found her testimony to be reliable and I have placed little weight on it.

2. Brittany Schwab

[255] Brittany was born in 1988 and has known N.S. and S.S. for their entire lives. She spent time with Mr. Schwab and Ms. Masters and often babysat for them. She described a close relationship with her uncle.

[256] She testified about her knowledge of Mr. Schwab's substance use disorder. She was aware that he had issues with drugs, but stated she learned about this through her mother and/or Ms. Masters. She recalled the time Mr. Schwab went to

rehab. She testified that while he was using drugs, he would be skinnier and not look well. After attending the rehabilitation facility, Brittany testified that his physical health was much improved and that he was engaging in physical activities.

[257] Brittany, similar to the other witnesses, described Mr. Schwab as an engaged father who very much loved his children. This was particularly evident when he was not using drugs.

[258] Regarding Ms. Warriner, Brittany believed she first met her at a gathering hosted by Mr. Schwab at the 85th Avenue Residence. Similar to Anita and Ms. Warriner, Brittany believed this first meeting occurred in February 2015. She testified that the first time she saw Ms. Warriner at a family function was at N.S.'s birthday in June 2015.

[259] Brittany testified about her observations of Mr. Schwab's relationship with Ms. Warriner. She testified that she had conversations with Mr. Schwab in 2015 and said that "he had met someone, he was not sure if it was serious or not, but he was excited."

[260] She testified that in 2016 she would see Mr. Schwab once or twice a week and Ms. Warriner was almost always with him. She testified that during this time, the children would be with Mr. Schwab about half of the time. She recalled a concert in 2016 and they all attended and then went to the beach the next day. She described a loving relationship between Ms. Warriner and the children.

[261] In 2016, Brittany testified about her conversations with Mr. Schwab. She stated that he told her he loved Ms. Warriner and they were "getting more serious" and he was happy he had found someone.

[262] She was then asked about her knowledge of where Ms. Warriner was living. She responded by stating, "they were living together. She had moved in with [Mr. Schwab]." Brittany testified that Ms. Warriner moved into the 85th Avenue Residence in September 2015. She also explained that Ms. Warriner had moved some of her items to the 85th Avenue Residence.

[263] Brittany knew from her uncle that he intended to propose to Ms. Warriner. She learned shortly afterwards that he had proposed in January 2017.

[264] She also testified about communications she had with Mr. Schwab about selling the 85th Avenue Residence. She testified that Mr. Schwab “told me about it. And wanting to move in together to something else...a smaller place.” Brittany testified that she and her boyfriend helped them move out of the 85th Avenue Residence.

[265] Though unclear, it seemed as if Brittany was suggesting that the couple intended to move in together *after* Mr. Schwab sold the 85th Avenue Residence.

[266] Brittany was asked specifically whether Mr. Schwab told her what he intended to do with the sale proceeds of the 85th Avenue Residence. She testified that she was told by him that he intended to purchase “that condo... in White Rock.” She did not recall him saying anything else about his intentions regarding the sale proceeds.

[267] Importantly, Brittany did not say anything about Mr. Schwab using the sale proceeds to repay a debt he had to Ms. Warriner.

[268] Brittany was asked what Mr. Schwab did with the sale proceeds. At first she was unable to recall, but then responded by saying he purchased the condo in White Rock and bought a car. She was specifically asked whether she recalled anything else about the sale proceeds and she responded, “no.”

[269] Brittany first mentioned her role as Mr. Schwab’s parental supervisor during cross-examination. She was taken to the MCFD records and agreed that her signature appeared on the MCFD record indicating she was to supervise Mr. Schwab’s parenting time with N.S. and S.S.

[270] Her testimony about her role as a supervisor was nondescript. She thought the visits had gone well, but did not provide any detail about her observations during this time.

[271] During direct examination, Brittany was asked about her own involvement during Mr. Schwab's parenting time. She described it this way:

- Q: [Did you have] any involvement in assisting with arrangements between Ms. Masters and Mr. Schwab about access to the children?
- A: No. They did that on their own.
- Q: Were you aware of their arrangement at this point?
- A: No. They did everything on their own.

[272] I found her testimony on this topic to be unusual. She was a young woman who had been given the important task of supervising her uncle's parenting time. She made no mention of it during her direct examination though she was specifically asked to describe Mr. Schwab's parenting time with the children. She only raised her supervisory role during cross-examination. She could not remember for how long she supervised, when the supervision started or when it ended, and was unable to remember attending a meeting with social workers and Mr. Schwab. From the MCFD records, it appears there was some sort of a meeting that she attended and, indeed, signed off on a safety plan acknowledging her responsibilities.

[273] I find it unusual that Brittany was unable to provide any further details about this MCFD appointment, including whether Ms. Warriner was present.

[274] I am unable to determine why it was that Brittany was unable to recall anything about this meeting. I accept that this meeting occurred in August 2016, that she and Mr. Schwab were present, and that the meeting culminated in a written agreement requiring Brittany to supervise parenting time.

[275] On May 31, 2019, Brittany swore an affidavit in support of the NOA. She was cross-examined on her evidence about Mr. Schwab's early time with Ms. Warriner. In her affidavit, Brittany's evidence was:

- 3. I became aware that Raymond started dating Diana Warriner in or around March 2015.
- 4. In or around the same time, Diana began attending family functions with Raymond. Myself and Raymond's other family members, including his mother and two sisters, were aware that Raymond and Diana were romantically involved.

[276] When this prior statement was presented to her, Brittany explained that she meant June 2015 and that “in or around” captured this time difference. She provided this evidence after being reminded that Ms. Masters had not moved out of the 85th Avenue Residence until after April 2015. She stood by her evidence about the timing of her first meeting with Ms. Warriner: February 2015 at a gathering hosted at the 85th Avenue Residence. That was so even though Ms. Masters would have been residing at the 85th Avenue Residence during this time.

[277] I have found Brittany’s evidence about Ms. Warriner’s living arrangements to be contrived. I make that finding based on the totality of the evidence I have accepted. I am unable to determine the basis for Brittany’s lack of recall regarding her supervision of her uncle’s parenting time with N.S. and S.S. There is marked consistency between Ms. Warriner, Anita, and Brittany about the timeline of Mr. Schwab’s meeting with Ms. Warriner—being February 2015 at Mr. Schwab’s residence. However, the independent evidence, including the separation agreement, establishes that Ms. Masters was living with the children at the 85th Avenue Residence until the end of April or early May 2015 and Mr. Schwab was living at his mother’s.

[278] During their testimony, it was apparent that Anita and Brittany had spoken to others about certain dates. Though I cannot say whether they intentionally mislead the court on this point, I am not satisfied that their evidence is reliable for the reasons I have stated.

[279] Both were reluctant to reveal too much about Mr. Schwab’s substance use. Brittany went so far as to say that she never observed Mr. Schwab or Ms. Warriner consume alcohol. In this regard, their evidence was different than that of Mr. Bains. Mr. Bains provided a detailed description of the observations he made of his friend during what would be their last encounter in August or September 2018. He described a man who was (and appeared) very ill. Mr. Bains had no reason to embellish or exaggerate this description of his friend. He was clearly not aligned with either Ms. Masters or Ms. Warriner and candidly espoused disliking them both.

[280] I find that Anita and Brittany minimized the extent of Mr. Schwab’s condition in September/October 2018. I do not speculate about why they did so.

[281] I have placed very little weight on the testimony of either Brittany or Anita.

3. Ms. Warriner’s Evidence

[282] At the time of the trial, Ms. Warriner was 51 years old. She had worked at various jobs, but predominantly at the family company, Harry’s Carpenter Services Inc. (“HCS Inc.”), doing the books, invoicing, picking up parts, and other administrative tasks. She was single and did not have any children when she met Mr. Schwab. She testified she met him in 2015 and would have been 44 years old.

a) Relationship with Mr. Schwab

[283] Ms. Warriner testified that she was living at her mother’s house in Richmond before she met Mr. Schwab (the “Daniels Road Residence”).

[284] She believed she met Mr. Schwab in late February or March 2015 at the 85th Avenue Residence. She said her friend, Anna, invited her to Mr. Schwab’s place. She testified that Ms. Masters, the children, “Anna and Kevin” and a few other people were present at the gathering.

[285] She was questioned about the accuracy of them meeting in February or March 2015 because Ms. Masters did not move out of the 85th Avenue Residence until late April 2015. In February or March 2015, Mr. Schwab would have been living at his mother’s home. She did not appear to resile from her position—that is, that she met Mr. Schwab in February or March at the 85th Avenue Residence.

[286] She said they became intimate in or around June 2015 stating that she formally met the remainder of his family at N.S.’s birthday at the end of June 2015.

[287] She said that the relationship moved quickly and she was frequently spending the night at Mr. Schwab’s residence—every other day. She testified that she was working full-time and would drive to his house after work. She was working while living at her mother’s house in Richmond and would sleep at her mother’s about

once a week. She testified that she worked Monday to Friday and would cook dinner while at her mothers. She would then take the meal to Mr. Schwab’s for him and the children.

[288] She testified that the children were “very often” at the 85th Avenue Residence and that they “got along great.” She described a good relationship with S.S. and N.S. She said they liked to play video games and they would go for walks with the dogs. She testified they would take the children to the pool. She said that she went to all of N.S.’s baseball games, though she may have missed the odd practice. She would say hello to Ms. Masters, but would stand off to the side because she had her dogs with her.

