

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Knelsen Estate*,
2020 BCSC 134

Date: 20200205
Docket: S-P-125254
Registry: Kelowna

In the Matter of the Estate of Jason Knelsen, Deceased

- and -

Docket: S125505
Registry: Kelowna

In the Matter of the Estate of Jason Jacob Knelsen, Deceased

Corrected Judgment: The text of the judgment was corrected at paragraph 139 on
February 10, 2020.

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

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Alanna Wertz:

K. Rule

Place and Date of Hearing:

Kelowna, B.C.
December 12-13, 2019

Place and Date of Judgment:

Kelowna, B.C.
February 5, 2020

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I. OVERVIEW OF THE PETITIONS

[1] These two petitions were heard together. They raise overlapping issues regarding the administration and distribution of the estate of the deceased, Jason Knelsen. The petitioner Norma Arnold is Mr. Knelsen's mother. The petitioner Alanna Wertz was in a marriage-like relationship with Mr. Knelsen for approximately 12 years prior to his death. They have two children together who are currently 11 and 6 years old. Mr. Knelsen died by suicide on August 15, 2018. It is common ground that Mr. Knelsen died without a valid Will.

[2] The relief sought by Ms. Arnold in her petition includes declarations that Ms. Wertz is not the spouse of Mr. Knelsen under s. 2 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*], and that his two children are the sole beneficiaries of Mr. Knelsen's estate pursuant s. 23(2)(a) of the *WESA*. Ms. Wertz, by contrast, seeks a declaration that she is the surviving spouse of Mr. Knelsen and is therefore entitled to the spousal share of Mr. Knelsen's estate pursuant to s. 21(5) of the *WESA*.

[3] Section 2(2)(b) of the *WESA* provides that two persons in a marriage-like relationship cease to be spouses for the purpose of the *WESA* if one or both persons terminate the relationship. The central disagreement between the petitioners is whether the spousal relationship between Mr. Knelsen and Ms. Wertz had terminated within the meaning of s. 2(2)(b) of the *WESA* prior to Mr. Knelsen's death.

[4] These petitions are brought pursuant to Rule 25-14(1) and (1.1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]. While there are conflicts in the affidavit evidence tendered in support of the petitions, neither party sought directions under Rule 25-14(8) of the *SCCR* that affiants be cross-examined or that there be a trial of any of the issues raised. The parties are content that the petitions can and should be resolved in a summary manner, particularly given the relatively modest size of Mr. Knelsen's estate.

[5] I am satisfied that I can fairly determine the issues raised on these petitions without the need for *viva voce* evidence or cross-examination.

[6] I note that the Office of the Public Guardian and Trustee (“PGT”) was given notice of the petitions in light of the fact that the potential beneficiaries of Mr. Knelsen’s estate include his minor children. The PGT did not appear at the hearing of the petitions, but did advise by letter that the PGT takes no position on the substantive issues in dispute, and in particular the issue of whether Ms. Wertz is Mr. Knelsen’s surviving spouse.

[7] The PGT does take the position that any order appointing an administrator of Mr. Knelsen’s estate should make the appointment subject to the administrator applying for a representation grant and posting a bond in an amount sufficient to secure the interests of the children in the estate, if any. In light of the PGT’s position, Ms. Arnold advised at the outset of the petition hearing that she was content to adjourn the order sought in para. 3 of Part 1 of her petition granting the administration of Mr. Knelsen’s estate to Ms. Arnold.

[8] The value of Mr. Knelsen’s estate is currently unknown, although it appears that the most significant asset is the family home which is registered in Mr. Knelsen’s name alone. Ms. Arnold and Ms. Wertz each seek an order granting them authorization to obtain estate information in Form P18.

II. THE LEGAL PRINCIPLES

A. The legislative framework

1. Intestate estates under the WESA

[9] The *WESA* sets out the principles governing intestate estates in British Columbia. The *WESA* came into effect on March 31, 2014. Prior to that, intestate estates were dealt with under the *Estate Administration Act*, R.S.B.C. 1996, c. 122 [EAA].

[10] Part 3 of the *WESA* prescribes the manner in which an estate is to be distributed where a person dies without a will. If the deceased is survived by a

spouse and descendants, then s. 21 provides that the spouse will receive the prescribed “preferential share of the estate”, with the residue being equally divided between the spouse and the descendants. Where, as here, the descendants are the descendants of both the intestate and the spouse, the preferential share of the spouse is \$300,000.

[11] If a person dies without a will and has descendants but no surviving spouse, then the distribution of the estate is governed by s. 23 of the *WESA* which provides, in relevant terms:

No spouse but intestate leaving descendants or relatives

23 (1) This section applies if a person dies without a will and without leaving a surviving spouse.

(2) Subject to subsection (3) and section 24, if a person dies without leaving a surviving spouse, the intestate estate must be distributed

(a) to the intestate's descendants,

[12] “Descendant” is defined in s. 1 of the *WESA* to mean “all lineal descendants through all generations”. There is no dispute that the children are Mr. Knelsen’s only descendants.

[13] Section 2 of the *WESA* determines when a person is a spouse for the purpose of the *WESA*. Pursuant to s. 2(1)(b), two persons are spouses of each other if they were both alive immediately before “a relevant time” and had lived with each other in a marriage-like relationship for at least two years. Section 2(3) provides that a relevant time for the purpose of s. 2(1) is the date of the death of one of the persons unless the *WESA* specifies another time as the relevant time.

[14] There is no dispute that Ms. Wertz was, at one time, Mr. Knelsen’s spouse within the meaning of the *WESA*. The question is whether they had ceased to be spouses under s. 2(2) of the *WESA* by the time of Mr. Knelsen’s death. Sections 2(2) and (2.1) provide:

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

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

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

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

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

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

[Emphasis added]

[15] If the relationship between Ms. Wertz and Mr. Knelsen had terminated within the meaning of s. 2(2)(b) of the *WESA* prior to Mr. Knelsen's death, then Ms. Wertz is not a spouse for the purpose of s. 21 of the *WESA*. In that event, Mr. Knelsen's estate would be distributed, in its entirety, to his children. Any claim by Ms. Wertz for an equal division of family assets, including the family home, under Part 5 of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*], would be brought against the estate.

[16] If the relationship between Ms. Wertz and Mr. Knelsen did not terminate prior to Mr. Knelsen's death, then she is entitled to the distribution of his estate that is mandated by s. 21 of the *WESA*. That is, Ms. Wertz would receive a preferential share of \$300,000 of the estate pursuant to s. 21(3), or the entirety of the estate if the net value is less than \$300,000. I am told that Mr. Knelsen's estate is unlikely to exceed \$300,000. It is expected, therefore, that there will be no residue of Mr. Knelsen's estate to distribute after Ms. Wertz receives her preferential share.

2. The test for determining whether a marriage-like relationship has "terminated" under s. 2(2)(b) of the *WESA*

a) The decision of the Court of Appeal in *Robledano*

[17] The meaning of the phrase "terminate the relationship" under s. 2(2)(b) of the *WESA* was recently considered by our Court of Appeal in *Robledano v. Queano*, 2019 BCCA 150 [*Robledano*]. In *Robledano*, the Court of Appeal reviewed in detail

the history and context of this provision. I draw the following points from the Court of Appeal's detailed review.

[18] As originally enacted, s. 2(2) of the *WESA* distinguished between married and unmarried spouses. A married spouse ceased to be a spouse under s. 2(2)(a) of the *WESA*, as it originally read, if: (i) the parties live separate and apart for at least 2 years with one or both forming an intention to live separate and apart permanently, or (ii) an event occurs that causes an interest in family assets, as defined in Part 5 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*], to arise. By contrast, an unmarried spouse ceased to be a spouse under s. 2(2)(b) of the *WESA* when one or both persons terminate the relationship.

