Editor's Note: Erratum released on September 19, 2013. Original judgment has been corrected with text of erratum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Law Society of British Columbia v. MacDonald,* 2013 BCSC 1204

Date: 20130708
Docket: S092624
Registry: Vancouver

Between:

The Law Society of British Columbia

Petitioner

And

Gail Joan MacDonald

Respondent

And

The Society of Notaries Public of British Columbia

Intervenor

Corrected Judgment: Paragraph 165 of the judgment was corrected on September 17, 2013

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Petitioner: E.B. Lyall, M.J. Kleisinger

Counsel for Respondent: D. Sands

Counsel for the Intervenor: A.A. Hobkirk

Place and Date of Hearing:	Vancouver, B.C. December 12 and 13, 2012 February 12 and May 21, 2013
Place and Date of Judgment:	Vancouver, B.C. July 8, 2013

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I. INTRODUCTION

[1] The core question before the Court in this matter is the scope of the exception set out in s. 18 of the *Notaries Act,* R.S.B.C. 1996, c. 334 to draw certain types of wills. Specifically, is a notary public that drafts a will that creates a life estate in real property, by employing one of the clauses suggested by the respondent, engaging in the practice of law as defined by s. 1(1) of the *Legal Profession Act*, S.B.C. 1998, c. 9?

[2] This question stems from the relief sought by the petitioner, the Law Society of British Columbia, in an application seeking an injunction, *inter alia*, prohibiting the respondent, Gail Joan MacDonald, from engaging in the practice of law not authorized by the *Notaries Act.* A further question arising in this case is whether the respondent was unlawfully engaged in the practice of law in relation to her involvement in a dispute over probate matters.

[3] This case arises from certain events in which firstly Ms. MacDonald drafted a will dated March 21, 2005 for Mr. Meindert Blom who passed away March 31, 2007, and secondly, was involved in the drafting of a release document in connection with the probate of a will. The respondent admits to contravening the *Legal Profession Act* by drafting a will creating a trust (which additionally created a life estate), but has responded, in turn, that if she should draft a will with a life estate in the future, she will use one of two particular types of clauses discussed in two presentations targeted to notaries public that she attended. For this reason, it is necessary to examine the clauses in question to answer the question of whether a notary public can draft a will using clauses such as those set out in the Blom will or the two presentations. This case also examines, to a limited extent, what constitutes the "practice of law" in the probate process.

[4] Section 1 of the *Legal Profession Act* explains that the drawing, revising or settling of "a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or letters of administration or the estate of a deceased person" is part of the "practice of law". However, the lawful practice of notaries public in the

Province of British Columbia is excluded from the practice of law. Under s. 18 of the *Notaries Act,* the legislature declared that notaries public may draw and supervise the execution of certain types of wills.

[5] By s. 15 of the *Legal Profession Act*, with few exceptions, the legislature has declared no person other than a practising lawyer is permitted to engage in the practice of law. There are sound policy reasons for this requirement including the protection of the public.

[6] For the reasons that follow, I conclude that a proper interpretation of s. 18 of the *Notaries Act*, when read in conjunction with s. 15 of the *Legal Profession Act* and considering the legislative scheme as a whole, prohibits the drafting of wills by notaries public in British Columbia utilizing the clauses proposed in this case. However, I conclude that it is unnecessary to address the Law Society's more broadly posed assertion that notaries public are precluded from drafting a will which intends to create a life interest in real property. I also conclude that the respondent was in violation of the *Legal Profession Act* when she acted on behalf of her client Janna Kamper concerning matters related to the probate of Mr. Blom's estate.

II. FACTUAL BACKGROUND

[7] Ms. MacDonald practices as a notary public in Mission, British Columbia.

A. Earlier incident and undertaking

[8] Long before the incident which was the genesis of these proceedings, another incident brought Ms. MacDonald to the attention of the petitioner. On July 28, 1999, Ms. MacDonald prepared a grant of letters probate and provided legal advice respecting the estate of a deceased person for a fee. The actual "client" who sought her advice, however, was in fact a private investigator retained by the Law Society.

[9] Following that incident, on January 25, 2000, the respondent provided an undertaking to the petitioner and a covenant that she would not engage in the practice of law as defined by the *Legal Profession Act*, except as permitted by the

Notaries Act. Ms. MacDonald was reprimanded and fined by the Society of Notaries Public in regards to this complaint.

B. Actions complained of by the petitioner

[10] The Law Society complains of two actions taken by Ms. MacDonald since that undertaking: first, the drafting of Mr. Meindert Blom's will (the "Will") in a manner the Law Society says violates the *Legal Profession Act* because it was not capable of being "distributed immediately on death" and thus not authorized by s. 18 of the *Notaries Act*; and, second, acting for the deceased's spouse (referred to in the materials as Mr. Blom's "Common-law spouse"), Janna Kamper, in relation to the personal effects of Mr. Blom and thereby acting in the probate of the Will contrary to section 15 of the *Legal Profession Act*.

1. Drafting

[11] With regard to the first action, the respondent included in the Will of Mr. Blom the following clause:

> "2. I NOMINATE, CONSTITUTE, AND APPOINT MARION RUTH BLOM, and MARGARET USPRECH to be the Executors of this my Will and Trustees of my Estate, JOINTLY; (hereinafter referred to as "my Trustee") AND I GIVE, DEVISE AND BEQUEATH unto my said Trustees all my estate, both real and personal of whatsoever nature or kind and wheresoever situate, and also estate over which I may have any power of appointment or disposal at the time of my death upon the following trusts, namely:
>
> …
>
> c. to hold whatever house and property I may own and be using as a home at the time of my death as a home for JANNA SOMBROEK KAMPER until her death or until she shall, in writing, advise my Trustees that she no longer desires to have such property held for her, whichever shall first occur, when the property shall fall into and form part of the residue of my estate. All taxes, insurance, repairs, mortgage interest and any other charges or amounts necessary for the general upkeep of the said property while it is held for JANNA SOMBROEK KAMPER shall be paid by JANNA SOMBROEK KAMPER."

[12] It is undisputed that this Will creates a trust and that the Trustees are given discretion to realize the estate and to divide the residue of the estate.