[289] She described a busy life with work and the children’s activities. She testified that the children started going to karate in 2015. She said it was really busy with baseball and birthday parties. She said the weekends were very hectic; N.S. did karate and she thought S.S. did as well.

[290] Ms. Warriner testified that she moved most of her belongings to the 85th Avenue Residence in September 2015. Photographs of the residence were presented in evidence and she described the items in the photographs that were hers, most of which she had brought to his house in September 2015.

[291] Ms. Warriner was cross-examined about where she lived before moving to the 85th Avenue Residence. At the trial, she testified that she moved from the Daniels Road Residence to the 85th Avenue Residence. At the examination for discovery³, she testified that she moved from her Chilliwack property to the 85th Avenue Residence. At trial, she explained this apparent contradiction by stating:

Because I lived in Daniels most of the time but I sometimes had to clean it up [in Chilliwack] so I would stay there because it’s a long drive.

[292] At the trial, she was cross-examined about her evidence regarding moving to Mr. Schwab’s residence in September 2015. She said this about the date:

³ The examination for discovery of Diana Warriner took place on November 29, 2021.

I said September 2015 but had actually moved in prior – but we didn't want anyone to know because it was quite quick.

Q: You are saying you were cohabitants by April 2015?

A: Yes.

Q: That information is untrue – [Ms. Masters] was living at the house and she hadn't even moved out yet

A: No. She wasn't living there. She had moved out before. Because she had a townhouse down the street.

[293] Ms. Warriner's evidence about moving into the 85th Avenue Residence in April 2015 is inconsistent with much of the evidence tendered, including the independent evidence in the separation agreement with recitals and signed by Ms. Masters and Mr. Schwab in 2015.

[294] Ms. Warriner said that their relationship became stronger in 2016. They loved each other and spent even more time together. As a couple, they decided that she would work full-time and he would spend time with the children because he wanted to work less. She said he was happier spending more time with the children and there was a lot of activities during that time, including school, baseball, and birthday parties. She described a very active integrated life with the children, Mr. Schwab and all of their activities. She testified that she would help but Mr. Schwab did most of the activities with the children.

[295] I note this is at odds with N.S.'s and S.S.'s evidence that Ms. Warriner only attended a few of their baseball games.

[296] She testified that Mr. Schwab proposed in January 2017. They went shopping for rings in January 2017, Mr. Schwab withdrew money from his investments and that is how he paid \$8,000 for the engagement ring.

[297] Mr. Schwab also gave Ms. Warriner a birthday card with a handwritten message from N.S. and S.S. Ms. Warriner testified that she received this card in March 2017.

[298] When asked about the couple’s intentions for the future, Ms. Warriner testified that they wanted to go on a holiday and start fresh. She testified that “we wanted to get him healthier and into a program.” She also added that they “talked about having children down the road”. She said they did not have children at the outset because she wanted him to get healthy and more stable first.

[299] This evidence of a plan to have children stands in contrast to her examination for discovery evidence:

Q: Did you and Raymond ever have plans to have children.

A: No.

[300] She explained this inconsistency by saying in the beginning, “we weren’t sure if we would have children – we talked about it after.” This explanation is inconsistent with her direct examination evidence about having children. She was cross-examined about the plausibility of this evidence considering their ages. Ms. Warriner responded with this:

Miracles happen every day. I don’t know. He was going to have [his vasectomy] reversed. He wanted more kids.

[301] Ms. Warriner would have been 47 years old when Mr. Schwab died. This evidence of having children “down the road” after he “got healthy” reflects well her attempt to describe a relationship in a way that was at odds with much of the evidence.

[302] I spend some time on Ms. Warriner’s description of the events of late 2017 and early 2018. In my view, her description of Mr. Schwab, their activities with the children, and her financial contribution does not mesh with the totality of the evidence.

[303] In January 2018, it is clear from the MCFD records that N.S. and S.S. were to live with Ms. Masters full-time and were not to have contact with Mr. Schwab. Ms. Warriner’s testimony did not account for these times when the independent evidence demonstrates that the children were not permitted to be with their father. It

was really only in cross-examination, when faced with contrary information, that she agreed his parenting time had been interrupted. However, in her narrative, she tended to overlook the several significant interruptions to his parenting time.

[304] Ms. Warriner's description of the division of labour in the relationship is also at odds with the balance of the evidence. She testified that she was earning about \$3,000 per month and he was earning about \$1,000. She testified that they used her credit card for quite a few things. She said that she paid for the groceries and entertainment expenses. Again, she submits that Mr. Schwab owed her about \$350,000 because they had agreed that she would work while he looked after the children. This was in circumstances where he had the children, at most, 50% of the time, and, at times, not at all. Mr. Bains testified that he rarely saw the children with Mr. Schwab after the separation.

[305] I struggle with reconciling her testimony about the amount she claimed to be working with the income she reported to CRA. As I detail below, Ms. Warriner reported about \$11,000 in annual income from 2016–2018.

[306] During the summer of 2018, Ms. Warriner described their conversations about moving to a condo in White Rock. They thought they would try living there to see if they liked the area, then they could decide whether to buy something. The other option was to move to the basement suite at Ursula Schwab's residence.

[307] Ms. Warriner testified that Mr. Schwab described ongoing disagreements he had with Ms. Masters. During this time, they also had discussions about fixing up and selling the 85th Avenue Residence. She said that Mr. Schwab was a "handy man not a finishing man" so they hired someone off Craigslist to help with the work.

[308] Ms. Warriner described a chaotic Thanksgiving (October 8, 2018) the day Mr. Schwab died. She testified that they were at Ursula Schwab's house, with the children, for Thanksgiving dinner. She described an altercation between Mr. Schwab and Ms. Masters who had attended to bring the children. Mr. Schwab was upset because he had not seen the children and he was proud of the new car he had

bought. He wanted to show the car to N.S., but Ms. Masters would not let him take N.S. for a drive in the car. According to Ms. Warriner, this put Mr. Schwab over the top. She described how upset Mr. Schwab was. After they returned to their condo in White Rock, she testified that Mr. Schwab went out without her. She testified that after he returned, they went out to walk the dogs and that is when he started to have trouble breathing and was having what seemed to be an asthma attack. He collapsed by their elevator and was dead shortly thereafter from a fentanyl overdose.

[309] Ms. Warriner testified that she helped organize Mr. Schwab’s funeral along with family members. She also produced documents demonstrating she paid for the funeral. She testified that the funds were “from the money I had left over after paying bills.”

b) Mr. Schwab’s Health

[310] When asked about illicit drug use, Ms. Warriner testified that she occasionally used cocaine during their relationship. She testified that Mr. Schwab consumed cocaine a few times per week. She said she did not do as much because she was working full time and taking her father to the cancer clinic, “but on the weekends, sometimes yes I did.” She said she did not believe she had a problem with cocaine. When asked about Mr. Schwab’s association with drugs in 2016 and whether he had a problem, she testified “no – not really.”

[311] For 2017, she testified that their drug use decreased. She said that Mr. Schwab’s habit was “better in 2017”. He was frequently seeing the children and she stated that his state of health was good. However, despite her evidence that his state of health seemed good, she testified that she had a discussion with Mr. Schwab about entering a rehab program, she believed in late 2017, but that he was unable to get in. She described him as a functioning addict at this time. He was still doing everything with the children and was working though she thought he probably should have gone to rehab.

[312] She then stated that she arranged and paid for him to see a doctor who ultimately prescribed methadone. She said that after he started methadone, he seemed to get a little better, he was a bit more active and started working.

[313] Ms. Warriner testified that Mr. Schwab was experiencing breathing problems in 2018. She was aware that he suffered from asthma. At her examination for discovery, Ms. Warriner described her knowledge of Mr. Schwab's health issues somewhat differently:

Q: How was Raymond Schwab's breathing in 2018?

A: It was okay.

Q: How many times did he go to the doctor in 2018 for breathing problems?

A: I don't know.

Q: No idea?

A: No.

Q: All right. And you don't even know the name of the doctor he went to?

A: I forgot the name, but I know him, but I forgot the name.

Q: Can you agree with me that he was being treated for drug dependency in 2018?

A: I don't know that.

Q: Okay. And were you aware he was using methadone in 2018 to treat his drug dependency?

A: I don't know.

[314] Ms. Warriner's evidence at trial that she encouraged and facilitated Mr. Schwab's methadone treatment appears to conflict with her examination for discovery where she stated she was unaware of the treatment. At trial, Ms. Warriner also appeared to have a stronger recall of Mr. Schwab's breathing problems than at her examination for discovery.

[315] It was suggested to Ms. Warriner in cross-examination that she really did not know Mr. Schwab very well. She responded that her memory was not the greatest, but that she knew him stating, "we were very close."

c) Documentary Evidence of Date of Co-Habitation

[316] Ms. Warriner produced and was taken to various documents that seem to speak to the nature of her relationship with Mr. Schwab. Some of the documents strengthen her claim that they were spouses, some do not.