[19] The differential treatment of married and unmarried spouses under s. 2 of *WESA*, as originally enacted, is explained by the fact that at the time the *WESA* was enacted, it was Part 5 of the *FRA* that governed family property division. Unmarried spouses were excluded from the scope of Part 5 by the manner in which "spouse" is defined in s. 1 of the *FRA*. The legislative history of s. 2(2) of the *WESA*, including Hansard debates which are quoted in *Robledano*, suggest a legislative intent that a more flexible approach to unmarried spouses was required under the *WESA* because of their different treatment under the *FRA*: *Robledano* at paras. 52-53. As explained in *Robledano*:

[51] Because Part 5 of the *Family Relations Act* did not apply to unmarried spouses, it was not possible to make s. 2(2)(a)(ii) applicable to them. A policy decision appears to have been made not to adopt a period of separation as the test for termination of spousal rights for unmarried couples. Instead, the legislation allowed unmarried spouses, through their statements or acts, to unilaterally and instantly terminate their spousal relations for the purpose of the *WESA*.

[20] With the enactment of the *FLA* in 2013, unmarried spouses have the same entitlement to property division on separation as married spouses. As such, there is no longer an apparent rationale for distinguishing between married and unmarried spouses under s. 2 of the *WESA*. However, while consequential amendments were made to s. 2(2)(a) of the *WESA* on the enactment of the *FLA*, s. 2(2)(b) of *WESA* was not amended: *Robledano* at para 54.

[21] The *WESA* thus continues to distinguish between married and unmarried spouses in determining when spouses cease to be spouses. For married spouses, it is typically separation that causes an interest in family property to arise under Part 5 of the *FLA*, and therefore married spouses cease to be spouses under s. 2(2)(a) of the *WESA* when they separate: *Robledano* at para. 45. For unmarried spouses, s. 2(2)(b) of the *WESA* makes no reference to separation or to Part 5 of the *FLA*. Instead, unmarried spouses cease to be spouses under the *WESA* when either or both of them “terminate the relationship.”

[22] The differential treatment of married and unmarried spouses in s. 2(2) of the *WESA* led the Court of Appeal in *Robledano* to conclude (at para. 46) that separation *per se* is not the test for termination of a marriage-like relationship. The proper approach to determining whether a marriage-like relationship is terminated is summarized in *Robledano* as follows:

[55] What we are left with, in s. 2(2)(b) of the *WESA*, is a rather imprecise and flexible legal standard. The question of whether a person has “terminated the relationship” requires a judge to consider the expressed and implicit intentions of each spouse, as well as the objective evidence concerning the subsistence of the relationship. The determination is a “judgment call” for the trial judge – the application of a broad legal standard to the factual circumstances of an individual case...

[23] The question requires a broad and holistic approach: *Robledano* at para. 59.

b) *Hodge v. Canada and Re Sanderson*

[24] Although the case is not directly applicable, both of the petitioners cite the decision of the Supreme Court of Canada in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 [*Hodge*] as providing additional guidance on the question of when a marriage-like relationship terminates.

[25] *Hodge* concerns the distinction drawn in the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“CPP”), between separated married spouses and separated common law spouses in determining entitlement to survivor benefits. The respondent in *Hodge* sought a survivor’s pension under the CPP by reason of the death of a man with whom she had formerly had a common law spousal relationship. The CPP

provides an entitlement to a survivor's pension to separated married spouses. The respondent argued, successfully in the courts below, that the CPP was contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* to the extent that it did not extend the same entitlement to separated common law spouses.

[26] In allowing Canada's appeal in *Hodge*, the Supreme Court of Canada held that the respondent did not belong to the asserted comparator group of "separated common law spouses" because her common law relationship had terminated prior to the death of her former spouse. On the respondent's own evidence, she left her former spouse in February 1994, with the intention that the relationship was finally at an end. Her former spouse died in July 1994. Thus by the time of the death of her former spouse, the respondent was not a "separated common law spouse", but rather had ceased to be a spouse at all.

[27] At paras. 42-43 of *Hodge*, the Supreme Court of Canada provides the following guidance as to what constitutes the termination of a common law spousal relationship:

[42] The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. "Cohabitation" in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue. I agree with the observation of Morden J.A. in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), at p. 432, that, subject to whatever provision may be made in a statute, a common law relationship ends "when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one". On this point, Professor Fodden observes:

. . . turning to a (constructed) mental phenomenon permits the court to make a decision as to the critical moment a relationship ended without having to place inordinate stress upon any particular event or lack of action. It allows for the bridging of gaps in the relationship as being "brief cooling-off period[s]" and perhaps gives courts some freedom to protract the continuation of cohabitation past the last physical symptom, where to do so might be just.

(S. R. Fodden, *Family Law* (1999), at p. 60)

[43] The test for “cohabitation” has been developed and refined in a number of cases: see, e.g., *Arsenault v. Collier* (2001), 208 Nfld. & P.E.I.R. 117 (P.E.I.S.C.T.D.), at paras. 15-17; *Tanouye v. Tanouye* (1993), 117 Sask. R. 196 (Q.B.), at paras. 32-38. It is not an issue that requires extended consideration here because, on the respondent’s own evidence, cohabitation was at an end. She brought it to an end.

[28] The decision of the Ontario Court of Appeal in *Re Sanderson and Russell*, (1979), 24 O.R. (2d) 429 (C.A.) [*Re Sanderson*], which is cited in the above passage from *Hodge*, concerned the proper interpretation of family law legislation that applied to common law spouses if they had cohabited “continuously for a period of not less than five years”. The parties in *Re Sanderson* had separated for a period of five days during the course of their five-year relationship. Mr. Russell argued that this brief period of separation meant that the parties had not cohabited “continuously” within the meaning of the statute.

[29] The Ontario Court of Appeal held that the parties’ short period of separation did not constitute a break in their cohabitation, and therefore the parties did cohabit continuously for a period of not less than five years. The Court commented as follows at 432 as to what might constitute the end of a common law relationship:

...Without in any way attempting to be detailed or comprehensive, it could be said that such a relationship has come to an end when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one. While the physical separation of parties following “a fight” might, in some cases, appear to amount to an ending of cohabitation the test should be realistic and flexible enough to recognize that a brief “cooling-off” period does not bring the relationship to an end. Such conduct does not convincingly demonstrate a settled state of mind that the relationship is at an end.

[30] *Hodge* and *Re Sanderson* have been applied by British Columbia courts in determining whether a marriage-like relationship has ended for the purposes of the *EAA*, which formerly governed intestate estates: *Gosbjorn v. Hadley*, 2008 BCSC 219 at paras. 117-122 and 142. *Hodge* and *Re Sanderson* have also guided courts in considering when spouses in a marriage-like relationship have separated for the purpose of the *FLA*: *Y.T.C. v. J.C.V.*, 2018 BCSC 773 at para. 22; *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at paras. 43-44.

[31] I acknowledge that care must be taken in relying on cases decided under the *FLA* given the distinction drawn in s. 2 of the *WESA*, as highlighted in *Robledano*, between married and unmarried spouses. It may be that the distinction between “termination” and “separation” will prove to have limited significance in practice given the manner in which separation is defined under *FLA*. The test for separation under the *FLA* is also a flexible one, and the focus of the analysis is on intention. This need not take the form of a mutually shared intention; a unilateral abandonment of the matrimonial relationship by one party is sufficient. The court must find, first, an intention held by one spouse to repudiate or end the spousal relationship and, second, action consistent with that intention: *Nearing v. Sauer*, 2015 BCSC 58 at paras. 54-57.

c) Summary of approach

[32] Ultimately, I must adopt the approach mandated by *Robledano* and consider, in a broad and holistic manner, the express and implicit intentions of both Ms. Wertz and Mr. Knelsen, as well as the objective evidence concerning the subsistence of the relationship. In order to find that the spousal relationship between Ms. Wertz and Mr. Knelsen had terminated prior to Mr. Knelsen’s death, I must be satisfied on the evidence that one or both of these parties had a settled intention to end the spousal relationship. In considering whether the evidence establishes such an intention, I must consider the specific circumstances of the relationship between Mr. Knelsen and Ms. Wertz over time, recognizing that a period of separation may not signal the end of a long-term relationship.