III. REMEDY SOUGHT

[13] The Law Society applies for an injunction against Ms. MacDonald, in the following terms:

> The Respondent Gail Joan MacDonald, until such time as she becomes a member in good standing of the Law Society of British Columbia, be permanently prohibited and enjoined from:
>
> (a) drawing, revising or settling a will, deed or settlement, trust deed, power of attorney or a document relating to any probate or letters of administration or the estate of a deceased person;
>
> (b) giving legal advice; and
>
> (c) offering to or holding herself out in any way as being qualified or entitled to provide to a person the legal services set out in (a) and (b) above;
>
> for or in the expectation of a fee, gain or reward direct or indirect, from the person for whom the acts are performed **PROVIDED** that nothing herein will prevent the Respondent from providing services as permitted by the *Notaries Act* while she is a member in good standing of the Society of Notaries Public of BC;
>
> [Emphasis in original]

[14] The Law Society additionally seeks its costs.

[15] The Society of Notaries Public of British Columbia (the "Intervenor") was granted intervenor status in these proceedings.

IV. POSITIONS OF THE PARTIES

1. Drafting wills with life estates

[16] The Law Society asserts that the "*Notaries Act* does not allow notaries public to prepare wills that include life estates". The Law Society submits that the Blom Will clause cannot be drafted by a notary public under s. 18 of the *Notaries Act* and therefore its drafting constitutes a violation of s. 15 of the *Legal Profession Act* by Ms. MacDonald.

[17] The Law Society submits that an injunction is necessary in the circumstances because of her "past conduct and on the basis that there is a risk of future breach and related harm to the public."

[18] The Intervenor takes no position on the specific relief sought as against the respondent except to dispute a specific assertion made in the petition. The Intervenor also argues the Court should not interpret whether s. 18 of the *Notaries Act* permits the drafting of a will which creates a life estate because the issue is moot and has no bearing on these proceedings. This position is supported by the respondent Ms. MacDonald.

[19] The parties, including the respondent Ms. MacDonald, agree that the Blom Will Clause was beyond the scope of a notary public to draft. The Law Society, Ms. MacDonald and the Intervenor all agree that notaries public are not authorized to prepare trust documents: *Re Horvath*, [2000] B.C.J. No. 169 (S.C.), at paras. 3-4 *per* Boyle J.; and *Crowe v. Bollong*, [1998] B.C.J. No. 771 (S.C.), at para. 35 *per* Boyle J.

[20] The respondent nonetheless, opposes the Law Society's application and the proposed injunction.

[21] Ms. MacDonald agrees that she impermissibly created a will with a trust that, furthermore, could not be distributed immediately. However, in her affidavit, Ms. MacDonald states:

> Since the 2007 Seminar, I no longer draft wills incorporating the Clause [employed in the Blom will]. Should I draft a will entailing a life estate in real property, it will comply with the 2007 Legal Advice and 2009 Legal Advice that, given the advice of legal counsel, does not contravene the *Notaries Act*...

[22] Ms. Macdonald explained in her affidavit that in April 2007, some years after she drafted the Clause at issue in the Will, she attended a seminar sponsored by the Society of Notaries Public. The seminar addressed wills which create life estates. At the seminar, a PowerPoint presentation was shown. In her affidavit, Ms. MacDonald referred to this as "legal advice", but more accurately it was simply part of presentation for notaries public, which she attended, put on by a law firm. There was no evidence placed before the Court that she engaged the law firm or author of the PowerPoint presentation to assist her in drafting clauses. In any event, the clause

proposed at that presentation was not used in the Blom Will she drafted. The PowerPoint provided an example of a clause creating a life estate designed to comply with the *Legal Profession Act* and the *Notaries Act*.

[23] A further seminar on life estates was sponsored by the Society of Notaries Public in 2009 and taught by the same group of solicitors. It proposed a new type of clause to comply with British Columbia legislation.

2. Engaging in the practice of law - probate

[24] In respect of the second matter complained of, the Law Society alleges Ms. MacDonald engaged in the practice of law following the death of Meindert Blom on March 31, 2007 by involving herself in the probate of Mr. Blom's estate.

[25] Probate was granted to Marion Ruth Blom, Mr. Blom's daughter-in-law, and Margaret Usprech, his daughter, on May 14, 2007. Disputes arose between the executrices and Ms. Kamper about certain possessions of the deceased. Ultimately, the matter was resolved by Ms. Kamper turning over the disputed items to the executrices. During the dispute, however, Ms. Kamper turned to Ms. MacDonald for assistance.

[26] Marion Blom deposed in her affidavit, that in June or July 2007, after they had been in contact about items of the estate, Ms. Kamper advised her that she would be seeking the advice of Ms. MacDonald and would get back to her. When Ms. Kamper returned Ms. Blom's call in approximately September 2007, she told Ms. Blom that she had been advised that before Ms. Blom could pick up the personal items, she was to give Ms. Kamper proper notice and furnish her with a "release". Ms. Blom stated in her affidavit:

> When I asked what she meant by "release", she told me that the respondent said it was a document where the beneficiaries of the estate could not later come back and claim against Ms. Kamper for things not taken.

[27] Following the telephone conversation, Ms. Blom contacted the lawyer who probated the Will, Mr. Christopher Boulton, and requested that he correspond with Ms. Kamper regarding the personal items.

[28] Ms. Kamper, in turn, contacted Ms. MacDonald and gave her the letters.

[29] A number of letters passed between Ms. MacDonald and Mr. Boulton.

[30] Ms. MacDonald also received a letter from Mr. Ronald S. Williams, a lawyer practising in St. Catharines, Ontario, asking for all notes in her possession in connection with the drafting of the Will. Mr. Williams was counsel representing Robert Blom, one of the beneficiaries under the Will. Ms. MacDonald wrote a letter, dated October 2, 2007, acknowledging receipt of Mr. Williams's letter, although she refused the request.

[31] Ms. MacDonald next wrote a letter to Mr. Boulton, dated November 4, 2007, in which she indicated she was "instructed" by Ms. Kamper to write the letter to propose a meeting. This was in an effort to turn over personal items of Mr. Blom. The letter authored by Ms. MacDonald continued, "in return, you will provide full and final releases of Janna Kamper executed by your clients and all beneficiaries to the estate which I will take possession of on that date".

[32] In her next letter to Mr. Boulton of November 7, 2007, Ms. MacDonald stated:

> I have reviewed your letter with Janna Kamper. Words can only describe the letter as hurtful to Janna.
>
> I have been instructed by Janna Kamper to write this letter and request that you arrange a date with your clients, <u>all beneficiaries of the will must be present</u>, to attend Janna's residence. You are to provide a list of all items your clients feel are unaccounted for, and provide the list to our office one (1) full week, seven (7) days before the scheduled date to attend Janna's residence.
>
> I will be present with a witness to turn over the items that your clients feel are unaccounted for, [and] in return you will provide full and final releases of Janna Kamper executed by your clients and all beneficiaries to the estate, which I will take possession of on that date.
>
> [Emphasis in Original]

[33] Mr. Boulton wrote to Ms. MacDonald on November 17, 2007, saying:

> What needs to happen is that the items need to be handed over in the most straightforward and professional way possible to the executrix of the estate, who is willing to take the items as discussed above and to sign a release in favour of your client.