[317] Ms. Warriner presented her income tax returns:

Year	Reported Income	Declaration re marital status	Address
2016	\$10,768.86	Single	11511 Daniels Rd., Richmond
2017	\$11,580.85	Single	11511 Daniels Rd., Richmond
2018	\$12,579.14	Single	11511 Daniels Rd., Richmond

[318] Ms. Warriner's tax filings directly conflict with her submission that she was Mr. Schwab's spouse for at least two years prior to October 2018, and that she had moved into the 85th Avenue Residence in 2015.

[319] In December 2015, Ms. Warriner, her brother and mother executed an alter ego trust. In this document, Ms. Warriner declared her address to be the Daniels Road Residence.

[320] Ms. Warriner agreed that the common book of documents did not contain any document where Ms. Warriner used the 85th Avenue Residence as her address before October 2016. Ms. Warriner explained that she always used the Daniels Road address, no matter where she was living at the time.

[321] The first time she used the 85th Avenue Residence was on a dental benefits application form dated October 13, 2016. Ms. Warriner is listed on the form as Mr. Schwab’s “common law girlfriend”. She testified that the reason they wrote “common law girlfriend” on the benefits application is because they were living together. The application contains the following:

If common law, please indicate date of co-habitation April 28, 2015

[322] Again, Ms. Warriner was challenged on the April 2015 date and it was suggested to her that the statement was untrue. Ms. Warriner responded by saying they actually moved in together in April, but she said September because their living together happened so quickly. She disagreed that Ms. Masters was still living at the 85th Avenue Residence in April 2015. To that point, Ms. Warriner stated, “she wasn’t living there. She had moved out before because she had a townhouse down the street.”

[323] Ms. Warriner was also taken to a Health Insurance BC letter dated November 8, 2017. In this letter, Ms. Warriner appears as a person eligible for coverage under Mr. Schwab’s health plan. The letter states, “enrolment with the medical services plan under account [number] begins...”

[324] The parties tendered a document entitled, “Healthwatch medication history” with entries as late as October 26, 2017. Ms. Warriner’s address is stated as 11511 Daniels Road, Richmond.

[325] In May 2018, Mr. Schwab and Ms. Warriner applied for a mortgage from Alpine Credit (Mr. Schwab as borrower and Ms. Warriner as guarantor). Ms. Warriner stated her monthly income to be \$3,000. This amount is inconsistent with the income documents she tendered at trial. She was cross-examined about her CRA documents not supporting a monthly income of \$3,000. During this line of cross-examination, she appeared to be suggesting that there was business income that was unaccounted for on her CRA filings. Her CRA filings were reviewed in some detail. I am not sure what she meant when she attempted to distinguish between personal and business income to explain the discrepancy in this evidence. However,

based on the evidence presented, I have found that her representations in the Alpine Credit application are inconsistent with her CRA reported income—despite the statement on the credit application that “I/We swear that the information given on this application is true and complete.”

[326] I find that Ms. Warriner misstated her income on the Alpine Credit application.

[327] On the Alpine Credit application, under marital status, Mr. Schwab noted he was “single.” He signed the Alpine Credit application in May 2018.

[328] Mr. Schwab needed to update his homeowner’s insurance policy for the 85th Avenue Residence after he obtained the Alpine Credit mortgage. The parties tendered a letter dated May 25, 2018 from HUB International Insurance Brokers stating:

The changes made to your policy are as follows:

Amended Loss Payee

Added Diana as Named Insured

[329] Ms. Warriner was cross-examined about when she was added to the insurance policy. At trial, she testified that she was added when she moved into the 85th Avenue Residence in September 2015. This evidence contradicts what she said at the examination for discovery:

Q: ...do you see a letter from HUB dated May 25, 2018?

A: Yes.

Q: Did you arrange insurance for the 85th Avenue property?

A: I assisted with Raymond. He put my name under the insurance when I moved in. So this was a letter – just a newer letter, I believe.

[330] Ms. Warriner testified that she had made a mistake and maintained that she moved into the 85th Avenue Residence in September 2015.

[331] On September 24, 2018, Mr. Schwab and Ms. Warriner completed a rental application for a condo in White Rock. This is where they were living when Mr. Schwab died. She was cross-examined about information written on the

application. In particular, she told the landlords that their average annual salary was \$100,000, contrary to their CRA reported earnings. She explained this discrepancy by testifying that this was a combined income between her and Mr. Schwab and was based on their intention to work more in the future.

[332] She was challenged on the notion that Mr. Schwab would make \$50,000 given he had not earned that amount of money for many years. Ms. Warriner explained that he sacrificed working full-time so he could look after the children.

[333] Ms. Warriner agreed that she was not forthright on the rental application but was not fussed by this misstatement. Regardless of this misstatement, the rental agreement is some evidence that as of late September 2018 Mr. Schwab and Ms. Warriner intended to live together.

[334] Ms. Warriner testified that the address listed for her driver's license is the Daniels Road Residence. She agreed she never switched the address to the 85th Avenue Residence. Similarly, she testified that she did not use the 85th Avenue Residence for her automobile insurance.

[335] In summary, excluding the dental benefits application, the documents show that Ms. Warriner continued to use the Daniels Road Residence as her personal address. The homeowner's insurance policy shows that Ms. Warriner was only added as a named insured in May 2018. This evidence conflicts with Ms. Warriner's submission that she lived at the 85th Avenue Residence as early as April or September 2015. However, the evidence does show that Mr. Schwab applied to add Ms. Warriner to his dental benefits in October 2016. Ms. Warriner was also a person eligible for Mr. Schwab's healthcare plan in November 2017. On the other hand, on the May 2018 Alpine Credit mortgage application, Mr. Schwab represented he was "single". Similarly, Ms. Warriner declared that she was single on all her tax returns from 2016–2018.

d) Proceeds from Sale of House

[336] The sale of the 85th Avenue Residence completed on August 29, 2018. Mr. Schwab's total proceeds were \$885,849.40. He was required to pay the outstanding mortgage (from Alpine Credit) of \$77,228.78. After the adjustments, the balance Mr. Schwab was to receive was \$802,529.25.

[337] Ms. Warriner was also taken through Mr. Schwab's CIBC bank statement and asked about the transactions in the weeks leading up to his death.

[338] On September 7, 2018, two amounts were withdrawn from Mr. Schwab's CIBC account: \$50,000 and \$45,000.

[339] Ms. Warriner testified that \$50,000 was a repayment of debt Mr. Schwab owed to her, HCS Inc. and her mother. The \$45,000 was to settle a debt owed to Andy the "drug dealer".

[340] She was cross-examined about the money paid from Mr. Schwab to her mother and to her. Ms. Warriner agreed that when she was supporting Mr. Schwab, she needed money from her mother or the company.

[341] Ms. Warriner also produced a bank statement from her mother and from the family company. Ms. Warriner did not testify about specific entries from her mother's bank statements nor did she attempt to connect entries from the company bank records to Mr. Schwab.

[342] The following note was tendered in evidence:

August 29, 2018

I, Raymond Schwab will pay back \$50,000 to HCS Inc.

Thank you

Raymond Schwab

September 7, 2018

Paid in full.

Thanks.

Ruth Zimmer

I, Raymond Schwab leave Diana Warriner in charge in cause (sp) anything shall happen to me.

Raymond Schwab

Ruth Zimmer

Diana Warriner

[343] On the note, Mr. Schwab's signature appears above the first signature block with his name. Ms. Warriner agreed that she had written the note, but Mr. Schwab signed it.

[344] Ms. Zimmer did not testify.

[345] The banking documents demonstrate that there was a bank transfer to Ms. Warriner of \$36,000 on September 13, 2018. Ms. Warriner explained that this money was used to pay off her TD Canada Trust ("TD") credit card debt. This money was connected to an outstanding lawsuit, filed August 16, 2018, against Ms. Warriner because she had defaulted on her credit card and line of credit.

[346] In summary, Ms. Warriner agreed that the following debts were paid before the \$350,000 transfer was given to her:

Ursula Schwab	\$100,000
Ruth Zimmer/HCS Inc.	\$50,000
Andy	\$45,000
Ms. Warriner's lawsuit	\$36,000
Total	\$231,000

[347] On September 14, 2018, Mr. Schwab purchased an Audi RS5 for \$60,376.

[348] On September 18, 2018, \$349,000 was transferred from Mr. Schwab's CIBC savings account to his chequing account.

[349] On October 4, 2018, Mr. Schwab purchased the bank draft for Ms. Warriner for \$350,000, from the Langley CIBC branch. The \$350,000 bank draft was deposited into Ms. Warriner's TD account at the Langley TD Branch. The hold that was originally placed on this account was lifted on October 15, 2018. After all of these transactions, \$85,000 was left in Mr. Schwab's bank account.

[350] In her direct examination, Ms. Warriner provided very little detail about the mechanics of the transfer of the \$350,000. She testified it was roughly the amount that Mr. Schwab owed her for all that she had provided over the years. She was shown the bank transaction slip showing a transfer of \$349,000 from Mr. Schwab's savings account to his chequing account. She testified that she handwrote "For Diana. R.S." on the bank slip. She testified that she received this on the day he did the transfer, "October 4, 2018".

[351] She was cross-examined extensively about the mechanics of this transfer.

[352] During cross-examination, she disclosed that she was not present when Mr. Schwab transferred the money into her account. Ms. Warriner testified that Mr. Schwab organized the bank draft at a CIBC Langley branch at Willowbrook Mall and that he did not go to his usual bank because he had to go to Willowbrook so he could buy shoes for the children and for her.