III. REVIEW OF THE EVIDENCE RELEVANT TO MS. WERTZ’S STATUS AS SPOUSE

[33] Ms. Arnold relies on the affidavit evidence of five individuals in support of her position that the relationship between Mr. Knelsen and Ms. Wertz had terminated by the time of Mr. Knelsen’s death. Ms. Arnold herself has sworn an affidavit. She additionally tenders affidavits from Mr. Knelsen’s brother and half-sister (David Knelsen and Stacey Swarchuk), a family friend (Alice Forshner), and Ms. Wertz’s biological mother (Kathleen HERNs).

[34] Ms. Wertz tenders the affidavit evidence of five witnesses in support of her petition, including herself. The other witnesses on behalf of Ms. Wertz are her sister (Dawn Kyle), fiancé (Todd Thicke), and two friends (Denilia McCormick and Corinna Pounder).

[35] There are objections to the admissibility of portions of the affidavits filed by each party, including evidence of some of the witnesses as to what they were told by Mr. Knelsen about his state of his relationship with Ms. Wertz prior to her death. I will review the evidence first before addressing the admissibility issues.

[36] My findings of fact are set out in the Analysis section of this judgment at paras. 124-138.

A. The evidence in support of Ms. Arnold's petition

1. The evidence of Ms. Arnold

[37] Ms. Arnold deposes that Mr. Knelsen began a relationship with Ms. Wertz in 2006 and moved in with her in 2008, just prior to the birth of their eldest son T. The youngest child, their daughter K., was born in 2013.

[38] Ms. Arnold says that while Mr. Knelsen was alive, she was very active in his life and the life of her grandchildren. She attended the childrens' birthday parties, saw them at Christmas, and regularly cared for them. She spoke to either Mr. Knelsen or Ms. Wertz on a weekly basis. Ms. Arnold resides in Kelowna, while Mr. Knelsen and Ms. Wertz lived together in Summerland.

[39] Ms. Arnold describes the relationship between Mr. Knelsen and Ms. Wertz as "rocky". They fought frequently, and would occasionally separate for a few nights to allow things to cool down before reconciling. On those occasions Mr. Knelsen would come to Ms. Arnold's house or would head out of town to work.

a) Mr. Knelsen's separation from Ms. Wertz

[40] Ms. Arnold discovered that Mr. Knelsen and Ms. Wertz had separated on July 26, 2018, when Ms. Wertz sent Ms. Arnold a text to advise her of the break-up. In the text message, Ms. Wertz stated:

Him and I have broken up and he's not doing well.

[41] Ms. Arnold spoke to Mr. Knelsen that night. She says he told her that Ms. Wertz had broken up with him because she had feelings for someone else. He was very upset and distraught.

[42] Ms. Arnold says Mr. Knelsen also told her that, at Ms. Wertz's insistence, they told the children about the separation on or about July 28, 2018. Ms. Arnold is not aware of any previous instance in which Mr. Knelsen and Ms. Wertz had such a conversation with the children during one of their periods of temporary separation. According to Ms. Arnold, Mr. Knelsen relayed to her that during the talk with the children, T. asked if his parents were breaking up so that Ms. Wertz could date T.'s baseball coach, Todd Thicke.

[43] Ms. Arnold says that Mr. Knelsen told her that he believed that Ms. Wertz had been unfaithful to him with Mr. Thicke, and that she made it clear to him that she intended to pursue the relationship. Ms. Arnold says Mr. Knelsen told her that his relationship with Ms. Wertz was over as he considered her relationship with Mr. Thicke to be a betrayal from which the relationship could not recover.

[44] On the long week-end of August 3-6, 2018, T.'s baseball team had a tournament in Comox. Ms. Wertz took T. and K. to Comox on August 1, 2018, and Ms. Arnold flew to Comox to join them on the evening of August 2, 2018. Mr. Knelsen had originally planned to attend the tournament. However, after discovering that Mr. Thicke would be in attendance, he refused to go.

[45] Ms. Arnold says that on the evening she arrived in Comox, she slept in a hotel room with the children. Ms. Wertz left and did not return to the room until 7:30

the next morning. Ms. Arnold says she told Ms. Wertz that she was not comfortable acting as a babysitter while Ms. Wertz spent time with Mr. Thicke, and Ms. Wertz replied “ok”. Ms. Wertz arrived at the hotel room after midnight that same evening. Ms. Arnold says T. was upset with Ms. Wertz for spending so much time with Mr. Thicke.

[46] Ms. Arnold says Ms. Wertz originally asked her to take both children home after the tournament because Ms. Wertz planned to stay in Comox for a while. Ms. Wertz later advised that she wanted T. to stay with her in Comox because Mr. Thicke had a son the same age and the two of them could keep each other busy.

[47] Following Ms. Arnold’s return home from the trip to Comox, Mr. Knelsen told her that he had changed the beneficiary on his life insurance policy and RRSP from Ms. Wertz to Ms. Arnold, in trust for the children. Mr. Knelsen also instructed Ms. Arnold to ensure that his and Ms. Wertz’s 2017 tax returns, which Ms. Arnold had agreed to prepare, indicated that he and Ms. Wertz separated on July 26, 2018. Ms. Arnold says she followed this direction. She did not retain a copy of the tax returns. She has asked Ms. Wertz for a copy of the filed returns but Ms. Wertz has declined to provide them.

[48] On August 9, 2018, Ms. Arnold spoke to her son David Knelsen (“David”) over the telephone. David advised Ms. Arnold that Ms. Wertz had changed her Facebook status to “in a relationship with Todd Thicke since July 26, 2018”. Ms. Arnold logged onto Facebook and saw this post. Ms. Arnold says that she did not take a screenshot of the Facebook post, but did text her friend about it the same day. A copy of this text is an exhibit to Ms. Arnold’s affidavit.

[49] Ms. Arnold says that on August 10, 2018, Mr. Knelsen advised her that he went to see two different family lawyers to obtain advice on his separation from Ms. Wertz. There are receipts from two lawyers related to these consultations that are exhibited to Ms. Arnold’s affidavit. The re: line on one of the invoices, from Derek Schissler of FH&P Lawyers LLP, reads “Initial Consultation – Family Matter,

Opposing Party – Alanna Wertz”. Mr. Knelsen subsequently told Ms. Arnold that he intended to retain Mr. Schissler.

[50] Ms. Arnold says that to her knowledge, Mr. Knelsen had never consulted a lawyer or taken steps to change the beneficiary on his life insurance or RRSP during past periods of temporary separation from Ms. Wertz.

[51] Ms. Arnold says that in the weeks prior to his death, Mr. Knelsen made notes in a personal journal. A copy of the notes are an exhibit to Ms. Arnold’s affidavit. The notes include comments from Mr. Knelsen on issues related to a potential family law claim, including property division, parenting arrangements, and the possibility of a mediation. His notes sketch out the start of separation agreement. He notes the “end of the relationship” as July 26, 2018.

[52] Mr. Knelsen’s notes do reflect an apparent internal struggle as to the future of his relationship with Ms. Wertz. Mr. Knelsen drafted two versions of a message to Ms. Wertz. The first version, on which he has written “No” at the top, is a one-and-a-half page letter which accuses Ms. Wertz of being a liar and a cheater and states their relationship has forever been changed by her behaviour. The second version, on which Mr. Knelsen has written “Yes”, consists of only one paragraph:

You are the smartest, most beautiful, funny, courageous, strong willed mother I have ever met. What you mean to me and this family cannot be described in a million words of print.