[34] Ms. MacDonald submitted that, at all times, she was only acting as a mediator. In her view, the above passage of the letter from Mr. Boulton demonstrated tacit approval of her mediation. In the next line of the letter, however, Mr. Boulton had continued: "If this cannot be done the estate will have no choice but to pursue legal action against Ms. Kamper".

[35] Ms. MacDonald then attended a meeting at the home of Ms. Kamper on December 4, 2007, which was attended by some of the beneficiaries under the Will as well as others. Ms. MacDonald stated she was there as mediator. No one other than Ms. Kamper, however, had asked for or agreed to her attendance. Only Ms. Kamper paid her fee for attendance. She was not seen by the others as an impartial and unbiased mediator.

[36] A release and settlement agreement dated December 4, 2007 prepared by Mr. Boulton was brought to the meeting. Prior to the execution of the document, Ms. MacDonald amended the document adding certain clarification to the agreement respecting missing items from the residence and storage area. The agreement is clearly in respect of Mr. Blom's last Will and testament. It was signed by Ms. Kamper and Ms. Blom and witnessed by the respondent, Ms. MacDonald.

[37] The respondent billed Ms. Kamper for "mediator services" in respect of that meeting. She also refers, however, to "attending to receive instructions", "all office visits and telephone correspondence", "correspondence and telephone attendance on your behalf", and "review of correspondence from other law firms".

[38] The Law Society says that these actions, in particular that of amending the release, disclose that Ms. MacDonald was providing services for a fee in relation to a matter of probate rather than as a mediator or in any other capacity permitted by the *Notaries Act*. The Law Society submits Ms. MacDonald thereby violated the *Legal Profession Act*.

[39] In her affidavit, Ms. MacDonald disputes a number of assertions made in the affidavit of the executors. Most notably she disputes the assertion that at the

meeting of December 4, 2007, she was there acting on behalf of Ms. Kamper. She insists that she was there solely as a mediator.

> She does not, however, dispute that she amended the release. She also argues the Will had been probated some months before she took the actions she did meeting with the beneficiaries and amending the release

V. THE ISSUES

[40] The questions before the Court are:

(1) whether the respondent was practising law as defined by the *Legal Profession Act* by drafting the clause in the Blom Will;

(2) whether it is necessary to determine if a notary public may draft a will which employs the 2007 or 2009 presentation clauses in order to grant the injunctive relief sought or whether that issue is moot;

(3) whether the clauses in both the 2007 and 2009 presentations conform to the powers granted to a notary public to draft wills;

(4) whether the respondent engaged in the practice of law through her conduct on behalf of Ms. Kamper following Mr. Blom's death.

[41] The Court must lastly consider whether the injunction should be granted.

A. ISSUE 1- Whether the Respondent was practising law as defined by the Legal Profession Act by drafting the clause in the Blom Will

1. Statutory framework

[42] The relevant legislation in this matter is contained in provisions of the *Legal Profession Act* and the *Notaries Act*.

[43] Under s. 15 of the *Legal Profession Act*, no person, other than a practising lawyer, is permitted to engage in the practice of law except seven categories of individuals, none of which apply to Ms. MacDonald.

[44] Section 1 of the *Legal Profession Act* states that:

> "practice of law" includes

> (b) drawing, revising or settling...
>
> > (iii) a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or letters of administration or the estate of a deceased person, [and]...
>
> (e) giving legal advice,...
>
> but does not include...
>
> (j) the lawful practice of a notary public,...

[45] Section 18 of the *Notaries Act* states that notaries public have the right and power of to draw and supervise the execution of certain wills. The provision states:

> 18 A member enrolled and in good standing may do the following:
>
> (b) draw and supervise the execution of wills
>
> > (i) by which the testator directs the testator's estate to be distributed immediately on death,
> >
> > (ii) that provide that if the beneficiaries named in the will predecease the testator, there is a gift over to alternative beneficiaries vesting immediately on the death of the testator, or
> >
> > (iii) that provide for the assets of the deceased to vest in the beneficiary or beneficiaries as members of a class not later than the date when the beneficiary or beneficiaries or the youngest of the class attains majority;...
>
> (f) perform the duties authorized by an Act.

[46] If actions taken by a notary public fall within s. 18 of the *Notaries Act*, it follows that those acts do not constitute the practice of law. A notary public performing such acts would not contravene s. 15 of the *Legal Profession Act*.

2. Legislative framework for statutory interpretation

[47] The starting point for the interpretation of provincial statutes in the *Interpretation Act*, R.S.B.C. 1996, c. 238 is s. 8:

> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[48] The section defining permissible wills in the *Notaries Act* was amended in 1981. As a consequence, s. 37 of the *Interpretation Act* is also to be considered. That section provides:

> No implications from repeal, amendment, etc.
>
> 37 (1) The repeal of all or part of an enactment, or the repeal of an enactment and the substitution for it of another enactment, or the amendment of an enactment must not be construed to be or to involve either a declaration that the enactment was or was considered by the Legislature or other body or person who enacted it to have been previously in force, or a declaration about the previous state of the law.
>
> (2) The amendment of an enactment must not be construed to be or to involve a declaration that the law under the enactment prior to the amendment was or was considered by the Legislature or other body or person who enacted it to have been different from the law under the enactment as amended.
>
> (3) An amendment, consolidation, re-enactment or revision of an enactment must not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

[49] Accordingly, the Court is limited in interpreting the section with reference to the prior enactment.

3. Modern approach to statutory interpretation

[50] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Iacobucci J. established the foundation for the modern approach to statutory interpretation where he stated for the Court at para. 21:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[51] Since that pronouncement, the Supreme Court of Canada has also applied the modern principles in *Francis v. Baker*, [1999] 3 S.C.R. 250; and *Chartier v. Chartier*, [1999] 1 S.C.R. 242.

[52] In *Bell ExpressVu L.P. v. Rex*, 2002 SCC 42 at para. 26, Iacobucci J. again endorsed Elmer Driedger's approach to statutory interpretation in his work *Construction of Statues*, 2d ed. (Toronto: Butterworths, 1983). This approach was also endorsed in *Nanaimo (City) v. Rascal Trucking Ltd*., [2000] 1 S.C.R. 342 and *R. v. Clark*, 2005 SCC 2.