[353] Ms. Warriner denied the suggestion that she persuaded Mr. Schwab to go to the Willowbrook branch in order to avoid Mr. Chase who would have counseled Mr. Schwab against the transfer. She also denied that she persuaded Mr. Schwab to give her the money to follow up on her investment ideas. She responded to this suggestion:

A: No. He gave me the money to pay bills. He wanted to pay me back because I supported him.

Q: But he did not owe you anything?

A: I know. But he wanted to give me the money. And he did.

[354] At trial, Ms. Warriner was adamant that she was at work when Mr. Schwab deposited the \$350,000 into her account. This is not consistent with her testimony from her examination for discovery:

Q: Isn't it true that you were in Langley at Willowbrook Mall with Raymond Schwab on October 4th, 2018?

A: I don't remember.

[...]

Q: So you might... have been?

A: Could be, yes.

[355] In my view, though she professed to be uncertain at the examination for discovery, I have found this to be different from what she stated at trial. At trial, she explained the discrepancy by suggesting she had her memory refreshed from an undisclosed text message indicating otherwise.

[356] I do not believe her testimony on this point. Though I do not make a finding that she was at Willowbrook Mall with Mr. Schwab, her evidence is extremely suspicious. This was a significant transaction and for reasons only known to Ms. Warriner, she was not candid about the role she played in the transfer or her presence at the bank when it occurred.

[357] I have found Ms. Warriner's trial testimony to be inconsistent, on a material point, from her discovery evidence.

e) Purpose of the \$350,000 Transfer

[358] Ms. Warriner testified about her conversations with Mr. Schwab regarding the sale proceeds of the house. In her direct examination, she testified:

We wanted to make sure all bills were paid – and have fresh start. He went to the bank – went to Michael Chase and directed 5,000 for each child. For the rest just leave in the bank or buy a place. Most likely, end up at his mom's because of his health.

[359] Ms. Warriner testified that she met Mr. Chase twice. She testified the first meeting was simply in passing. She said the next meeting lasted about 30 minutes. She testified that she did not say much during the meeting and that Mr. Schwab and

Mr. Chase did most of the talking. At this meeting, Mr. Schwab said he wanted to set up the RESP accounts for the children and that he was “adamant about that amount” despite Ms. Warriner’s suggestion that he make it a little bit more.

[360] Ms. Warriner repeatedly rejected the suggestion that Mr. Schwab transferred the money to her to invest either in real estate or some sort of business or to shield the money from Ms. Masters or a combination of those ideas. She maintained that he transferred the money to her to pay her back for her years of support, and that there were no additional duties associated with the money

[361] She disputed the suggestion in cross-examination that Mr. Schwab gave her the money to manage, to buy a condo, or that there were duties associated with the money.

[362] Ms. Warriner agreed that Mr. Schwab did not record any of the money she says he owed in a note or contract or any piece of paper. She agreed that she reconstructed the credit card accounts and transaction history and came up with the \$350,000 number. Yet she also testified that “he gave me his word...we knew roughly what the amount added up to.” She testified that Mr. Schwab “knew roughly what he owed. It was around the \$350,000 mark.”

[363] Ms. Warriner was challenged on the fact that the bills had all been paid by the time the \$350,000 was transferred to her. She stated: “No, I didn’t realize all the bills I had once I started paying everything.”

[364] In her direct examination, she testified that she and Mr. Schwab specifically discussed giving her the money. She put it this way:

He wanted to give me money to pay all the bills. I know you have been taking care of us for the last how many years. I want to pay you back.

And I want to pay everyone back.

And I paid all of his bills and Ray does not owe anyone money.

[365] In an effort to demonstrate this debt, Ms. Warriner disclosed a collection of transaction reports for her TD account. In the index to the Book of Documents, this

collection of documents is described as “2015-2018 TD Canada Trust Transaction History for Diana Warriner.” Ms. Warriner described this as her banking records and she prepared a colour-coded chart in an effort to prove the debt she alleged Mr. Schwab owed to her.

[366] In her direct examination, Ms. Warriner testified that she created this document because Mr. Schwab had “discussed with me earlier on to write down what was owing. That’s how I put them in categories.” As I understood her evidence in chief, the document was created after the \$350,000 was transferred to her account.

[367] I find her evidence about the accumulating debt self-serving. She needed to provide at least some specificity about how it was that Mr. Schwab owed her what would be over \$350,000 in addition to paying off her off her credit card lawsuit.

[368] I will say more about the use to be made of Ms. Warriner’s banking records shortly. However, at this point, I note fundamental deficiencies with these records. The records are incomplete in two respects. First, the exhibit only includes records up to March 2017. The first entry is dated September 2, 2015 and the final entry is dated March 20, 2017. Ms. Warriner did not tender her personal banking statements after March 2017.

[369] The second deficiency relates to the Ms. Warriner’s categories of expenses. She testified that each of the transactions was highlighted by her and then categorized according to how the money was spent by her on Mr. Schwab or his children. These records are non-descript and there is nothing linking each transaction to Mr. Schwab or the alleged debt she says he owed her. The entries simply show account activity—nothing links the transactions to Mr. Schwab. The only evidence linking the various transactions to Mr. Schwab is Ms. Warriner’s general testimony saying so.

[370] The record, in and of itself, does not prove what Ms. Warriner attempts to prove. Even her testimony about this record is deficient because she failed to

provide evidence particularizing her accounting. In my view, something more is required to prove such an accumulating debt. For example, on p. 69 of the record, there is an entry that is highlighted showing that on January 18, 2017, there was a credit card payment of \$200. Based on Ms. Warriner's evidence about this document and how it worked, the entry is highlighted because the payment was on behalf of Mr. Schwab.

[371] I cannot tell from the record whether this had anything to do with Mr. Schwab or his children. I have only her vague testimony that all highlighted entries related to her financial support. Based on the evidentiary record tendered, it is impossible to determine whether this \$200 formed part of her credit card lawsuit (and hence would have been paid when Mr. Schwab paid off this debt). Surely, there needs to be some reconciliation performed beyond Ms. Warriner simply asserting these entries constituted his unpaid debt—not specified in the amount but believed to be approximately \$350,000—in circumstances where Mr. Schwab had already paid her credit card lawsuit, her mother, and her company. These payments totaled \$86,000.

[372] I was told the original document was colour-coded but the exhibit copy does not contain any colour-coding. In my view, whether there is colour-coding does not impact my findings regarding the reliability of this document. I do not accept Ms. Warriner's evidence that it was created at the urging of Mr. Schwab so he could pay her back. When I review the document, I can see that Ms. Warriner has attributed almost every transaction from her bank statement to Mr. Schwab or his children—except those that are obviously hers (on the face of the entry), such as expenses for her Chilliwack property. The categories she listed are:

- a) Entertainment with kids;
- b) Money from mother;
- c) Bill payments, inc. food, etc;
- d) Cash given to [Mr. Schwab];
- e) Household items purchased.

[373] During her examination in chief, Ms. Warriner did not attempt to review each transaction. She proclaimed that the highlighted transactions formed part of the debt

Mr. Schwab owed her. She did not provide any detail about the transactions. It is troubling that the total amount of these transactions, even if 100% attributable to Mr. Schwab as Ms. Warriner suggested, is less than \$100,000.

[374] Her evidence on this point was confusing. Her testimony also evolved. Initially, she testified that she created this document after Mr. Schwab deposited the money into her account. Later in her direct examination, she was asked whether they ever discussed this document. She answered, “he talked about giving me a lump sum so we had a clean slate to start fresh.” This occurred, she stated, months before “we sold the house.”

[375] She testified that they were to sell the 85th Avenue Property and pay all the bills. He also wanted to buy a new car and then start with a new place without any bills—a new start.

[376] She testified that the \$350,000 was close to the amount he owed her. She added that she had to pay RS Contracting (Rob), the contractor, for the renovations as well.

[377] In short, I do not accept her evidence that this document proves what she says it proves. I have found that Ms. Warriner created this document in an effort to prove that Mr. Schwab owed her \$350,000 to justify the transfer to her. The document is incomplete, she did not take the Court through the transactions and it ends, without any explanation, in early 2017.

[378] Ultimately, Ms. Warriner agreed that she had not produced a single document (no note, contract, piece of paper) in the lawsuit that proves Mr. Schwab owed her money in October 2018.

[379] During cross examination, counsel for Ms. Masters suggested to Ms. Warriner that Mr. Schwab had actually transferred the \$350,000 to her for his children’s benefit or to invest in real estate. Ms. Warriner denied both.

[380] Ms. Warriner was cross-examined about a promise she made to Mr. Schwab.

- Q: You made a promise to Mr. Schwab before he passed away that you would take care of the kids and leave them money
- A: We discussed I would take care of his kids and he said he would take care of my dogs.

[381] During her examination for discovery, Ms. Warriner agreed that Mr. Schwab never stated he intended to disinherit the children by leaving them nothing. She was cross-examined about this portion of her examination for discovery:

- Q: ... So the money from the sale of the house, some of that money was intended to look after his children, correct?
- A: Absolutely.
- Q: Right. But you're the only one that has any of that money.
- A: Yes.
- Q: Right. So you're supposed to use some of it to care for his children, are you not?
- A: Right.