[53] As reviewed below at para. 99, the second version of Mr. Knelsen’s message to Ms. Wertz is consistent with the message he wrote in a card he delivered to Ms. Wertz prior to his death.

b) The circumstances of Mr. Knelsen’s death

[54] Mr. Knelsen and the children came to visit Ms. Arnold on the weekend prior to his death, which was August 11-12, 2018. Mr. Knelsen told Ms. Arnold on the Saturday of that weekend that Ms. Wertz had asked to speak to him. Mr. Knelsen drove down to Summerland that day and returned to Kelowna in the evening. On his return, Mr. Knelsen told Ms. Arnold that he and Ms. Wertz had gotten into a fight.

Ms. Arnold says Mr. Knelsen gave no indication in the course of this weekend that there was a possibility of reconciliation with Ms. Wertz. Instead, he insisted their relationship was over.

[55] Mr. Knelsen and the children stayed in Kelowna for a few more days, returning to Summerland on the afternoon of August 14, 2018. Mr. Knelsen told Ms. Arnold that he needed to return to Summerland in order to ready the family home for Ms. Wertz to move out. Mr. Knelsen also asked Ms. Arnold to attend a counselling session with him and the children on August 15, 2018. Mr. Knelsen arranged counselling in order to provide emotional support to the children through their parents' separation. T. was engaging in concerning behaviour, including self-harm. Mr. Knelsen's concern about T.'s behaviour is reflected in a text he sent to Ms. Arnold on August 14, 2018.

[56] Ms. Arnold's last conversation with Mr. Knelsen before his death was on the evening of August 14, 2018. He said he had spoken to Ms. Wertz and the conversation had not gone well. Ms. Wertz left the house and Mr. Knelsen suspected she was going to see Mr. Thicke. Mr. Knelsen stated his intention to retain Mr. Schlissler immediately. Ms. Arnold suggested to Mr. Knelsen that he come back to Kelowna that evening with the children. He said he did not want to leave immediately because he had things to do around the house. He stated that he was staying in trailer on the property and would stay away from Ms. Wertz if she returned.

[57] On the morning of August 15, 2018, Ms. Wertz telephoned Ms. Arnold to advise that Mr. Knelsen had died. Mr. Knelsen's cause of death was eventually determined to be suicide.

[58] Ms. Arnold immediately went to Summerland. Ms. Arnold says she was present as Ms. Wertz was interviewed by RCMP officers and the coroner. She says Ms. Wertz stated that she had come home at 11 p.m. on the evening of August 14, 2018, had spoken to Mr. Knelsen, and then went into the house and went to bed.

Mr. Knelsen stayed in the trailer with the children. Ms. Wertz found him dead the next morning.

c) Events after Mr. Knelsen's death

[59] Ms. Arnold says that Mr. Thicke drove Ms. Wertz to Ms. Arnold's home in Kelowna on August 15, 2018. Ms. Wertz stayed overnight, and then Mr. Thicke drove her back to Summerland on August 16, 2018.

[60] Ms. Arnold had understood, apparently mistakenly, that Ms. Wertz planned to bring Mr. Thicke to Mr. Knelsen's funeral service. In fact, Ms. Wertz meant to suggest that T.'s hockey teammates attend the funeral to show their support for T. Ms. Wertz sent a text message to Ms. Arnold to correct the misunderstanding. The text message, sent August 19, 2019, stated in part:

You have this all wrong. I would NEVER bring my boyfriend around there. I was talking about the HOCKEY kids.

[61] Ms. Arnold and Ms. Wertz eventually had a falling out after Mr. Knelsen's death. Ms. Arnold believes this is due to a number of issues, including a Ministry of Children and Family Development ("Ministry") investigation that Ms. Wertz blames Ms. Arnold for instigating, and a dispute over what to do with Mr. Knelsen's ashes. In September 2018, Ms. Arnold initiated steps to apply to be the administrator of Mr. Knelsen's estate so as to preserve it for the benefit of T. and K. She says that Ms. Wertz has prevented her from seeing the children since then. Ms. Arnold has filed proceedings in Provincial Court seeking contact time with her grandchildren.

[62] Ms. Arnold says that while she is saddened that the dispute between her and Ms. Wertz has come to this point, Ms. Arnold's only objective is to secure Mr. Knelsen's estate for her grandchildren. Ms. Arnold has no personal pecuniary interest in Mr. Knelsen's estate. She says she will not seek trustee fees for administering the estate in the event that she is granted administration.

2. The evidence of Stacey Swarchuk

[63] Ms. Swarchuk is Ms. Arnold's stepdaughter, and the biological half-sister of Mr. Knelsen. Ms. Swarchuk has known Mr. Knelsen her entire life and the two had a close relationship. Ms. Swarchuk was not as close to Ms. Wertz and did not spend a lot of time with her.

[64] Ms. Swarchuk says her knowledge of the relationship between Mr. Knelsen and Ms. Wertz came primarily from the conversations she had directly with Mr. Knelsen over the years. Mr. Knelsen told her that he and Ms. Wertz fought frequently. Mr. Knelsen said he wanted to make the relationship work for the sake of the children.

[65] On July 29, 2018, Ms. Swarchuk received a telephone call from Mr. Knelsen. She describes Mr. Knelsen as sounding distraught. Mr. Knelsen told her that Ms. Wertz wanted to end their relationship because she was seeing someone else.

[66] On August 3 or 4, 2018, Mr. Knelsen came to visit Ms. Swarchuk. They talked for several hours. Ms. Swarchuk says she asked Mr. Knelsen whether this was a temporary separation or if it was permanent. Mr. Knelsen told Ms. Swarchuk that in the days since their phone call on July 29, 2018, he had concluded this was the end of his relationship with Ms. Wertz. Mr. Knelsen said that he had discovered Ms. Wertz was having a relationship with T.'s baseball coach. Mr. Knelsen said his primary focus was the children and ensuring they were adequately supported through the break-up, and that he was arranging for counselling for T.

[67] Ms. Swarchuk says she spoke to Mr. Knelsen on a couple more occasions between this visit and the time of his death. Mr. Knelsen never stated to Mr. Swarchuk that he had any intention to reconcile with Ms. Wertz and did not give her the impression that he was contemplating a reconciliation.

[68] On August 14, 2018, the night before Mr. Knelsen died, he telephoned Ms. Swarchuk between 7:00 and 7:30 pm and they spoke for about an hour. Mr. Knelsen advised Ms. Swarchuk that he was staying in a trailer on the family

property. He said that he and Ms. Wertz had just had an argument about the separation. Ms. Wertz had suggested they still loved each other while also fighting with him and calling him derogatory names. Ms. Swarchuk says Mr. Knelsen described Ms. Wertz as a “ticking time bomb”. He stated that he made it clear to Ms. Wertz that the relationship was over, and Ms. Wertz left the house. He believed she went to see Mr. Thicke. Mr. Knelsen reiterated to Ms. Swarchuk that his relationship with Ms. Wertz was over.

[69] Ms. Swarchuk says Mr. Knelsen also discussed T.’s counselling appointment on August 15, 2018 with her. He said that he intended to avoid further conversations with Ms. Wertz that evening and focus on getting the children to Kelowna the following day.

[70] Ms. Swarchuk says that prior to Mr. Knelsen’s death, she and Ms. Wertz were friends on Facebook. She observed Ms. Wertz post on Facebook that she was in a relationship with Mr. Thicke. Ms. Wertz took this post down after Mr. Knelsen died.