4. The maxim *expressio unius est exclusio alterius*

[53] On behalf of the Law Society, it is also argued the maxim *expressio unius est exclusio alterius* applies which, simply put, stands for the proposition that where the Legislature has created a list of specific terms, other terms should not be read in. Whereas here, it is argued, the statute provides an exclusive list of the types of wills notaries public may draft and occupies the field, other powers cannot be implied as further exceptions to a general rule. The case of *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142, per Major J. for the majority at p. 152 S.C.R., was also argued by the Law Society in support of this proposition. In *Zeitel* the maxim was described as standing for the proposition that:

> [19]…where a statute specifies one exception to a general rule, other exceptions are excluded.

[54] Similarly, in *Ref. re Society of Notaries Public* (1969), 6 D.L.R. (3d) 447 (B.C.C.A), the Court of Appeal concluded that notaries public did not have the power to incorporate corporations. While not expressly utilizing *expressio unius est exclusio alterius*, Robertson J.A. reviewed the other classes of instruments listed in the *Notaries Act* and concluded that "it is a fair inference that it was not intended that the things which a notary public might do should include the matters with respect to corporate bodies that are referred to in the definition of practice of law in the *Legal Professions Act*" (at p. 478). In the course of his analysis, Robertson J.A. noted that the power of notaries public with respect to wills "is limited" to the classes described in the legislation of the day (p. 478). Under the current *Notaries Act*, argues the Law Society, the powers of notaries public in respect of wills are expressly limited to the specific examples set out in s. 18(b).

5. Secondary role of statutory interpretation

[55] The Society of Notaries Public argues that a "secondary" rule of statutory interpretation applies in this case and that is that statutes which "have the effect of creating a professional monopoly" must be "interpreted strictly where the wording is ambiguous." This rule, the Law society responds, if valid, is of no assistance to the Society of Notaries Public. There is no ambiguity in the relevant provisions of the *Legal Profession Act*: whether Ms. MacDonald has engaged in the "lawful practice of a notary public" turns on the true construction of s. 18 of the *Notaries Act* which exhaustively defines the types of wills notaries public may prepare. If there is ambiguity in s. 18 of the *Notaries Act* (which the Law Society disputes) this "secondary" rule would arguably call for a strict construction of s. 18, not the expansive interpretation urged by the Society of Notaries Public.

6. Legislative objective - protection of the public

[56] The Law Society submits in any event that this "secondary" rule is subordinate to the remedial interpretation mandated by the *Interpretation Act* and the overarching objective of protecting the public, enshrined in s. 3 of the *Legal Profession Act*. In *Law Society of British Columbia v. Lawrie*, the Court of Appeal rejected an argument similar to that now advanced by the Society of Notaries Public:

> ….the interpretation of statutes governing the legal profession must necessarily focus on the protection of the public and not on the false issue of the fanciful monopoly of lawyers …. The people of this province through their Legislature have seen fit to impose upon the legal profession a huge, expensive and onerous regulatory framework deemed necessary for the protection of the public….

See *Law Society of British Columbia v. Lawrie* (1991), 59 B.C.L.R. (2d) 1 (C.A.), at para. 15, p. 8 B.C.L.R. per Carrothers J.A.; see also *Law Society of British Columbia v. Dempsey,* 2005 BCSC 1277, at paras. 110-114, per Williams J.

[57] Any interpretation, accordingly, must be through the lens of the protection of the public as a first consideration.

7. Is it necessary to determine whether there is a non-extinguished common law power to draw wills with life estates?

[58] The history of notarial powers was not argued by the parties. However, sec. 18(b)(f) of the *Notaries Act* provides that notaries public may "perform the duties authorized by an Act". If notaries public could draft wills incorporating a life estate in England, on November 19, 1858, either by common law or by ordinance or statute, then this ability would have continued in British Columbia pursuant to the provisions of *The English Law Ordinance* and its successor, s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Section 2 of the *Law and Equity Act* provides:

> Subject to section 3, the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

[59] This power to draft such wills, if it existed, would have remained until displaced by legislation.

[60] Section 18(b) of the *Notaries Act* now specifically defines a notary public's power to draw and supervise the execution of a will. The British Columbia Supreme Court, in *Law Society of British Columbia v. Gravelle* (1998), 57 B.C.L.R. (3d) 388 (S.C.) aff'd 2001 BCCA 383 [*Gravelle*] on the basis of *Reference re Society of Notaries Public of British Columbia* (1969), 69 W.W.R. 475 (C.A.), makes clear that the *Notaries Act* in its various iterations does not explicitly provide an exhaustive definition of the lawful practice of a notary public. On that basis, the Court in *Gravelle* determined whether notaries public were permitted to probate wills before November 19, 1858 in England, the date at which the *English Law Ordinance*, 1867 incorporated the laws of England into those of British Columbia. The Court ultimately concluded that notaries public did not possess such a power to probate a will. Bauman J. (as he then was) refused to grant to the Law Society a declaration that "practice of law" included a long list of services which the Society enumerated. Bauman J. held at para. 110:

> I do not think it appropriate to effectively supplement the Legal Profession Act by expanding the formal definition of "practice of law" in this manner. It is sufficient to say, as I have, that on the facts as found in this case the respondent notary public has engaged in the unlawful practice of law.

[61] The reasoning of the Court was upheld on appeal as noted.

[62] After review of the legislative history, context and scheme of the *Notaries Act*, I have concluded that even if a common law power to draft wills with life estates existed, no such power has existed in Canadian law since 1956 for estates creating trusts or estates worth more than $10,000. A review of the legislative history of the *Notaries Act* will explain that decision.

[63] Richard Brooke in his *Treatise on the Office and Practice of a Notary in England*, 5th ed. (London: Stevens and Sons Ltd., 1890) notes at p. 15 that "[i]n England, and in most other countries in Europe, Notaries have been, from a remote period of time, frequently employed in preparing wills and codicils." The 1912 edition of *Halsbury's* as cited in *Gravelle* at para. 57 states:

> A notary public is a duly appointed officer whose public office it is, amongst other matters, to draw, attest, or certify, usually under his official seal, deeds and other documents, including conveyances of real and personal property, and powers of attorney relating to real and personal property situate in England, the British dominions beyond the seas, or in foreign countries; to note or certify transactions relating to negotiable instruments; to prepare wills or other testamentary documents; to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships.
>
> [Emphasis Added]

[64] Bauman J. (as he then was) in *Gravelle* expands on the meaning of "testamentary documents" at para. 58:

> [58] The reference to preparation of testamentary documents requires a brief discussion. Black's Law Dictionary defines "testamentary paper or instrument" as:
>
> > An instrument in the nature of a will; an unprobated will; a paper writing which is of the character of a will, though not formally such, and, if allowed as a testament, will have the effect of a will upon the devolution and distribution of property.