[382] Despite wanting to have some money for the children, Ms. Warriner agreed that she has not given anything to them. She testified that it was in part because of the ongoing litigation. Though she agreed that the discovery evidence was true, but stated "we didn't realize all the bills we had. There were quite a lot of bills to pay."

[383] At the end of her testimony at trial and after portions of her discovery transcript was put to her, Ms. Warriner agreed that "they" did not know what they would do with the balance of the sale proceeds. They thought they may live in Ursula Schwab's basement suite for a time until Mr. Schwab got better. She also agreed that they discussed purchasing a condo. She agreed that "part of the plan was to purchase a condo." Though she added, "we weren't sure what we were going to do."

[384] She testified that Mr. Schwab gave her the money because he trusted her to take care of things and that is what she did.

f) RS Contracting Invoice

[385] Ms. Warriner also tendered an invoice from “RS Contracting (Rob)” dated June 2018 for renovations purportedly performed at the 85th Avenue Residence for \$62,685. It is her evidence that she had to pay this invoice after Mr. Schwab’s death.

[386] In her direct examination, she testified that Mr. Schwab was a “handyman and not a finishing man”; therefore, they needed to get help with the work required before they could sell the 85th Avenue Residence. She testified that they hired the contractor and thought they could pay him when the house was sold. She stated that Mr. Schwab found “Rob” off Craigslist. She testified that the 85th Avenue Residence needed work because of the grow operation that had been in the home. She testified that the front door needed paint, the basement needed to be done because the house had plants in the crawl space and there was mould coming through, and it needed repairs before we sold it.

[387] During her cross-examination, Ms. Warriner denied that this invoice was fake and created by her.

[388] Ms. Masters testified that she did not witness any renovation or construction work carried on the 85th Avenue Residence in 2018. Indeed, she testified that no such work was necessary because she and Mr. Schwab had undertaken the necessary remedial work when they first moved in many years earlier. Similarly, N.S. and Mr. Bains testified that they did not observe the work described by Ms. Warriner.

[389] I do not accept Ms. Warriner’s evidence about the work performed by Rob or the legitimacy of the invoice or that money was owed by Mr. Schwab to “Rob”. Rob did not testify about this area of dispute.

g) Ms. Warriner’s Chilliwack Property

[390] There was some time spent on a property owned by Ms. Warriner. The plaintiff suggested that Ms. Warriner’s ownership of this rental property is consistent with her experience with “flipping properties.” I found this area of Ms. Warriner’s testimony to be confusing. She was cross-examined about her interest in real estate

transactions and suggested that she lost any interest she once had after her bad experience with the Chilliwack property.

[391] She described this loss of interest as set out below.

[392] Ms. Warriner agreed that she owned a property in Chilliwack and she used it to earn rental income. She explained that she sold the property in 2018 after she had a bad experience with unauthorized people inhabiting the property. She said they made a mess of the property and it cost a lot of money to repair. She testified that before this experience, she liked the concept of “flipping properties”, but afterwards, she was no longer interested. She explained that she used an email “realestaterulz” and this reflected her views about real estate deals before she had the negative experience with her Chilliwack property. She was cross-examined about why she did not disclose the damage at her examination for discovery. She responded by saying she did not know and she had a bad experience and she did not want to relive it at that point.

[393] It seemed to me that Ms. Warriner adjusted her evidence in accordance with what would suit her best at any given time. Here, in the context of being cross-examined about coaxing Mr. Schwab into investing his money with her, she attempted to distance herself from any interest in “flipping property.”

[394] That said, her testimony about the Chilliwack property was inconsistent with her earlier discovery evidence.

VI. CREDIBILITY FINDINGS

[395] I have considered the testimony of the witnesses at trial as well as the documentary record presented.

[396] I start with Ms. Masters. Ms. Masters stated at the outset that she has advanced this litigation for the benefit of N.S. and S.S. She maintains that she does not have an interest in the estate nor does she assert one.

[397] For the most part, I have accepted all that Ms. Masters described about her observations of Mr. Schwab and her description of their interactions, including those from 2015–2018.

[398] I have been careful, however, not to place weight on the evidence of Mr. Schwab’s statements to Ms. Masters about his relationship with Ms. Warriner. I accept Ms. Masters’ testimony that she did not often see Ms. Warriner at the 85th Avenue Residence. However, Ms. Masters also testified about statements Mr. Schwab made to her about the seriousness of his relationship with Ms. Warriner. I have not relied on her testimony on this point. This is not because I found Ms. Masters not to be credible, but because Mr. Schwab’s statements to her were often generic and I expect made in the context of MCFD involvement. They are also statements to his former common-law spouse (and someone he once tried to reconcile with). Mr. Schwab may not have always been open with Ms. Masters about his life and new relationships. Thus, though he may have said things about Ms. Warriner to Ms. Masters, I have concluded those statements are not reliable.

[399] For the reasons stated earlier, I have accepted the testimony of N.S. and S.S. that they did not believe Ms. Warriner ever moved into the 85th Avenue Residence. However, as stated earlier, I accept that Ms. Warriner and Mr. Schwab were living in a marriage-like relationship in the months before his death as I will discuss below.

[400] I have also accepted the evidence of Mr. Bains. I appreciate that because he lived in Alberta, he did not see Mr. Schwab with Ms. Warriner on a day-to-day basis. However, he was close with his friend and regularly communicated with him, either by regular visits (four to five times per year) or by bi-weekly telephone calls. Mr. Bains was not an interested party. He also had the benefit of separation from Mr. Schwab. That is, he would not see Mr. Schwab for a few months and indicated his shock about Mr. Schwab’s deteriorating physical appearance, something that may not have been obvious to those who saw Mr. Schwab more regularly.

[401] For the reasons given above, I placed little weight on Anita’s and Brittany’s evidence.

[402] I have grave difficulty with the veracity of Ms. Warriner's testimony. I make this finding with respect to two significant acts. I do not believe Ms. Warriner when she testified that she moved in with Mr. Schwab in September 2015 (or earlier). I also do not believe her testimony that the transfer of \$350,000 was repayment of any debt to her.

[403] Generally, Ms. Warriner delivered a narrative about a loving relationship where the couple moved in together in secret before anyone was aware of the depth of their relationship because they thought it was too soon to share.

[404] I am not satisfied her narrative was a true one.

[405] Ms. Warriner's evidence on the date she moved into the 85th Avenue Residence was equivocal and inconsistent with the totality of the evidence presented, including the documentary record.

[406] In an affidavit she tendered in support of the NOA, Ms. Warriner deposed that she met Mr. Schwab in 2014, a date clearly inconsistent with the totality of the evidence. She resiled from this timeline when she realized that this date could not have been accurate. At trial, sometimes she testified that she moved into the 85th Avenue Residence in September 2015, at other times she testified that she moved in April 2015. Both dates are inconsistent with the MCFD record that Mr. Schwab told the social worker "they don't live together" as reflected in a record dated October 21, 2015. It is also inconsistent with the various documents discussed above, that I have found to be reliable, which show her address as the Daniels Road Residence.

[407] This testimony was inconsistent with evidence of Ms. Masters, which I accept, that she did not move out of the 85th Avenue Residence until the end of April 2015, making Ms. Warriner's suggestion that she met first met Mr. Schwab at the 85th Avenue Residence in February unlikely.

[408] Ms. Warriner's timeline is also inconsistent with the dates expressed in the separation agreement. The agreement contemplates that Ms. Masters was to vacate the 85th Avenue Residence in mid-April 2015.

[409] Ms. Warriner also described a life with the Schwab children that was totally at odds with much of the evidence I have accepted, including the MCFD records. She describes working full-time to support Mr. Schwab's desire to have more time with his children and hence to work less. No one else testified about Mr. Schwab's supposed wish to decrease his time working so he could parent N.S. and S.S. All described him as a loving and involved parent; however, this evidence from Ms. Warriner that this was a deliberate decision on the part of this couple is odd for a number of reasons.

[410] The Schwab children were only with Mr. Schwab, at best, 50% of the time. And sometimes not at all. For example, the January 2018 safety plan gave full parenting time to Ms. Masters. Also, Mr. Schwab did not see the children from mid-September 2018 (time of the Pacific Inn incident) to October 8, 2018 (at the Thanksgiving dinner). Ms. Warriner's story fails to account for the reality of Mr. Schwab's parenting time. In my view, this evidence was an attempt to explain her absence from the 85th Avenue Residence and why it may have been that the witnesses did not see her there.

[411] The evidence of Anita and Brittany was similarly flawed on this point.

[412] As I have stated, Ms. Warriner's evidence about income does not accord with someone working as much as she purported to work.

[413] I do not know the answer to the question about whether Mr. Schwab intended to proceed with the marriage. Clearly there was a proposal in January 2017. However, for reasons unclear on the evidence tendered, no steps had been taken to advance the proposal in the twenty months that followed. Even Mr. Bains, someone who I have found to be a long-time friend of Mr. Schwab and a credible and reliable witness, was unaware of this marriage proposal.

[414] I find Ms. Warriner's evidence about planning to have children with Mr. Schwab—but waiting for him to get better—to be unbelievable. They were 47 years old, he had a vasectomy, and she was supposedly wanting to put off their

pregnancy plans until Mr. Schwab got better. Her testimony on this point does not accord with the totality of the evidence presented at the trial. Importantly, this evidence stands in contradiction to her discovery evidence that they did not intend to have children.