3. The evidence of Alice Forshner

[71] Ms. Forshner has been friends with Ms. Arnold for 38 years. Their children grew up together. Ms. Forshner’s eldest son is three months older than Mr. Knelsen, and the two attended school together. Ms. Forshner remained in contact with Mr. Knelsen after he became adult. She visited him in Summerland, and babysat his children.

[72] Ms. Forshner says she observed Mr. Knelsen and Ms. Wertz to have a rocky relationship. She is aware that the couple separated briefly a couple of times. On those occasions, Mr. Knelsen would stay with Ms. Arnold or go out of town for work. Ms. Forshner knows this because she would see Mr. Knelsen at Ms. Arnold’s house or he would tell her about the separations when she saw him.

[73] In the summer of 2018, Ms. Forshner found out that Mr. Knelsen and Ms. Wertz had separated again when Ms. Arnold telephoned her and told her to look at Ms. Wertz’s Facebook page. Ms. Forshner logged onto Facebook and observed

that Ms. Wertz had posted on her Facebook page that she was in a new relationship with someone else. Ms. Forshner did not recognize the name. Ms. Arnold told her that it was T.'s baseball coach.

[74] Shortly after this phone call, Ms. Forshner says she had a conversation with Mr. Knelsen when visiting Ms. Arnold. He stated that he and Ms. Wertz had told the children about the separation. During this conversation, T. inquired as to whether Ms. Wertz planned to date Mr. Thicke. Mr. Knelsen was upset that T. appeared to be aware of Ms. Wertz's relationship with Mr. Thicke. Mr. Knelsen told Ms. Forshner that he could not handle the fact that Ms. Wertz had lied to him and cheated on him. He said he had told her to move out of the house. Mr. Knelsen told Ms. Forshner about the counselling he had set up for the children, and also about his intention to retain a lawyer.

[75] Ms. Forshner says she spoke to Mr. Knelsen a final time on August 14, 2018. Mr. Knelsen reiterated that he wanted Ms. Wertz out of the house as soon as possible. He said he intended to give her a deadline of September 1, 2018. Ms. Forshner says that Mr. Knelsen never told her at any time that there was a prospect he may reconcile with Ms. Wertz. He told her that had "tried everything" and the relationship was "over".

4. The evidence of Kathleen HERNs

[76] Ms. HERNs is the biological mother of Ms. Wertz. Prior to Mr. Knelsen's death, she frequently saw Ms. Wertz, Mr. Knelsen, and their children. She babysat the children and attended T.'s hockey games. When Ms. HERNs first moved to Summerland in approximately 2014, she lived in a trailer on the family's property for approximately a year.

[77] Ms. HERNs says she observed countless fights between Mr. Knelsen and Ms. Wertz over the years. The relationship would stabilize when Mr. Knelsen worked out of town. If Mr. Knelsen was home more often, the relationship would worsen. In Ms. HERNs' observation, Mr. Knelsen and Ms. Wertz typically made up quickly after a fight.

[78] On July 19, 2018, Ms. Herns went to visit Ms. Wertz while Mr. Knelsen was out of town working. Ms. Wertz told Ms. Herns that she was not happy in the relationship and that she planned to separate from Mr. Knelsen. Ms. Herns says she was uncertain after this conversation whether Ms. Wertz would in fact separate from Mr. Knelsen.

[79] On July 29, 2018, Ms. Herns attended a baseball game with Ms. Wertz, T., and T.'s baseball team. Ms. Herns observed Ms. Wertz and Mr. Thicke putting their arms around one another. She overheard Mr. Thicke state "we are going to make it known now". Ms. Herns says she was shocked by this. When Ms. Herns, Ms. Wertz and T. returned to the vehicle, T. asked whether Ms. Wertz planned to break up with Mr. Thicke. Ms. Wertz told T. to "shut up".

[80] Ms. Herns says she spoke to Mr. Knelsen on August 2, 2018, when Ms. Arnold and Ms. Wertz were in Comox for T.'s baseball tournament. Mr. Knelsen came over to assist Ms. Herns with some errands. He told her that he had given Ms. Wertz a month to leave the family home, and stated that he thought Ms. Wertz should be the one to leave because she had the affair. Mr. Knelsen stated his intention to find work closer to home so he could be there for the children.

[81] Ms. Herns says that following this conversation with Mr. Knelsen on August 2, 2018, she spoke to him five or six more times prior to his death. At no time did Mr. Knelsen express a desire to reconcile with Ms. Wertz.

[82] On August 14, 2018, Mr. Knelsen telephoned Ms. Herns to ask if she could watch the children so that he could have a discussion with Ms. Wertz. He said Ms. Wertz asked to speak to him at 5:00 p.m. that day. Ms. Herns agreed to watch the children, and Mr. Knelsen brought them over. Mr. Knelsen told Ms. Herns when he dropped the children off that Ms. Wertz had been crying and was upset about having to move out of the house.

[83] Mr. Knelsen returned to pick up the children at about 8:45 p.m. on August 14, 2018. Mr. Knelsen told Ms. Herns that the conversation with Ms. Wertz had not gone

well and that Ms. Wertz had accused him of being a bad father and a bad provider. He said Ms. Wertz had flip flopped during the conversation, going from wanting to reconcile to yelling at him. After they fought, Ms. Wertz left the house. Ms. HERNs says that at no time during this conversation did Mr. Knelsen indicate that he was contemplating a reconciliation with Ms. Wertz. Rather he was adamant that the relationship was “done”.

[84] Ms. HERNs has been estranged from Ms. Wertz since early September 2018. She believes that the cause of the estrangement is Ms. Wertz’s belief that Ms. HERNs had reported a child protection concern to the Ministry. Like Ms. Arnold, Ms. HERNs has filed an application in Provincial Court seeking an order that she be permitted contact with her grandchildren.

5. Evidence of David Knelsen

[85] David is Ms. Arnold’s biological son, and Mr. Knelsen’s brother. David has always been very close to Mr. Knelsen. He has known Ms. Wertz since she and Mr. Knelsen began to date. At the time of Mr. Knelsen’s death, David lived in Kelowna with Ms. Arnold. He saw Ms. Wertz and Mr. Knelsen several times a month. Mr. Knelsen would often stop by Ms. Arnold’s home alone for a visit when he was on his way out of town to work.

[86] David says Mr. Knelsen and Ms. Wertz had a volatile relationship. They separated a couple of times, but David says the separations were short-lived. Mr. Knelsen says that he and Ms. Wertz always resolved to get back together after their fights for the sake of the children. It helped that Mr. Knelsen worked out of town as this gave the couple cooling off periods between fights.

[87] In the summer of 2018, David became aware that Mr. Knelsen and Ms. Wertz had separated again. He found out about the separation when he saw that Ms. Wertz had changed her relationship status on her Facebook page to “In a relationship” with Mr. Thicke. He distinctly recalls seeing the Facebook status change. David called his mother. Ms. Arnold told him that Mr. Knelsen and Ms. Wertz had separated.

[88] David says he later discussed the Facebook post with Mr. Knelsen. Mr. Knelsen expressed disgust that Ms. Wertz would post something about their breakup so publicly. Mr. Knelsen was adamant that his relationship with Ms. Wertz was over. He told David that he was going to retain a lawyer to separate the assets and deal with parenting of the children.

[89] David says he spoke to Mr. Knelsen on a number of occasions in the last two weeks of his life. At no time did Mr. Knelsen tell David that he wanted to reconcile with Ms. Wertz, nor did he express uncertainty about the separation. David saw Mr. Knelsen three days before his death when Mr. Knelsen brought the children to Kelowna. Mr. Knelsen reiterated that he was taking the steps he needed to ensure that he and Ms. Wertz separated. This included retaining a lawyer and changing his life insurance beneficiary.