[65] These sources do not preclude the possibility that notaries public had a general power to draft all wills, including those which create a life estate, on November 19, 1858.

[66] On the basis of the information before me, I decline to determine whether a common law power to draft life estates existed at some time. Such a determination is unnecessary in the circumstances of this case, as the legislative history of the *Notaries Act* (discussed below) demonstrates that even if such a power existed, it is no longer a law in force in British Columbia applicable to these facts.

8. The legislative history of will-drafting powers under the *Notaries Act*

[67] Section 12 of the first *Notaries Act* [R.S.B.C. 1948, c. 240] provided that a notary public could exercise "all powers, rights, duties, privileges, and emoluments heretofore or hereafter attaching to the office of Notary Public".

[68] Section 12 was repealed in 1956 by the *Notaries Act Amendment Act*, S.B.C. 1956, c. 35. It was replaced with a new provision which stated that a notary public has the power to *inter alia* "[d]raw and supervise the execution of wills of the class prescribed by the bylaws of The Society of Notaries Public".

[69] In 1956, the Society of Notaries Public enacted a bylaw which stated:

> The right and power of Notaries Public duly qualified under the Act to draw and supervise the execution of wills pursuant to Subsection I of Section 12 of the Act shall be limited to the class of wills following, that is to say:--
>
> (1) Wills by which the testator devises or bequeaths to his beneficiaries absolutely and whereby no limited life estates or trusts are created; or
>
> (2) Wills where the estate is declared by the testator at the time of making the will to be of no greater value than $10,000.00.

That bylaw remained in effect until the new *Notaries Act*, S.B.C. 1981, c. 23 came into effect on August 21, 1981 when legislature enacted the now operative section 18.

[70] The 1956 legislation was modified in 1981 when a new *Notaries Act* was drafted. The *Notaries Act*, S.B.C. 1981, c. 23 repealed the previous provision governing wills and replaced it with the current enumeration of notarial powers contained in s. 18.

[71] The change in language defining the powers of a notary public with regard to wills does not in itself declare that the law changed. As noted above, an amendment does not involve a declaration by the legislature that the law was different: see s. 37(2) of the *Interpretation* Act, R.S.B.C. 1996, c. 238. Thus, the amendment of the notary public's power to draw wills does not in itself signify that the power to draft wills under the previous legislation was in any way changed.

[72] The court in *Gravelle* had to determine whether s. 18(f) (empowering notaries public to "perform the duties authorized by an Act") incorporated a common law notarial power into the *Notaries Act*. Similar reasoning with respect to wills and life estates is unnecessary in the present case. "Act", within its meaning for s. 18 of the *Notaries Act* is defined in s. 1 of the *Interpretation Act*:

> "Act" means an Act of the Legislature, whether referred to as a statute, code or by any other name, and, when referring to past legislation, includes an ordinance or proclamation made before 1871, that has the force of law;

[73] It has already been determined that any common law power which might have existed was expressly extinguished by the 1956 bylaw for all trusts or limited life estates or wills administering an estate worth more than $10,000. That legislation would have stripped any common law power applicable to the circumstances of this case of the force of law. Therefore, a formerly existing common law power would not qualify as authorized by an Act in any situation where the testator or testatrix's will is worth more than $10,000. Similarly any ability to create a will with limited life estates or trusts was extinguished. While the definition of trust was not in issue, the meaning of "limited life estate" was not defined nor argued. Consequently, the issue of life estates was not resolved by resort to this provision.

[74] I leave open the issue of whether such a right exists in the rare circumstances when an estate is declared to be of no greater value than $10,000 on the basis that s. 18(f) which permits notaries to "perform the duties authorized by an Act" would incorporate the common law as at the date of November 19, 1858.

9. Statutory interpretation of s. 18(b) of the *Notaries Act* - 18(b)(i) to (iii) separate distinct provisions

[75] The Court must determine if subsections 18(b)(i), (ii) and (iii) should be read as three independent bases on which wills may be drawn by notaries public. The Legislature employed the term "or" to delineate between the three subsections of 18(b), such that a notary public may draw a will by which the testator's estate is "distributed immediately" or either of the two other limited circumstances is present. In *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 15, E.A. Driedger discusses the interpretation of the terms "and" and "or":

> The effect of the decisions on *and* and *or* problems, is stated by Maxwell as follows:
>
> > In ordinary usage, "and" is conjunctive and "or" is disjunctive. But to carry out the intention of the legislation it may be necessary to read "and" in pace of the conjunction "or" and *vice versa*.

[76] In *R. v. Daoust*, 2004 SCC 6 at para. 61, Bastarache J. for the Court considered the use of "or":

> 61 In the present case, the words "conceal" and "convert" are not part of a list. On the contrary, they are two distinct terms with distinct meanings. This is demonstrated by Parliament's use of the expression "with intent to conceal or convert", as the use of the word "or" shows an intent to distinguish the two terms from each other. For this reason, these two terms should not be read together, and the *noscitur a sociis* rule does not apply.

[77] This is not a case in which the Court must diverge from the ordinary meaning of the term "or". Each of the subsections in s. 18(b) denotes a distinct type of clause permitted to be drawn by a notary public. The Legislature clearly intended to create three disjunctive means by which a notary public may draft a will. Each clause is to be read independently from the other two. Accordingly, I must determine whether

any of the three subsections of s. 18(b) allow the creation of one of the clauses at issue in these proceedings.

(i) Subsection 18(b)(i)

(a) "Distributed immediately"

[78] The words "distributed immediately" are not defined in the Notaries Act, the Legal Profession Act or the Interpretation Act. The common law interpretations and definitions must be explained.

[79] The intervenor submits that the term "distributed immediately" refers to distribution of an interest in the property. In the intervenor's submission, distribution occurs contemporaneously with vesting. Essentially, as I understand the argument, the estate is distributed when all of the beneficiaries are vested in interest. It would follow, to the intervenor, that a simple life estate, in which both the life tenant and the remainderman are vested in interest upon execution of the will, is distributed immediately within the meaning of s. 18(b)(i). To the intervenor, the fact that the remainderman cannot take possession of the property until the death of the life tenant is inconsequential.

[80] The petitioner submits that the term "distributed immediately" requires a will to put all beneficiaries into immediate possession of the property. In the petitioner's submission, a will creating a life estate is outside the powers of a notary public because the remainderman to such an estate is not entitled to possession of the property until the death of the life tenant and hence it is not distributed immediately.