[415] I am satisfied that Mr. Schwab was in poor health in the summer of 2018 (and earlier) and that this was evident to those who interacted with him, including Ms. Masters and Mr. Bains. He had just had a significant interaction with the police in mid-September 2018 and his parenting time had been suspended. Coupled with Mr. Bains's evidence about his friend's appearance, Ms. Warriner's shifting evidence about his apparent good health in 2018 is not believable because it does not accord with the evidence I have accepted.

[416] In sum, Ms. Warriner tried to paint a picture of a couple making plans for a future together. I agree with counsel's suggestion to her: she really did not know Mr. Schwab very well. Notably, she seemed unfamiliar with the severity of his medical issues.

[417] I have concluded that she had made up a story and added certain features to it when necessary.

[418] I turn to perhaps the most significant and material area of inconsistency, that is the transfer of the \$350,000 to her.

[419] Ms. Warriner gave several versions about the mechanics of the transfer of the \$350,000 from Mr. Schwab to her. At her examination for discovery she testified that she "could've been" at the bank with Mr. Schwab when he executed the transfer. In cross-examination, Ms. Warriner's story changed, she testified that she was not at the bank and was allegedly texting Mr. Schwab her banking information. Ms. Warriner claimed to have these text messages, but they were not tendered.

[420] I also note that Ms. Warriner's testimony regarding the reason for the transfer was confusing. She maintained that Mr. Schwab intended to pay her back for the years he was home with the children. However, at other times she seemed to

suggest that the transfer was a gift, that Mr. Schwab simply “wanted to give her the money. And he did.” In yet other instances Ms. Warriner suggested the \$350,000 was to pay Mr. Schwab’s debt to RS Contracting/Rob.

[421] Ms. Warriner presented documents at the trial to corroborate her story. However, even she agreed that many of the documents were created after the fact. Examples of these after-the-fact documents include:

- a) Ms. Warriner’s testimony that she wrote the note dated August 29, 2018, signed by Mr. Schwab, “I, Raymond Schwab, leave Diana Warriner in charge in cause [sic] anything shall happen to me”;
- b) Ms. Warriner’s admission that she affixed Mr. Schwab’s signature to the CIBC transfer receipt dated September 28, 2018; and
- c) Bank statements purporting to show Mr. Schwab’s accumulating debt to Ms. Warriner.

[422] It is for this reason that I have not found the documentary evidence to be corroborative of Ms. Warriner’s version. And where one would expect to see corroborative documentary evidence (such as bank statements), those were not provided. Indeed, there was not a single financial document that on its face, corroborated Ms. Warriner’s version that Mr. Schwab had a massive debt owing to her.

[423] On collateral issues, I would also note that there are several examples where Ms. Warriner was not truthful when she completed certain applications, namely the Alpine Credit loan application and the rental application for the White Rock condo. Though she attempted to explain away the misrepresentation regarding her income, I find that she was simply dishonest when she presented these applications. Regarding the rental application, I do not accept that a person in her mid-40s, purporting to have some experience in the business world, would be confused about what it meant to disclose her income to a potential landlord. It is preposterous to suggest that she believed she could disclose her future anticipated earnings,

particularly when there was no evidence that either she or Mr. Schwab's earnings were about to increase.

[424] I reject Ms. Warriner's evidence about the renovation and the payment required of the contractor. Some evidence suggests that the 85th Avenue Residence did not require renovations. Based on the evidence of the witnesses, little work was done to the 85th Avenue Residence before it sold. The authenticity of the invoice is in dispute and "Rob" was not called to authenticate it. It would have been useful to have had Rob or someone from RS contracting testify if any such work was performed at the 85th Avenue Residence.

[425] In addition, Ms. Warriner was inconsistent about the type of renovations, where the renovations were performed and whether the contractor was someone found on Craigslist or whether Rob was a friend of Mr. Schwab and he was the person who performed the work.

[426] I find that the RS Contracting invoice was not legitimate.

[427] I turn to the meeting at CIBC with Mr. Chase. Mr. Chase testified that he met Ms. Warriner in passing while Mr. Schwab was addressing the hold on his account. Ms. Warriner described two meetings with Mr. Chase, one where they met in passing and a second, much more involved meeting. At this second meeting, she testified that she was present along with Mr. Schwab and Mr. Chase. Her description of the meeting does not accord with Mr. Chase's evidence overall.

[428] I accept Mr. Chase's version of the meeting on September 7, 2018; namely, that Mr. Chase only met Ms. Warriner in passing and that there was not a 30-minute meeting between Mr. Schwab and Mr. Chase with Ms. Warriner present.

[429] Overall and for the reasons set out above, I reject Ms. Warriner's testimony.

VII. ANALYSIS

[430] I turn to my analysis of each of the issues presented.

A. Spouses Under WESA

[431] I am satisfied that the evidence presented establishes on a balance of probabilities that Ms. Warriner and Mr. Schwab were living together at the time of Mr. Schwab's death. However, I am not satisfied that they were living together in a marriage-like relationship for more than two years. I reach this conclusion after considering the legal principles discussed earlier and as guided by the flexible approach expressed in *Jones*. That is, I have examined the relationship as a whole and have considered the various objective criteria.

[432] I have rejected Ms. Warriner's evidence that she moved into the 85th Avenue Residence in September 2015 or at anytime earlier. The preponderance of the evidence does not support the timeline she puts forward. I accept that Ms. Warriner was living with Mr. Schwab at the time of his death and they had moved into the White Rock condo together late in the summer of 2018. I accept N.S.'s testimony that he saw more of Ms. Warriner towards the end of Mr. Schwab's life and that she was around when N.S. and S.S. spent time at the hotels with their father. Based on the closing date of the 85th Avenue Residence this would have been at the end of August 2018. However, I accept the testimony of N.S. and S.S., that they did not believe Ms. Warriner ever lived at the 85th Avenue Residence. This is consistent with the evidence of Mr. Bains on this point. Though he lived in Alberta, he visited periodically and spent the night at his friend's place and he was firm that no one else appeared to be living at the 85th Avenue Residence.

[433] With respect to my finding that this was not a marriage-like relationship, I have considered the totality of the evidence tendered, including:

- a) Ms. Warriner continued to use the Daniels Road Residence address for her driver's license, automobile insurance, CRA filings, and the alter ego trust;
- b) the insurance required by Alpine Credit in May 2018 showed Ms. Warriner to be added as an insured at that time;

- c) the benefits application of October 13, 2016, completed by Ms. Warriner stating she was the “common law girlfriend” and that co-habitation commenced on April 28, 2015;
- d) the MCFD entries including the October 20, 2015 entry indicating “they don’t live together” (contrary to the statement from the benefits application);
- e) the CIBC records indicating in January 2018 that Mr. Schwab did not have a spouse when he withdrew money from his RRSP for financial hardship;
- f) the CRA filings for 2015 and 2016 for Mr. Schwab declaring he was either separated or single;
- g) the CRA filings for 2016, 2017 and 2018 for Ms. Warriner declaring she was single; and
- h) the admission by Ms. Warriner that she never used the 85th Avenue Residence as her own address.

[434] *WESA* requires that Mr. Schwab and Ms. Warriner were in a marriage-like relationship for two years. Ms. Warriner submits that it would be unfair to find that the marriage-like relationship commenced on October 13, 2016, the date of the benefits application, which is only five days after the statutory period.

[435] However, I do not find that the benefits application, on its own, when I weigh all of the evidence, establishes a marriage-like relationship. I agree with counsel for the plaintiff that the application is suspect in that it was a form completed by Ms. Warriner, with unusual language (“common law girlfriend”) and included a date of co-habitation that I have not accepted. The benefits application does not accord with much of the evidence I have accepted.

[436] Anita and Brittany testified about their subjective views of the relationship between Mr. Schwab and Ms. Warriner and that they lived together. For the reasons

stated earlier about the unreliability of their timelines, I have rejected their evidence. Ms. Warriner did not call any other witness to attest to their observations of this couple and how they presented themselves to the world at large.

[437] In this case, when I look at the documentary records, there was no co-mingling of bank accounts. Mr. Schwab and Ms. Warriner maintained separate bank accounts. Despite Mr. Schwab's payment of Ms. Warriner's credit card debt, they did not thereafter join their accounts.

[438] In addition, I have accepted the evidence of N.S. and S.S. about their observations and the basis for their belief that Ms. Warriner was not living at the 85th Avenue Residence for two years prior to Mr. Schwab's death. I have found that Mr. Schwab's parenting time was interrupted at times, the children nonetheless testified about their belief. I have accepted their evidence on this point.

[439] I have also considered Mr. Bains's evidence on this point. He testified that Ms. Warriner was not living at the 85th Avenue Residence. Though I agree that Mr. Bains was only in town four to five times a year, he had an opportunity to observe the living arrangements and Mr. Schwab's relationship with Ms. Warriner. Other girlfriends aside, Mr. Bains offered some evidence consistent with that of N.S. and S.S., that is, Ms. Warriner was not living in a marriage-like relationship for two years before Mr. Schwab's death.