[90] David says that three days after Mr. Knelsen died he spoke to Ms. Wertz when he was at the family home in Summerland. He says Ms. Wertz told him that she and Mr. Knelsen had been separated for months and that Mr. Knelsen had been staying in the trailer on the family property. She said they had stopped saying "I love you" to each other. Ms. Wertz told David that she had found love with Mr. Thicke and that this was not her fault. She had hoped Mr. Knelsen would come to terms with the fact that she was in love with Mr. Thicke, but this did not happen.

[91] David says that he and Ms. Arnold were with Ms. Wertz and the children almost constantly in the days immediately following Mr. Knelsen's death. He says that during this time, Ms. Wertz never mentioned that she had tried to reconcile with Mr. Knelsen.

IV. THE EVIDENCE IN SUPPORT OF MS. WERTZ'S PETITION

A. Evidence of Alanna Wertz

[92] Ms. Wertz deposes that she and Mr. Knelsen met in 2006, when Ms. Wertz was 19 years old, and they became a couple. They had a marriage-like relationship

for 12 years, but never married. Their oldest child, T., was born in September 2008, and their youngest child, K., was born in April 2013.

[93] Mr. Knelsen and Ms. Wertz bought a house together in Summerland in 2011. The house was put into Mr. Knelsen's on the advice of a mortgage broker so that Ms. Wertz could preserve her entitlement to a future tax exemption. Ms. Wertz says she covered the full amount of the down-payment on the house, which was \$13,000, and has contributed to mortgage and housing expenses since then. She says the house is worth approximately \$470,000 and there is a mortgage debt of approximately \$350,000. Ms. Wertz says that Mr. Knelsen's only other assets are vehicles and a bank account that Ms. Wertz believes has less than \$5,000 on deposit.

[94] Ms. Wertz agrees with the characterization of her relationship with Mr. Knelsen as "rocky". Ms. Wertz says that she and Mr. Knelsen broke up for a period of nine months when T. was three months old. Mr. Knelsen moved back into the family home around T.'s first birthday.

[95] Ms. Wertz says that she and Mr. Knelsen argued many times over the course of their relationship. Mr. Knelsen would leave to go to work and they would not talk while he was gone. Sometimes this would last for a whole week, but they would always talk things out when he returned.

[96] Ms. Wertz says that Mr. Knelsen became depressed after the death of his brother in December 2016. On occasion he would threaten to kill himself. Ms. Wertz says that on two occasions she was concerned enough about Mr. Knelsen harming himself that she called the police. She says Mr. Knelsen told her on multiple occasions that if they ever broke up he would kill himself.

[97] Ms. Wertz agrees that she and Mr. Knelsen continued to have troubles in their relationship. The issues, from Ms. Wertz's perspective, were that Ms. Wertz wanted to be legally married to Mr. Knelsen, she wanted Mr. Knelsen to reduce his drinking, and she wanted him to find work in Summerland so he was home more to

help with the children. Ms. Wertz believed that if Mr. Knelsen worked on these issues, she would want to continue working on their relationship.

[98] Ms. Wertz acknowledges that she had become close to T.'s baseball coach, Mr. Thicke. She says Mr. Knelsen wanted her to confirm to Mr. Thicke that they were just friends. Ms. Wertz says she told Mr. Thicke on the night before Mr. Knelsen died that she was going to try to make her relationship with Mr. Knelsen work, and that she and Mr. Thicke could only be friends.

[99] Ms. Wertz says that on the day before Mr. Knelsen died, they were still talking about working out the issues in their relationship. Ms. Wertz says that Mr. Knelsen gave her a card that was full of messages about how much he loved her. A copy of the card is an exhibit to Ms. Wertz's affidavit. It is undated, although appears from its content to have been written after Mr. Knelsen discovered Ms. Wertz's relationship with Mr. Thicke as it refers to the existence of "another man". The card includes the following messages in Mr. Knelsen's handwriting:

To my everything,

You are smart, funny, beautiful, a wonderful mother, and most of all the best woman I have ever met...

Please don't give up on me, I have so much more to offer. I promise you I will do everything I should have already done...

You and our children mean everything to me. The life we built isn't perfect, not even close, but I know I can fix that and reignite the spark.

[100] Ms. Wertz says that Mr. Knelsen also told her he had bought her an engagement ring because he knew that she wanted to be legally married. It is not clear from Ms. Wertz's affidavit when this discussion occurred. I note parenthetically that Mr. Knelsen's banking records, which are in evidence, do not indicate that any ring was in fact purchased by Mr. Knelsen in the weeks before his death.

[101] Ms. Wertz denies telling David that she and Mr. Knelsen had been separated for many months prior to his death. She says she told David that she and Mr. Knelsen had been going through a tough time in the few days before his death

and that she had been having a hard time saying “I love you” back to Mr. Knelsen when he said that to her.

[102] Ms. Wertz says she does not recall ever adding her spousal status to her Facebook page while she was with Mr. Knelsen. She believes that the evidence of other witnesses that they observed Ms. Wertz to change her Facebook status to reflect a relationship with Mr. Thicke related to items she was tagged on, either by Mr. Knelsen or Mr. Thicke, rather than anything she posted.

B. Evidence of Todd Thicke

[103] Mr. Thicke says he met Ms. Wertz in June 2018 when he was coaching T.’s baseball team. Mr. Thicke says he and Ms. Wertz got along well. They “flirted” and “enjoyed each other’s company”. Mr. Thicke’s affidavit does not particularize the nature of his relationship with Ms. Wertz in June 2018 beyond this description.

[104] Just before Mr. Knelsen took his own life, Ms. Wertz told Mr. Thicke that they could only be friends as she and Mr. Knelsen planned to work on their marriage. Mr. Thicke says this was fine with him as he was coming out of a 12-year marriage and was not sure what he wanted.

[105] After Mr. Knelsen’s death, Mr. Thicke says that he and Ms. Wertz have dated, split up, and then started dating again. They are presently engaged to be married. Mr. Thicke moved into Ms. Wertz’s Summerland house with his two children in June 2019.

C. Evidence of Denilia McCormick

[106] Ms. McCormick worked with Ms. Wertz at the Pharmasave in Summerland and has known her for many years.

[107] In the summer of 2018, Ms. Wertz told Ms. McCormick that she was going through turmoil in her marriage and that she and Mr. Knelsen separated. Ms. Wertz later told Ms. McCormick that she and Mr. Knelsen had a discussion in which Mr. Knelsen was made aware of how unhappy Ms. Wertz was with the situation. Ms.

Wertz relayed to Ms. McCormick that in the course of this discussion, Mr. Knelsen said he wanted to work things out and Ms. Wertz said she would love nothing more. Ms. McCormick believes this discussion happened on August 14th.

D. Evidence of Corinna Pounder

[108] Ms. Pounder met Ms. Wertz and Mr. Knelsen in 2013 or 2014 when their kids played hockey together.

[109] Ms. Pounder says that during the last two to three weeks of Mr. Knelsen's life, he spent time in her house and confided to her about what was going on in the marriage. She now cannot recall the dates or times of these conversations.

[110] Ms. Pounder says that during these conversations, Mr. Knelsen confided to her that he was still in love with Ms. Wertz and wanted to be with her. He expressed hope that he and Ms. Wertz would reconcile.

E. Evidence of Dawn Kyle

[111] Ms. Kyle is Ms. Wertz's sister. Ms. Kyle saw Ms. Wertz often, but Mr. Knelsen less often because he would be working out of town when Ms. Kyle visited.

[112] Ms. Kyle says that in the last months of Mr. Knelsen's life, Ms. Wertz told her that Mr. Knelsen had bought an engagement ring for her. He also promised to make other changes in his life, such as getting healthy. Ms. Wertz told Ms. Kyle that Mr. Knelsen had returned the ring, but then spoke about buying it again because he planned to propose at an upcoming tournament in Comox that was shortly before Mr. Knelsen's death.