[81] There lies the disagreement. Does the term "distributed immediately on death" require distribution in interest (vesting) or distribution in possession? Proper interpretation of the *Notaries Act* inclines me to find that s. 18(b)(i) requires distribution in possession. Vesting of an interest in property absent possession is insufficient to constitute immediate distribution.

[82] The term "distribute" is defined by *Black's Law Dictionary*, 8th ed. as:

> 1. to apportion; to divide among several. 2. to arrange by class or order. 3. to deliver. 4. to spread out; to disperse.

[83] The *Oxford English Dictionary*, 11th ed. defines "distribute" as:

> 1. hand or share out to a number of recipients. → supply (goods) to retailers 2. (be distributed) be spread over or throughout an area. 3. use (a term) to include every individual of the class to which it refers.

[84] Alone, these grammatical definitions suggest that in the context of the *Notaries Act*, distribute refers to the handing out or apportioning of an estate. But what is to be handed out or apportioned is unclear based on grammar alone.

[85] In *Arthritis Society v. Vancouver Foundation,* [1993] 1 W.W.R. 748, 72 B.C.L.R. (2d) 245 (S.C.), the Court echoed the above definitions. Lowry J. (as he then was) cited the Black's Law Dictionary (6th ed.): "Distribute. To deal or divide out in proportion or shares." The clauses in the Will stated:

> The net remainder of my Residuary Estate to The Vancouver Foundation, to distribute equally among the following charities, either as an endowment or as outright bequest, as the Vancouver Foundation may in its absolute discretion decide...

[86] Lowry J. concluded "to distribute" in trust context was to "divide the net remainder equally".

[87] In the Alberta case of *Singer v. Singer*, the Surrogate Court of Alberta in the probate context considered the term "distributed": (2000) 280 A.R. 127, [2001] 6 W.W.R. 129.

[88] In that case, the matter was brought under the *Alberta Family Relief Act* six months after the time to seek relief. Therefore, the applicant could only be successful if there remained assets in the estate to be distributed.

[89] The Court held the assets of an estate are considered to be "distributed" only if the state has ceased to have in its possession or control of those assets. There is nothing further for executors or trustees to do with regard to "distributed" assets.

"Distribution" of estate assets implies payments of the assets to a beneficiary or in a trust capacity for himself or herself by the executor or executrix. This interpretation was upheld on appeal: see *Singer v. Singer (Estate)*, 2002 ABCA 294.

[90] At the Court of Appeal, the Court in *Singer* held:

> 14 Here, the entire estate consisted of 850 shares and these shares had been transmitted into the names of three trustees as trustees. When the application was filed, there was no estate to administer. The entirety of the estate had been transferred out of the estate and over to the trustees.
>
> 17 We conclude that as there were no debts or taxes to be paid, and as there was only one asset in the estate, the work of the executors was concluded when the shares were transmitted to the trustees. Return of the shares to the executors at the death of Ruth Singer is unnecessary, as the powers of the trustees are such that they can see to completion the second object of the trust created by the will, that is, the transfer of the shares to the Ruth Singer Family Trust.

[91] In the proposed clause situation, there is a life estate and, in contrast, there is no immediate transfer of the estate assets out of the estate to a trustee or otherwise.

(b) Vest and distribute

[92] The Legislature saw fit to use iterations of both the term "vest" and "distribute" within s. 18(b) of the *Notaries Act*. Accordingly, the question becomes whether, if an asset vests, it is immediately distributed.

[93] The surrounding legislative context of the *Notaries Act* assists in giving meaning to the term "distributed". Section 18, in particular, sheds light on the proper interpretation of the grammatical meaning of the word. Specifically, the presumption of consistent expression has a bearing on the proper interpretation of "distributed" within the legislative framework. The presumption of consistent expression is summarized in *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 163:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings.

[94] The Intervenor asks the Court to find that "distributed immediately" is synonymous with "vested immediately". *Black*'s *Law Dictionary*, 8th ed. defines "vest" to be "to give (a person) an immediate, fixed right of present or future enjoyment".

[95] The Legislature expressly uses the word "vest" in s. 18(b)(ii) and (iii). However, in s. 18(b)(i), "distributed" is used. The presumption of consistent expression noted in *Driedger* dictates that this Court is to presume the legislature was careful in making that language choice distinction. Accordingly, "distributed immediately" cannot be synonymous with "vested immediately". If the Legislature sought such an interpretation, it would have used the word "vest" in s. 18(b)(i). Thus, the proper meaning of "distributed immediately", read in its entire context and its grammatical and ordinary sense pursuant to the instructions of Iacobucci J. in *Bell ExpressVu* and subsequent cases, means distributed immediately in possession.

[96] As I understand the intervenor's argument, a life estate is distributed immediately because the beneficiary of the life estate is in immediate possession and at the same time, the remainderman has a vested interest. However, as I have explained above, by use of the word "or" the sections are to be read separately and do not create a situation where s. 18(b) can be viewed as having been complied with, because the word "vest" is used in its place in s. 18(b)(ii). To use the words interchangeably would not be in accordance with the approach adopted by the Supreme Court of Canada. Vesting and distribution are different concepts. The word "vested" means "vested in interest" but not necessarily "vested in possession". Further, in the case of a remainderman, the interest in the fee simple is vested in interest but possession cannot occur until the death of the life tenant. MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Looseleaf, 2000), §§17.4, 17.11, 17.16, Tab 35 Petitioner's Book of Authorities.

[97] In *Re Ross* (1984), 6 D.L.R. (4th) 193 (B.C.S.C), the issue was whether the death of the remainderman before the termination of the life tenancy resulted in divestment. McEachern C.J.S.C. (as he then was) granted a vesting order in favour of the remainderman's heir. The Chief Justice's discussion of the authorities

demonstrates that while there is a presumption in favour of early vesting, a life interest postpones distribution: at paras. 6-7.

[98] Similarly, in *Browne v. Moody et al*., [1936] 4 D.L.R. 1, [1936] A.C. 635, [1936] O.R. 422 (J.C.P.C.), the Court held a postponement of distribution for the purposes of an interposed life interest does not exclude vesting particularly when the postponement is to a date certain such as the death of the life tenant, and not until he attains a certain age: see also *Browne v. Moody et al* [1936] 4 D.L.R. 1, [1936] A.C. 635 (P.C.), at p. 5 D.L.R. per Lord MacMillan; and *Cameron v. Roberson Estate*, [1937] S.C.R. 354, at p. 360 per Davis J.

[99] However, had the legislature intended to permit wills to be drafted by notaries public that "vested immediately", this could have been done.