[440] Finally, I accept the plaintiff's submission about the reliability of Mr. Schwab's statements to social workers. He certainly was not hiding the fact that he had a girlfriend to the social workers. I have not considered the undated entry regarding the suggestion Ms. Warriner lives in Richmond. However, the MCFD records provide further evidence supporting the notion that Ms. Warriner and Mr. Schwab were not living in a marriage-like relationship. It is also odd that Ms. Warriner does not even recall the meeting with the social worker.

[441] Ms. Warriner has not satisfied the burden to prove on a balance of probabilities that she and Mr. Schwab had a two-year marriage-like relationship that

began on October 8, 2016. In sum, there is documented evidence, signed by Ms. Warriner and Mr. Schwab declaring their marital status as single after October 8, 2016. Their finances were separate, and Ms. Warriner maintained her mailing address as the Daniels Road Residence.

[442] Ms. Warriner's evidence about her furniture and other personal belongings at the 85th Avenue Residence similarly do not tip the scale in favour of finding they were spouses.

[443] Since I have found that Ms. Warriner and Mr. Schwab were not spouses, the principle of advancement does not apply and I reject the argument.

B. Express or Resulting Trust

1. Was the handwritten note an express trust?

[444] The plaintiff submitted that the handwritten note found by Ms. Masters at the storage locker constituted an express trust reflecting Mr. Schwab's intention for the sale proceeds.

[445] The parties focused their submissions on resulting trust. I have done the same, and, therefore decline to engage in an analysis about whether an express trust was established.

2. Did the transfer of \$350,000 constitute a resulting trust?

[446] Ms. Warriner asserts that Mr. Schwab transferred the \$350,000 to her, four days before he died, because he owed her the money and he was simply paying her back. She does not assert that all of the money was a gift. Rather, she says he owed her this money for being the primary bread-winner for the years they were together. She testified that there was agreement between her and Mr. Schwab about the approximate amount of the debt and that he was to repay her.

[447] I reject Ms. Warriner's claim that the transfer of \$350,000 was to repay a debt owed to her. As detailed above, I did not accept Ms. Warriner's testimony on this point and the documents presented at the trial do not assist Ms. Warriner. In

particular, the banking records tendered do not help her assertion in this regard. I accept the plaintiff's submission that this was a record created after the fact and is self-serving. Ms. Warriner has simply selected every non-descript banking transaction and attributed it to an expense incurred by Mr. Schwab or his children. She made no effort to provide any detail about the specifics of the expense. In addition, even if I accepted that every single highlighted entry could be allocated to Mr. Schwab, the total amount is far short of \$350,000.

[448] Ms. Warriner's admission that there was no formal arrangement or agreement to split expenses does not help her case. The banking records demonstrated that if Mr. Schwab borrowed money from third parties, including Ruth Zimmer, then Mr. Schwab paid it back when he sold the 85th Avenue Residence. He also paid Ms. Warriner's credit card debt of \$36,000.

[449] Further, I have relied on Mr. Bains's testimony, which suggests that Mr. Schwab did not consider that he owed Ms. Warriner money.

[450] Mr. Bains described a conversation that he had with his friend about the sale proceeds. This conversation occurred just weeks before Mr. Schwab died and took place at the time Mr. Schwab was receiving the sale proceeds. Mr. Bains testified that Mr. Schwab intended to pay back his debts using the sale proceeds.

[451] Mr. Schwab was specific to Mr. Bains about who he owed and for what purpose. The first debt he needed to pay was to his mother for the money he owed her when he paid Ms. Masters pursuant to the separation agreement.

[452] The banking records and Mr. Chase's testimony show that Mr. Schwab, consistent with his conversation with Mr. Bains, transferred \$100,000 in fulfillment of his debt to his mother.

[453] The second debt that Mr. Schwab told Mr. Bains about relates to the money owing to their drug dealer. Mr. Bains testified that Mr. Schwab told him about his drug-related debt to Andy and that he intended to repay this money as well. Again,

from the banking records, there is a withdrawal consistent with Mr. Schwab's stated intention to repay Andy.

[454] Mr. Bains was asked whether Mr. Schwab told him about a debt owing to Ms. Warriner. Mr. Bains testified that Mr. Schwab never said anything to him about such a debt.

[455] Mr. Bains was not challenged on the conversation he had with Mr. Schwab about his intentions for the sale proceeds of the 85th Avenue Residence. I accept his evidence about what Mr. Schwab said to him about the use to be made of the sale proceeds.

[456] In sum, I have rejected Ms. Warriner's evidence that the transfer of the funds was as repayment of a debt owed to her. I find that the transfer was gratuitous and Ms. Warriner must rebut the presumption of a resulting trust. Otherwise, she must return the funds to the estate.

[457] Ms. Warriner has not rebutted the presumption of resulting trust by establishing that Mr. Schwab intended to gift her the money. She has not shown that Mr. Schwab intended to give her both legal and beneficial interest in the funds. The only evidence that the transfer was a gift is Ms. Warriner's equivocal, inconsistent evidence that Mr. Schwab simply wanted her to have the funds.

[458] On the contrary, I find that there is evidence that Mr. Schwab intended to invest the funds rather than gift them to Ms. Warriner.

[459] At the time he received the sale proceeds, Mr. Schwab's stated intention to Mr. Bains was that he wanted to invest the money. Mr. Schwab told Mr. Bains that he intended to either purchase real estate or invest with Ms. Warriner's brother. Mr. Bains may have cautioned Mr. Schwab about transferring the money to Ms. Warriner or her brother. There was no suggestion in Mr. Bains's evidence that Mr. Schwab intended the transfer as a gift or as a repayment of debt.

[460] Further, Mr. Chase, in his charting notes from January 15, 2018, noted that Mr. Schwab intended to sell the 85th Avenue Residence and “buy, renovate and flip subsequent properties” for income. Shortly after this conversation, Mr. Schwab listed the 85th Avenue Residence for sale. It sold in June 2018 and the sale completed on August 29, 2018. These steps are consistent with Mr. Schwab’s statement to Mr. Chase about his intentions. Ms. Warriner also testified that after the sale of the 85th Avenue Residence, they planned to purchase a condo.

[461] Mr. Bains also gave evidence that Mr. Schwab was paranoid about Ms. Masters making a claim for the money, whether this belief was justified or not. In this context, Mr. Bains counselled Mr. Schwab to give the money to someone he trusted.

[462] In my view, the totality of the evidence establishes that Mr. Schwab’s intention when he transferred the money to Ms. Warriner was to shield the sale proceeds from Ms. Masters, based on some notion that she intended to go after this money, and to eventually purchase real estate or some other investment with the funds.

[463] In the result, Ms. Masters has established that there was no consideration given for the transfer giving rise to the presumption of a resulting trust. Ms. Warriner has failed to rebut this presumption. On the contrary, the evidence shows that Mr. Schwab never intended to gift Ms. Warriner the funds; he intended to invest the funds and to shield the funds from Ms. Masters.

C. Undue Influence

[464] Ms. Masters submits that the transfer was induced by Ms. Warriner’s undue influence. I accept this submission. For the reasons set out below, I am satisfied that the plaintiff has established, on a balance of probabilities, that the evidence supports raising the presumption of undue influence. I also find that Ms. Warriner has failed to rebut this presumption.

[465] I accept the plaintiff’s submission that Mr. Schwab was in a vulnerable state such that there was the potential for domination by Ms. Warriner. At the time of the

transfer Mr. Schwab was dealing with significant health issues. In the weeks before his death, Mr. Schwab was actively using drugs. In September 2018, the police needed to deal with him at the Pacific Inn and this interaction confirmed his drug use. He also, of course, tragically died of a fentanyl overdose only four days after the transfer. Further, Mr. Schwab was also seeing his doctor for breathing related issues connected to his asthma. He visibly was looking unhealthy (according to Mr. Bains and Ms. Masters) and had again lost his parenting time with his children.

[466] S.S. testified that he acted odd and was not himself.

[467] Other witnesses testified that he was “stressed.”

[468] Perhaps most striking was Mr. Bains’s evidence of Mr. Schwab’s physical state at the garage sale around the time the 85th Avenue Residence was sold. That day Mr. Bains gave Ms. Warriner fresh fish so that Mr. Schwab would have food to eat.

[469] At the same time, Mr. Schwab received a significant sum of money from the sale of the 85th Avenue Residence, which he was paranoid would be taken from him by Ms. Masters. The evidence clearly shows that Mr. Chase tried to help him manage this sum of money and endeavoured to schedule an appointment with him. Mr. Chase said that the only time he was able to interact with Mr. Schwab was when he came in to have a hold lifted. It was at this time that Mr. Chase met Ms. Warriner for the first time.

[470] Despite his efforts, Mr. Schwab cancelled the meetings with Mr. Chase. He never consulted Mr. Chase about transferring \$350,000 to Ms. Warriner. Rather, Mr. Schwab went to a bank in Langley to purchase this substantial bank draft to Ms. Warriner’s credit. This was a bank where the staff did not know Mr. Schwab. I reject Ms. Warriner’s explanation that Mr. Schwab went to this bank because he wanted to buy shoes for the children. For one thing, in late September, Mr. Schwab’s parenting time had been suspended. The children were with Ms. Masters in accordance with MCFD’s safety plan.

[471] It is suspicious that this transaction occurred without Mr. Chase’s knowledge and at a different branch, where Mr. Schwab was not known.

