by **AMY MORTIMORE**
TLABC Member

Amy Mortimore is a partner at Clark Wilson LLP, and co-chair of its Estates & Trusts Practice Group. Her practice includes all types of estate and trust litigation and elder law. She and Mark Weintraub QC co-authored the textbook British Columbia Estate Litigation, published by LexisNexis. Amy is the Past Chair of the Board of Directors of CLEBC, and the co-Chair of the TLABC WLR Committee. Amy volunteers as Referral Counsel to the BCCA, and sits on the CBABC Advisory Committee to the Judicial Council.

The Estate and Trust Year in Review, 2021

It is safe to say that 2021 was not uneventful, and it is fair to say those events were not all positive. Yet, 2021 saw positive developments in British Columbia estate and trust law. This article will address the following: amendments to legislation to allow for electronic wills, section 58 decisions, section 59 decisions, will execution issues, development of "spouse" and "parent", a wills variation update, and privacy issues in probate.

A significant development in estate law is the official move to electronic wills. The amendments to *Wills, Estates and Succession Act,* S.B.C. 2009, c.13 ("**WESA**") relating to electronic wills came into force December 1, 2021. Wills which are entirely electronic (with no physical copy) are now accepted as wills. These may be signed with a secure electronic signature, but the provision may also allow for a typed name or for using an image of the person's signature. See[1] sections 35.1 (definitions) and 35.2 of WESA.

The dispensing provision in section 58 of WESA continues to generate a number of written decisions. While our courts have already defined the general parameters of this power, 2021 (and late 2020) saw smaller developments related to:

- COVID-19 as the accepted reason for delay/failure in executing new will (*Bishop Estate v. Sheardown*, 2021 BCSC 1571);
- continued willingness by the Court to recognize unsigned computer documents as wills (*Rempel Estate v. Dudley*, 2020 BCSC 1766); and
- confirmation the Court will not 'rubber stamp' any application, but rather will inquire into whether letters/writings are the 'fixed and final' intentions of the deceased, particularly where there is a formal will already in place (*Van De Bon Estate*, 2021 BCSC 505 and *Henderson v. Myler*, 2021 BCSC 1649).

2021 also saw two further section 59 rectification decisions to add to the handful of existing British Columbia section 59 decisions. In *Jamt Estate*, 221 BCSC 788, the will-maker gave instructions for the residue of his estate to be left to Per Kare Jamt. This was in error. Per Kare Jamt was in fact the will-maker's deceased brother. Other identifying details the will-maker provided to his lawyer were consistent with an intention to gift the residue to his nephew Per Martin Jamt. In all of the circumstances, the Court allowed the will to be rectified to allow the residue to pass to the nephew. In *Simpson v. Simpson Estate*, 2021 BCSC 1486, the will gifted certain private company shares to the will-maker's children, with the remainder of the estate to their step-mother. However, shortly after the will-maker's death, the other shareholder exercised his right under a shareholder agreement to purchase the shares. The children sought a rectification of the will to reflect the deceased's intention to gift the shares or the value of the shares to them. Of note were the planning solicitor's notes, which reflected the intention to gift the shares to the children, a discussion of the value of the shares, and a note that the other shareholder was likely to exercise his right to purchase the shares shortly after the will-maker's death. However, the solicitor had not been provided with a copy of the shareholder agreement. It provided that the purchase price of the shares would be the FMV less a $150,000

life insurance policy on each of the shareholders, payable to their respective spouse. The company paid the premiums on these life insurance policies as a business expense. The step-mother took the position that the gift of shares failed and the proceeds fell into the residue. She argued that she was entitled to keep both the life insurance proceeds and the proceeds of the sale of shares. The Court, however, disagreed. It relied on the solicitor's notes as accurately reflecting the will-maker's intention, and that "it would be unusual for him to want them to have the Shares but not the market value purchase price from their sale." The will was rectified to give effect to this intention.

Two execution issues of note were addressed by the British Columba courts in 2021. In *Wolk v. Wolk*, 2021 BCSC 1881, the will was witnessed by the two beneficiaries (his parents). The will-maker was not married, but had two children, the younger of whom was still an infant. The will-maker was a steel worker, and was often out of town for extended periods for work. He and his infant daughter resided with his parents for a number of years, and the parents assumed primary care of the infant daughter. The parents also paid down the will-maker's debts and assisted him generally. The will gifted the entire estate to the parents, with a wish that they in turn provide for his daughters. The will was executed with 4 witnesses present: the parents and another couple. The parents and one of the others signed the will as witnesses. The fourth witness did not sign. The Court considered WESA section 43, and the central issue of "what did [the will-maker] actually intend?" The Court determined that the will-maker did indeed wish to benefit his parents, and declared the gift valid despite the parents signing as witnesses. Secondly, *Conner Estate v. Worthing*, 2021 BCCA 231 grappled with the meaning of a witness "subscribing" a will, under the *Wills Act*. In this case, the lay witnesses printed their name and completed their address, but did not sign their signature on the will. Given that the *Wills Act* had no dispensing or substantial compliance provision, the Court was tasked with determining whether the printing was sufficient to constitute subscription. The Court considered the intentions of the witnesses when printing their names, and determined that they were intending to witness the will. As such, the printing was found to be a subscription such that the will was validly executed.