[100] The Intervenor argues in response that no estate in British Columbia can ever lawfully be immediately distributed in possession because in all cases, distribution, transfer and delivery of assets will be delayed. As an example, it is noted that s. 12 of the *Wills Variation Act*, R.S.B.C. 1996, c. 490, mandates that an executor or trustee must not distribute any portion of an estate to beneficiaries until six months have passed from the issue of probate for the will unless all person entitled to apply under the *Wills Variation Act* consent or the court authorizes it. Under the circumstances, it seems clear that the term "immediately" does not refer to an instant distribution, but rather means "immediate" within the limitations of estate administration, including provisions of income tax statutes and the *Wills Variation Act*. I do not find that normal delays which form part of estate administration invalidate the above interpretation of s. 18(b)(i).

[101] In *McBratney v. McBratney* (1919), 59 S.C.R. 550, Duff C.J. noted in the situation of rival constructions:

> If one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.

> [See p. 561; see also Construction of Statutes, Sullivan and Driedger 4th ed. (Toronto: Butterworths)]

[102] Accordingly, distributed immediately means as soon as is practical, given other statutory duties. If the legislature had chosen to permit notaries to draft wills that provide for immediate vesting of assets as an alternative to immediate distribution it could easily have done so.

[103] I further note the general rule, explained in Driedger's work that an Act of Parliament "is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy or injustice" citing *Abel v. Lee* (1871), L.R. 6 C.P.P. 365, at p.371. Additionally he writes:

> And in Mount v. Taylor (1868) L.R. 3 C.P. 645 at p. 652 Willes J. held that a construction contended for "would raise such an inconsistency of the legislature *with itself*…as calls on us to be astute in putting a construction on the statue which would prevent *such an absurdity*". This is a form of disharmony, within the Act that permits of a departure from the ordinary and natural sense of the words.
>
> [See E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at pp. 63-64]

[104] Applying this rule, it would be absurd to see from s. 18(b) a result where a will could be drafted wherein property vested immediately but prevented the drafting of wills with the estate to be distributed immediately. To do so would result in departure from legally required waiting periods dictated in other statutes. Accordingly, "distributed immediately" means within a period immediately following those timelines prescribed.

[105] It follows that while a life tenant is entitled to immediate possession, the owner of the fee simple, the remainderman, is not entitled to immediate possession. In other words, distribution to the remainderman is postponed until the life estate expires.

[106] This is so even if the remainderman is entitled to a conveyance of the fee simple (arguably, practice in this Province would signal caution in transferring the title from the executor until the life estate has finished). In any event, British

Columbia's statutory land title system does not alter the fundamental characteristics of the freehold estates. Pursuant to the *Land Title Act*, R.S.B.C. 1996, c. 250 a life estate may be registered as a charge on the fee simple. This option was developed for the purposes of registration, to conform with the Torrens system and a simplified title system. The legislation should not be construed as altering fundamental property doctrines. In *Stonehouse* v. *Attorney-General of British Columbia* ((1960), 26 D.L.R. (2d) 391 (BCCA), aff'd [1962] S.C.R. 103), Davey J.A. in the Court of Appeal confirmed (at p. 394):

> … the *Land Registry Act* was never intended to produce a new body of conveyancing and real property law by the fusion of legal principles and the provisions of the *Land Registry Act*. All that it does is to impose a system of recording of titles upon the existing real property law and conveyancing practice, making only such changes therein as are expressly provided, or must be necessarily implied to give effect to the Act.

[107] Section 18(b)(i) appears directed at simple wills, where the gift is distributed both legally and beneficially, immediately.

(ii) Subsection 18(b)(ii)

[108] Subsection 18(b)(ii) similarly applies to very specific situations in which a beneficiary predeceases the testator or testatrix. In such circumstances, a gift over to alternative beneficiaries vesting immediately on the death of the testator or testatrix is permitted.

(iii) Subsection 18(b)(iii)

[109] Subsection 18(b)(iii) permits a notary public to draft a will in another limited situation in which delayed vesting is permitted, namely when assets vest in a class no later than when the youngest of the class attains the age of majority.

[110] Subsection 18(b)(iii) clearly carves out an exception to (i).

[111] A class denotes more than a group of individual people. A class is defined by some common tie or characteristic in the group. In *Kingsbury v. Walter*, [1901] A.C. 187 at p. 190 Lord MacNaughton for the House of Lords explained:

> In my opinion the principle is clear enough. When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was regarding the body rather than the individuals constituting the body, and you can also see that the testator intended that if one of that body died in his lifetime the survivors should take, there is nothing to prevent your giving effect to that intention. (pp. 190-191)

[112] Lord MacNaughton noted that the interests of the members of a class will vest in interest at the same time (whatever time that may be). It is this circumstance which s. 18(b)(iii) describes. A notary public is permitted to draft a will which provides assets to a class as long as the assets vest in the class no later than the date that the youngest of the class attains the age or majority.

[113] Neither 18(b)(ii) or (iii) apply to the circumstances in this case.

10. The Will clause

[114] The Will drafted by Ms. Macdonald for Meindert Blom provided the following:

> 2. I NOMINATE, CONSTITUTE, AND APPOINT MARION RUTH BLOM, and MARGARET USPRECH to be the Executors of this my Will and Trustees of my Estate, JOINTLY; (hereinafter referred to as "my Trustee") AND I GIVE, DEVISE AND BEQUEATH unto my said Trustees all my estate, both real and personal of whatsoever nature or kind and wheresoever situate, and also estate over which I may have any power of appointment or disposal at the time of my death upon the following trusts, namely:
>
> ...
>
> > c. to hold whatever house and property I may own and be using as a home at the time of my death as a home for JANNA SOMBROEK KAMPER until her death or until she shall, in writing, advise my Trustees that she no longer desires to have such property held for her, whichever shall first occur, when the property shall fall into and form part of the residue of my estate. All taxes, insurance, repairs, mortgage interest and any other charges or amounts necessary for the general upkeep of the said property while it is held for JANNA SOMBROEK KAMPER shall be paid by JANNA SOMBROEK KAMPER.

[115] This clause is clearly outside the powers granted by s. 18(b) of the *Notaries Act*. It creates a trust administered by the trustees for an estate worth more than $10,000, with Ms. Kamper as beneficiary. It does not even name a remainderman in whom an interest could vest, much less be distributed immediately in possession.

With no person into whom the remainder could vest, there is no doubt that the clause stops the testator's estate from being distributed immediately on death under any interpretation of the term. It is also clearly outside the limited scope of ss. 18(b)(ii) and (iii). Mr. Blom's estate was not declared to be worth no greater than $10,000. Because this clause of the Will is outside the scope of the *Notaries Act*, it follows that Ms. MacDonald acted in contravention of s. 15 of the *Legal Profession Act* in drafting a will containing this clause. In summary, the clause of the Will was impermissibly drafted both because it created a trust, and because it falls outside the scope of the exceptions in section 18 of the *Notaries Act*.