[472] Mr. Schwab was also not sophisticated in financial matters. This much was clear when he described his plan for the sale proceeds to his friend, Mr. Bains. He was ill-equipped to manage day-to-day household bills, to the point that utility companies threatened to cut off service for non-payment.

[473] Ms. Warriner was much more sophisticated. She had experience with her family company and with alter ego trusts, a document she agreed reflected some sophistication on her part. In addition, she owned a rental property and was experienced in running that property, though she downplayed her experience with it to some extent. Ms. Warriner pleaded that Mr. Schwab was financially dependent on her. And while I did not find they were spouses, I did find that they were in a marriage-like relationship (albeit not for the two years as stipulated by *WESA*), at the time of the transfer.

[474] Based on the above, I am satisfied that Mr. Schwab was vulnerable and Ms. Warriner was in a position where he was dependent on her. The potential for domination by her was present. Since I have already found that the transfer was gratuitous, the onus shifts to Ms. Warriner to rebut the presumption of undue influence. In effect, she must prove that Mr. Schwab entered into the transaction of his own “full, free and informed thought”: *Geffen* at 379.

[475] Considering the factors in *Stewart*, Ms. Warriner has failed to rebut the presumption of undue influence.

[476] Ms. Warriner admits that Mr. Schwab did not have independent legal advice before he transferred the money to her. She also admitted that she did not have power of attorney over any of Mr. Schwab’s affairs, including his financial affairs.

[477] The size of the disadvantage was also significant. The 85th Avenue Residence was by far Mr. Schwab’s most valuable asset. The \$350,000 transfer aside, Mr. Schwab spent a substantial amount of it on Ms. Warriner and her mother,

about \$86,000. By the time his debts were paid, the \$350,000 was well over half of the entirety of his assets. Transferring these funds to Ms. Warriner left Mr. Schwab almost entirely dependent on her as he was not working in 2018.

[478] Given Ms. Warriner's unbelievable evidence regarding the reason for the transfer and Mr. Schwab's intentions, I find she has failed to lead evidence that Mr. Schwab knew what he was doing or that she did not actually influence him. On the contrary, her evidence is that she discussed the transfer with Mr. Schwab and that she feels entitled to the funds for the alleged past expenses.

[479] Finally, I accept that Ms. Warriner misled Mr. Schwab that she would care for his children. It is little solace that Mr. Schwab did not owe anybody anything at the time of his death.

[480] In sum, I am satisfied that the plaintiff has proven on a balance of probabilities that the potential for domination existed in the relationship. Based on the nature of their relationship, Mr. Schwab's vulnerability at the time (because of his ongoing drug addiction and health condition and his paranoia about Ms. Masters), Ms. Warriner was able to dominate his will. She exercised a persuasive influence over him. When I consider the factors enunciated by Punnett J. in *Stewart*, Ms. Warriner has not rebutted the presumption of undue influence. That is for the reasons set out above including the fact that he did not have independent legal advice, he had not given Ms. Warriner power of attorney, the sum was substantial in the circumstances, and Mr. Schwab's vulnerability.

[481] Mr. Schwab did not transfer the \$350,000 of his own full, free and informed thought.

D. Remedy

[482] In sum, I have found that Mr. Schwab's transfer of \$350,000 to Ms. Warriner constituted a resulting trust. In addition, I have found that Ms. Warriner exerted undue influence over Mr. Schwab and that she has not rebutted the presumption of undue influence.

[483] A resulting trust is an equitable doctrine used to recognize the obligation to return property to the beneficial owner: *Pecore* at para. 20. They are often used remedially to reverse what would otherwise be an unjust enrichment, similar to a constructive trust: Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Carswell, 2021) at 413–414.

[484] However, in this case, the funds transferred cannot be returned since they have been spent without an accounting.

[485] Based on the Court's conclusion that there was undue influence, I am satisfied that a monetary award is warranted. The plaintiff has asked that the transfer be declared void for undue influence. However, since undue influence being an equitable doctrine, the appropriate remedy is rescission. Therefore, the defendant must make restitution of the property: *Kupchak v. Dayson Holdings Ltd.*, 53 D.L.R. (2d) 482 at 486, 1965 CanLII 497. Again, since the funds are spent they cannot be returned, so rescission in this case is not practical or possible.

[486] That said, rescission is a flexible remedy that can be moulded to the needs of the case. The court may order the payment of damages instead of rescission to remedy a deficiency in returning the property: *Kupchak* at 485–488. Indeed, the Court of Appeal in *Dusik v. Newton*, 62 B.C.L.R. 1, 1985 CanLII 406 (C.A.), awarded damages in lieu of rescission when a contract was duped into an unconscionable contract and rescission was not possible.

[487] The rationale for awarding damages when rescission is not available is that equity does not allow a defendant to retain the benefits of their misconduct: *Dusik* at para. 105. The court in *Dusik* was reassured in their decision by the fact that an unconscionable bargain is constructive or equitable fraud. It cannot be argued that the court cannot provide a remedy in such circumstances: *Dusik* at para. 106. Analogously, undue influence is also serious misconduct amounting to constructive fraud: *Ogilvie v. Ogilvie Estate*, 49 B.C.L.R. (3d) 277, 1998 CanLII 6278 (C.A.) at para. 6.

[488] I find that it is within my discretion to do justice on the facts of this case. Since the \$350,000 cannot be returned, I award the plaintiff damages in the amount of \$350,000. This is especially appropriate when considering the significant unfairness of allowing Ms. Warriner to benefit from her misconduct, while leaving Mr. Schwab's children with a minimal inheritance.

E. Punitive Damages

[489] The plaintiff seeks punitive damages in the amount of \$100,000. This award is based on Ms. Warriner's admission that she spent all of the money Mr. Schwab gave her. The plaintiff submits she was a fiduciary because she held the funds in trust for Mr. Schwab and his estate. As a fiduciary she had an obligation of utmost good faith to him and could not use her position as a fiduciary for her own profit, benefit or advantage.

[490] I do not need to decide whether Ms. Warriner was a fiduciary as the trustee of a resulting trust. Regardless, I am willing to grant punitive damages.

[491] Punitive damages may be awarded when "the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 196. The award is exceptional, and limited to where there is "misconduct that represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36. Punitive damages are not compensatory in nature. Rather, they are punitive and intended "to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened": *Whiten* at para. 94. Thus, punitive damages should only be awarded when "the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence": *Hill* at para. 196.

[492] Punitive damages, if awarded, should be assessed to be reasonably proportionate to "such factors as the harm caused, the degree of the misconduct, the

relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant for the misconduct in question”: *Whiten* at para. 94. The amount should be no greater than needed to rationally accomplish their purpose: *Whiten* at para. 94.

[493] In this case, I find that Ms. Warriner’s conduct is such as to support an award of punitive damages. I make this finding after considering the *Whiten* factors.

[494] Ms. Warriner had access and *de facto* control over what was almost the entirety of Mr. Schwab’s estate, less the approximate \$73,000 left in his bank accounts and his car. She admitted that she spent all of this money without any accounting to Mr. Schwab’s two minor children, aged only 11 and nine years old at the time of their father’s death. Despite his end, there is no dispute on the evidence that Mr. Schwab loved his children and wanted to take care of them. Ms. Warriner agreed that Mr. Schwab did not intend to disinherit his children. She also testified that she promised Mr. Schwab that she would take care of his children if he passed away. Ms. Warriner failed to take any steps to fulfil her promise to Mr. Schwab; he trusted her and she abused that trust. I find her conduct after Mr. Schwab’s death, spending all of his money without account and without any effort to meet the needs of the children, to be egregious. She was in a position of trust regarding Mr. Schwab’s estate because she had it in her possession and control. I am not satisfied that an award of costs would otherwise address her conduct.

[495] Ms. Warriner used her position for her own profit, benefit and advantage. By the time of her discovery in November 2021, Ms. Warriner had spent all of the money with no accounting. Based on my earlier findings that she did not have the legal right to spend the funds, she deprived N.S. and S.S. of their entitlement. Ms. Warriner has not been otherwise fined for this misconduct.

[496] I am satisfied that this sort of misconduct, control and dissipation of the assets of an estate in these circumstances, is malicious and oppressive conduct that markedly departs from ordinary standards of decent behaviour. The award is warranted in part to adequately address retribution, deterrence, and denunciation.

[497] Under all the circumstances, I conclude that a punitive damages award is appropriate in this case in the amount of \$50,000.

VIII. CONCLUSION AND ORDERS

[498] In sum, the Court makes the following orders:

- a) damages against Ms. Warriner in the amount of \$350,000;
- b) punitive damages against Ms. Warriner in the sum of \$50,000;
- c) a declaration that the defendant is not Raymond Schwab’s spouse pursuant to s. 2(1)(b) of *WESA*; and
- d) the NOA is dismissed.

[499] If I am incorrect with my findings on undue influence and the appropriate remedy, then I would have granted a declaration that the \$350,000 Mr. Schwab transferred Ms. Warriner are held in a resulting trust in favour of the estate.

[500] The plaintiff sought leave to make submissions about special costs and an application for a charging order on Ms. Warriner’s personal and real estate assets. If required, leave is granted to present those submissions. The parties are to inform scheduling within 60 days of the date of these reasons to schedule a hearing on costs and ancillary orders.

“Winteringham J.”