[113] Ms. Kyle says that she and Ms. Wertz spoke over the telephone often in the last few weeks of Mr. Knelsen's life. She recalls that Ms. Wertz was struggling with what do to about her relationship with Mr. Knelsen. Ms. Wertz told Ms. Kyle that she and Mr. Knelsen had a good conversation the night before he died and she felt his promises were genuine.

V. ANALYSIS

A. The evidentiary objections

[114] As noted, each party objected to portions of the opposing party's affidavit evidence. Most of the objections centred on the hearsay nature of the evidence, particularly in relation to statements attributed to Mr. Knelsen. Additionally there were objections to those portions of the affidavits in which witnesses not only recounted what they were told by Mr. Knelsen, but also offered their interpretation of Mr. Knelsen's thoughts and intentions.

[115] Statements attributed to a deceased person may be admissible for the truth of their contents either under the state of mind exception to the hearsay rule or through the application of the principled approach to hearsay evidence: *Peterson v. Welwood*, 2018 BCSC 1379 at para. 71. The state of mind exception is explained by Justice Doherty in *R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.) at 341:

Assuming relevance, evidence of utterances made by a deceased...which evidence her state of mind are admissible. If these statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred. The result is the same, whichever route is taken, although circumstantial evidence of a state of mind poses added problems rising out of the inference drawing process...

[116] Under the principled approach, hearsay evidence may be admitted where the twin criteria of necessity and reliability are met: *Peterson v. Welwood*, 2018 BCSC 1379 [*Peterson*] at para. 73.

[117] Whether the statements of a deceased are sought to be adduced under the established state of mind exception to the hearsay rule or through the application of the principled approach to receipt of hearsay evidence, the court must first be satisfied as a threshold issue that the statement was in fact made by the deceased. This turns on an assessment of the credibility of the witnesses who report the hearsay statements attributed to the deceased declarant: *Peterson* at para. 79.

[118] In the present case, the statements attributed to Mr. Knelsen about his intentions to end, or not, his relationship with Ms. Wertz are generally admissible pursuant to the state of mind exception to the hearsay rule, provided I am satisfied that the statements were in fact made. To the extent that there are credibility issues with the affiants in reporting statements by Mr. Knelsen, I will address that in my substantive analysis.

[119] While the actual statements attributed to Mr. Knelsen are admissible as an exception to the hearsay rule, provided I am satisfied the statements were actually made, the same cannot be said of the evidence of the affiants as to their personal views as to Mr. Knelsen's intentions. To the extent that affiants have offered such views, and examples can be found in the affidavits of both parties, I have simply ignored those portions of the evidence.

[120] I note, finally, that there are also hearsay issues in relation to statements attributed to Ms. Wertz by some of the affiants.

[121] Where the statements are tendered on behalf of Ms. Arnold as out-of-court admissions by Ms. Wertz, they are admissible pursuant to the established exception to the hearsay rule for admissions by a party that is adverse in interest: *Jones v. Ma*, 2010 BCSC 866 at paras. 9-10. By way example, Ms. Wertz's text messages to Ms. Arnold stating that she and Mr. Knelsen had broken up and describing Mr. Thicke as her "boyfriend" are admissible under this exception.

[122] Where the statements are tendered on behalf of Ms. Wertz, they are admissible for the limited purpose of rebutting the allegation implicit in Ms. Arnold's case that after Mr. Knelsen's death, Ms. Wertz fabricated her story that the two had reconciled before Mr. Knelsen's suicide. While prior consistent statements are generally inadmissible, there is an exception where the statement are tendered for the purpose of rebutting an allegation that a party's evidence has been recently fabricated to meet the exigencies of the case: *P.B. v. R.V.E.*, 2007 BCSC 1568 at paras. 183-184. By way of example, Ms. McCormick's evidence about what she was

told by Ms. Wertz prior to Mr. Knelsen's death about her desire to reconcile is admissible under this exception.

[123] With those evidentiary principles in mind, I turn to the question of what conclusions can be drawn from the evidence on the question of whether the relationship between Mr. Knelsen and Ms. Wertz had terminated prior to Mr. Knelsen's death.

B. Had the spousal relationship terminated prior to Mr. Knelsen's death?

[124] I begin my analysis of the evidence by observing there is no question that the relationship between Mr. Knelsen and Ms. Wertz was in a state of significant crisis by the time of Mr. Knelsen's death as a result of Ms. Wertz's relationship with Mr. Thicke. The affidavit evidence overwhelmingly supports, and I find, that Ms. Wertz and Mr. Thicke had started a romantic relationship by the end of July 2018, and that Mr. Knelsen knew of the relationship at least by July 26, 2018. In support of this finding, I rely on the following evidence:

- i. Mr. Knelsen told Ms. Arnold on July 26, 2018, that Ms. Wertz had broken up with him because she had romantic feelings for Mr. Thicke and intended to pursue a relationship with him.
- ii. Mr. Knelsen also told Ms. Swarchuk, Ms. Forshner, Ms. HERNs, and David that he and Ms. Wertz had broken up over her relationship with Mr. Thicke.
- iii. At a baseball game on July 29, 2018, Ms. HERNs observed Ms. Wertz and Mr. Thicke putting their arms around one another. Ms. HERNs also overheard them stating their intention to make the relationship publicly known.
- iv. At T.'s baseball tournament over the weekend of August 3-6, 2018, Ms. Arnold was left to babysit the children while Ms. Wertz spent time with Mr. Thicke.

- v. By August 9, 2018, Ms. Wertz had changed her Facebook status to “in a relationship with Todd Thicke since July 26, 2018”.
- vi. Soon after Mr. Knelsen’s death, Ms. Wertz referred to Mr. Thicke as her “boyfriend” in a text message she sent to Ms. Arnold.

[125] The evidence of Ms. Wertz and Mr. Thicke as to the nature of their relationship in the summer of 2018 does not significantly conflict with the evidence of Mr. Arnold’s witnesses. Ms. Wertz and Mr. Thicke are both strategically vague in their evidence. Ms. Wertz admits only to becoming “close to” Mr. Thicke, while Mr. Thicke says they had a flirtation and got along well. Ms. Wertz does not directly deny that she changed her Facebook page to record that she was in a relationship with Mr. Thicke. Rather she says that she cannot recall ever indicating her spousal status on Facebook and says she generally had little time for social media.

[126] I conclude that the evidence of Ms. Wertz and Mr. Thicke is deliberately tailored to minimize the nature and extent of the relationship they had formed by July 26, 2018. Neither directly responds to the detailed evidence of other witnesses of what they directly observed between Ms. Wertz and Mr. Thicke and what they heard from Mr. Knelsen. Instead, Ms. Wertz and Mr. Thicke offer vague and incomplete descriptions of having been “close” or “flirtatious”. To the extent that the evidence of Ms. Wertz and Mr. Thicke as to the nature of their relationship differs from other witnesses, including in relation to the Facebook post, I prefer the evidence of other witnesses.

[127] However, the more difficult question is whether the crisis in the relationship between Ms. Wertz and Mr. Knelsen had led one or both of them to form the settled intention to permanently terminate the relationship by the time of Mr. Knelsen’s death.