The Supreme Court of Canada agreed that the Estate Trustees had failed to demonstrate a serious risk to safety, and thus could not displace the open court principle, which is fundamental to the proper functioning of our democracy.

The definitions of both "spouse" and "parent" were addressed in 2021. In *Boughton v. Widner Estate*, 2021 BCSC 325, the Court addressed whether a person could be in two separate spousal relationships simultaneously. There, the deceased was murdered, and died intestate. He had a legal wife of 17 years, with whom he had two children. At issue was the nature of his relationship with a second woman with whom he had had a romantic relationship for 8 years and two further children. The legal wife did not know of the second woman until after his death, although the second woman knew of the legal wife. Apparently unbeknownst to the legal wife, the deceased had lived with both families, but told the legal spouse that he had to travel for work quite frequently. This "travel" was the time he spent living with the other family. The Court ultimately concluded that the legislature provided for exactly such a circumstance, and that the deceased had two spouses at the time of his death. The Court also noted that the legal spouse had challenged the validity of the spousal provisions in WESA, and that matter remained outstanding. Just recently, the British Columbia Court of Appeal released its decision, *Mother 1 v. Solus Trust Company Limited*, 2021 BCCA 461. Like in *Boughton v. Widner Estate*, the deceased in this case was also murdered and also died intestate. The Court was asked to review whether the trial judge had erred in determining Mother 1 was not a spouse of the deceased. Of note was that the trial judge had considered that the 2 year time period during which a claimant lived in a marriage-like relationship with the deceased "to run backwards from the time of death." The trial decision had been released prior to the BCCA's decision in *Robledano v. Queano*, 2019 BCCA 150, and the parties in this appeal all agreed the trial judge had erroneously interpreted the timing requirement. In *Mother 1*, the Court of Appeal confirmed that, to be a "spouse" under WESA, the claimant must be a spouse at the time of death, but that the 2 year period was not that period which immediately preceded the death. The Court also held that the parties do not have to have a "mutual intent" to be in a spousal relationship. Rather, a court will review the parties' intent, but also the objective evidence of their lifestyle and interactions to determine the nature of their relationship. Finally, the Court of Appeal also addressed a sealing order request, and in so doing, referenced the recent *Sherman Estate* decision of the Supreme Court of Canada, discussed below. Here, the Court refused to make a permanent sealing order, as it held the evidence did not meet the "high bar" required to displace the open court principle.

With respect to "parent", *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767 considered a polyamorous relationship. There, the three petitioners lived in a committed polyamorous relationship. Two petitioners were the biological parents of the child, conceived through sexual intercourse. The petition

sought a declaration that the third petitioner was also a "parent" of the child pursuant to the *Family Law Act*, S.B.C. 2011, c. 25 (the "**FLA**"). The Court confirmed that the FLA did permit three parents of a child, but only where the child is conceived through assisted reproduction. The Court then identified a gap in the FLA as it relates to more than two parents for a child not conceived through assisted reproduction, and exercised its *parens patriae* jurisdiction to declare that the third petitioner was the child's legal parent. This is a significant advancement in the recognition of polyamorous relationships, and foreshadows issues we will ultimately be seeing in the estate litigation context.

On the wills variation front, many British Columbia estate lawyers have been following the Nova Scotia case, *Lawen Estate v. Nova Scotia (AG)*, 2021 NSCA 39, given that Nova Scotia's dependants relief legislation is similar to ours. In 2019, the trial court had held that the legislation permitting adult independent children to bring a variation claim was contrary to section 7 of the *Charter*. However, the Nova Scotia Court of Appeal overturned the trial decision. Specifically, the Court of Appeal held that the trial judge's reasoning was not sufficiently detailed nor correctly framed. The Court of Appeal then applied the test of whether section 7 was engaged on these facts, and concluded it was not.

Finally, the Supreme Court of Canada weighed in on the right to privacy in a probate matter in *Sherman Estate v. Donovan*, 2021 SCC 25. This matter arises from the 2017 murders of billionaires Barry and Honey Sherman, in their home in Ontario. To date, the murders remain unsolved. The Estate Trustees applied to seal the probate records, alleging that the file contained the names and details of the beneficiaries, some of whom were infants. They further alleged that the murderer(s) were not yet identified, and the beneficiaries could be at risk if their information became known. The application judge granted a sealing order. The Toronto Star sought to have that order set aside, but the Ontario Superior Court of Justice refused to do so. The Ontario Court of Appeal overturned the decision, and lifted the sealing order. It found that it was mere speculation that the disclosure of the file would create risk to the beneficiaries or Estate Trustees. The Supreme Court of Canada agreed that the Estate Trustees had failed to demonstrate a serious risk to safety, and thus could not displace the open court principle, which is fundamental to the proper functioning of our democracy.

While there were, of course, other estate and trust related decisions released in 2021, those set out above provide highlights in key areas of development over the past year.

1 I would like to thank my colleague, Zachary Rogers, for sharing his notes on recent caselaw with me for use in preparing this article.