[128] Ms. Arnold relies on the following evidence in support of her position that the relationship had terminated:

- Ms. Wertz's text message of July 26, 2018 stated that she and Mr. Knelsen had "broken up".
- Mr. Knelsen communicated his distress over the break-up of his relationship with Ms. Wertz to Ms. Arnold, Ms. Swarchuk, Ms. Hems, Ms. Forshner, and David. These witnesses depose that Mr. Knelsen was adamant in his discussions with them up to the time of his death that his relationship with Ms. Wertz was over.
- This break-up was different than previous separations between Ms. Wertz and Mr. Knelsen in that this time they told the children they were separating. In addition, Mr. Knelsen consulted with a family lawyer, changed the beneficiary on his life insurance policy, and took steps to change his marital status on his income tax return to "separated".
- Mr. Knelsen refused to go to T.'s baseball tournament in Comox after discovering Ms. Wertz's relationship with Mr. Thicke.
- Mr. Knelsen made notes about the separation in his notebook, including drafting the beginnings of a separation agreement.
- Ms. Wertz changed her Facebook relationship status to indicate she was in a relationship with Mr. Thicke, publicly spent time with Mr. Thicke, and referred to Mr. Thicke as her "boyfriend" in a text message to Ms. Arnold after Mr. Knelsen's death.
- David Knelsen recalls Ms. Wertz telling him after Mr. Knelsen's death that the couple had been separated for a number of month before the "final" separation.

- Ms. Arnold, Ms. Swarchuk, and Ms. HERNs all depose that they spoke to Mr. Knelsen after his final conversation with Ms. Wertz on August 14, 2018. Each of these witnesses recall Mr. Knelsen stating that his conversation with Ms. Wertz on August 14 had not gone well and he considered the relationship to be “done”. Ms. Swarchuk and Ms. HERNs both recall Mr. Knelsen describing Ms. Wertz as inconsistent in her attitude during the conversation. Ms. Wertz stated that she still loved Mr. Knelsen and wanted to reconcile, but at the same time she yelled at Mr. Knelsen and called him derogatory names.

[129] Ms. Wertz points to the following evidence in support of her position that neither party had a settled intention to terminate the relationship prior to Mr. Knelsen’s death:

- Prior to Mr. Knelsen’s death, Ms. Wertz told her co-worker, Ms. McCormick, that she hoped to reconcile with Mr. Knelsen.
- Ms. Wertz and Mr. Thicke both say that Ms. Wertz told Mr. Thicke that they could only be friends because she wanted to work on her relationship with Mr. Knelsen.
- The evidence of both Ms. Sawchuk and Ms. HERNs suggests that Ms. Wertz did not have a settled intention to finally end her relationship with Mr. Knelsen by the time of their final conversation on August 14, 2018. Rather, Ms. Wertz was reported to be inconsistent in her message.
- Mr. Knelsen told Ms. Wertz that he had purchased a ring for her. He also gave Ms. Wertz a handwritten card, clearly written after Mr. Knelsen discovered her relationship with Mr. Thicke, in which he professed his love for Ms. Wertz and talked of a possible future for their relationship.
- Although the witnesses on behalf of Ms. Arnold all depose that Mr. Knelsen was adamant that his relationship with Ms. Wertz was over, this is inconsistent in the message he conveyed to her in the card he gave her.

Ms. Wertz argues that this indicates that Mr. Knelsen may not have been forthright with family and friends as to what was actually going on in the relationship prior to his death.

- Mr. Knelsen's own notebook reflects his internal struggle over whether to terminate his relationship with Ms. Wertz.

[130] It goes without saying that this is an exceedingly difficult and emotional case. It is most unfortunate that the tragedy of Mr. Knelsen's death has been compounded by the deteriorating relationships among Mr. Knelsen's surviving family members, in part due to this legal dispute over the distribution of his estate.

[131] I accept Ms. Arnold's evidence that her only motive in bringing this petition is to preserve Mr. Knelsen's estate for her grandchildren. There is certainly evidence that one could point to in support of the argument that one or both parties intended to terminate the spousal relationship prior to Mr. Knelsen's death. However, viewing the evidence objectively and holistically, I simply cannot conclude that it has been established that one or both of Ms. Wertz and Mr. Knelsen had the settled intention to finally terminate their relationship.

[132] The evidence in this case must be viewed from the perspective of the specific relationship between Ms. Wertz and Mr. Knelsen. They lived in a marriage-like relationship for 12 years and had two children together. Their history included a previous pattern of temporary separations followed by reconciliations. At least one of their previous separations lasted for nine months.

[133] I accept that there were features of the relationship break-down in July 2018 that differed from previous separations. They told the children they were separating. Mr. Knelsen changed his life insurance beneficiary and instructed Ms. Arnold to change his spousal status on his income tax return. He consulted a family lawyer. This separation was qualitatively different from past separations because it involved Ms. Wertz entering a romantic relationship with another man. This clearly caused a significant rupture to the relationship.

[134] However, it must also be borne in mind that a period of time of less than three weeks had elapsed between Ms. Wertz's announcement to Mr. Knelsen on July 26, 2018 that she intended to pursue a relationship with Mr. Thicke and Mr. Knelsen's death. This is a very short time over which to assess the permanency of the breakdown in the relationship between Ms. Wertz and Mr. Knelsen that had endured for 12 years.

[135] I acknowledge that Ms. Arnold, and the witnesses providing evidence in support of her petition, are consistent in testifying to Mr. Knelsen's insistence that his relationship with Ms. Wertz was over. If I was simply balancing that evidence against Ms. Wertz's insistence that she and Mr. Knelsen discussed the possibility of reconciliation, the analysis might be more difficult. For the reasons I have already stated, I do not find Ms. Wertz to be a particularly credible witness in describing the details of her relationship with Mr. Thicke.

[136] However, the evidentiary record does not consist simply of a contest between Ms. Wertz and Ms. Arnold and her affiants as to Mr. Knelsen's statements of intention. We also have Mr. Knelsen's own words in evidence as recorded in his notebook and the card he wrote to Ms. Wertz. Mr. Knelsen's personal writings suggest an internal struggle over the future of his relationship with Ms. Wertz that is inconsistent with a settled intention to finally terminate the relationship. It may be that Mr. Knelsen did not fully share the uncertainty of his feelings with family and friends, but that is not entirely unexpected in such acutely personal and emotional circumstances.

[137] The evidentiary record is also ambiguous about Ms. Wertz's intentions when it came to the future of her relationship with Mr. Knelsen. On the evidence of Ms. Arnold's affiants, Ms. Wertz broached the possibility of reconciliation with Mr. Knelsen during their final conversation on August 14, 2018, and stated that she still loved him. While Ms. Wertz may have vacillated between a stated desire to reconcile with Mr. Knelsen and her expression of anger towards Mr. Knelsen, this

simply highlights the difficult choice faced by both parties at the time as to the right path forward.

[138] It may be that Ms. Wertz's relationship with Mr. Knelsen would never have recovered. Whether that is so is ultimately unknowable. From the evidentiary record before me I am simply unable to conclude that the intention of either party was sufficiently clear to demonstrate a termination of the relationship prior to Mr. Knelsen's death. As such, I conclude that Ms. Wertz was Mr. Knelsen's spouse at the time of his death.

VI. ORDERS/CONCLUSION

[139] In conclusion, I allow Ms. Wertz's petition in Kelowna Registry No. 125505, and make the following declarations and orders:

- i. Alanna Wertz is the spouse of the deceased, Jason Knelsen, pursuant to s. 2(1)(b) of the *WESA*.
- ii. As the spouse of the Mr. Knelsen and the mother of his two children, Ms. Wertz is entitled to the spousal share of his estate under s. 21(5) of the *WESA*.
- iii. Ms. Wertz is granted an authorization to obtain estate information in Form P18.

[140] Ms. Arnold's petition in Kelowna Registry No. 125254 is dismissed.

[141] Unless there are circumstances of which I am unaware, Ms. Wertz is entitled to her costs of these petitions at scale B. If either party seeks an alternate costs order, the parties are at liberty to provide further written submissions on costs, not to exceed three pages, within 30 days of the date of this judgment.

"Horsman J."