B. ISSUE 2 - Is it necessary to determine if a notary public may draft a will which employs the 2007 or 2009 presentation clauses in order to grant the injunctive relief sought?

[116] The intervenor submits that the matter before the Court in respect of life estates is now moot because Ms. MacDonald accepted that the clause in the Will was beyond the power of a notary public to draft. It follows, says the Intervenor, that there is no need to determine whether a notary public could draw a will which creates a life estate in either the manner the Will does or in the suggested clauses in the 2007 and 2009 law firm PowerPoint presentations. In its submission, the Intervenor argued there is no risk on the evidence that Ms. MacDonald will create wills which employ such a clause in the future.

[117] The Law Society, in contrast, submits that the Court must determine this issue because Ms. MacDonald's affidavit can be construed as demonstrating an intention to prepare wills creating a form of life estate recommended by either the 2007 or 2009 PowerPoint presentations. It follows that there is a risk that Ms. MacDonald may breach the injunction against her by drafting such clauses.

[118] With respect, I cannot accept the intervenor's argument that the issue is moot. Ms. MacDonald's affidavit, I find, discloses a probable intention to draw wills which create a life estate based on the 2007 and 2009 presentations. In her affidavit she deposes:

> Since the 2007 Seminar, I no longer drafts [sic] wills incorporating the Clause. Should I draft a will entailing creating a life estate in real property, it will comply with the 2007 Legal Advice and 2009 Legal Advice that, given the advice of legal counsel, does not contravene the *Notaries Act*, RSBC 1996, Chapter 334.

[119] Though this statement does not conclusively say that Ms. MacDonald intends to draft wills with life estates, I find in all the circumstances that it is probable, if unrestricted, that she would draft wills with life estates in future on the basis of the 2007 and 2009 law firm PowerPoint presentations. Ms. MacDonald has demonstrated a desire to utilize her powers as a notary public in circumstances that are not appropriate. She has contravened the *Legal Profession Act* in these proceedings by her own admission that the Will under scrutiny created a trust. She may also have violated the *Legal Profession Act* in 1999 in her actions for which she entered into an undertaking with the Law Society. She has also demonstrated a reticence to comply with requests from the Law Society. Having already undertaken not to prepare letters probate or provide legal advice on January 25, 2000, she breached that undertaking by her conduct which generated these proceedings. Within that context, I find that, absent a consideration by the Court of the 2007 or 2009 clauses proposed in the law firm presentations, she is likely to do just that. As a result, the issue is not moot, but rather goes directly to the effective enforcement of the Law Society's proposed injunction against her.

[120] The Intervenor, however, submits that the Law Society injunction will have larger ramifications to all notaries public in the province; if ruled impermissible, the ruling would have the effect of a declaration that such clauses, when drafted by a notary public engage the practice of law in violation of the *Legal Profession Act*.

[121] Our Court of Appeal recently addressed the scope of declaratory relief which should be granted by the British Columbia Supreme Court in *Tele-Mobile Company v. British Columbia*, 2013 BCCA 216. At para. 11, Groberman J.A. for the Court of Appeal reasoned:

> [11] While it is clear that the Supreme Court has broad powers to make declarations of rights even in the absence of live controversies, the power to grant a declaration is discretionary. In general, there is a strong preference

> toward deciding actual disputes rather than hypothetical ones. The factual components of such disputes place the legal issues in context, and allow a more thorough evaluation of them. The requirement that there be a genuine dispute ensures that judicial resources are devoted to resolving real controversies rather than speculative ones. Further, the presence of a concrete dispute guards against collusive attempts to obtain a narrow ruling on a specific legal point.

[122] While the Law Society here does not seek specific declaratory relief, certain findings must be made by the Court, to consider whether the relief sought by the Law Society is appropriate.

[123] Accordingly, I find there remains an actual dispute as to whether Ms. MacDonald, as a practising notary public, can draft wills which create interests based on the 2007 and 2009 presentations given the wording in her affidavit. The Blom Will Clause, in conjunction with the materials provided in the law firm presentations, provides the factual matrix on which the Court can determine the issues before it. Accordingly, to that extent, the issue is not moot. This is not a hypothetical issue. It is a live issue.

C. ISSUE 3 - Whether the clauses in both the 2007 and 2009 presentations conform to the powers granted to a notary public to draft wills

[124] In order to ensure the effective and proper enforcement of the proposed injunction against Ms. MacDonald, this Court must consider whether those clauses comply with the *Legal Profession Act*.

1. The 2007 presentation clause

[125] The life estate clause suggested in the 2007 seminar materials ("2007 Clause") referenced by Ms. MacDonald provided as follows:

> "I give my property at 123 Anywhere Street, Vancouver, BC, to Brian, subject to a life estate in favour of Jane."

[126] This Clause creates both a life tenant, Jane, and a remainder interest which is vested in Brian, the remainderman.

[127] It is understood that the intention of the testator is to create a life estate to Jane with a remainder to Brian accordingly. I need not resort to rules of construction of wills.

[128] It is noted in presentation materials that this Clause accomplishes the following:

> "√ Property vests in Brian immediately on death;
> √ Common law principles apply to life estate in favour of Jane;
> √ No extended trust created"

[129] Various phrases have been construed by courts in Canada as having conferred life estates. In *Principles of Property Law*, 5th ed., (Toronto: Carswell, 2010) at 177, Professor Bruce Ziff writes that no special phrases are needed to create a life estate at common law. On the same page, Professor Ziff notes various phraseology which may result in creation of a life estate:

> Hence a will might "confer a privilege" to live on the land (*Bartels v. Bartels* (1877) 4 U.C.Q.B. 22), allow "fee use"; (*Re Richter* (1919) 46 O.C.R. 367), permit the donee to "use" the property, with a gift over "[w]hen she no longer needs" the premises, (*Martini Estate v. Christensen*, [1999] 10 W.W.R. 417), or to use property "as long as he wishes"; (*Charles v. Barzey (Dominica)*, [2002] UKPC 68).

[130] The 2007 Clause creates a simple life estate with both a life tenant, Jane, and a remainder interest which is vested in Brian, the remainderman.

[131] The Saskatchewan Court of Appeal in *Re: Park Estate*, [1989] 5 W.W.R. 279 at paras. 9-10 discussed the meaning of remainderman, stating:

> Black's Law Dictionary, 5th ed. (1979), defines the remainderman in this way:
>
> > One who is entitled to the remainder of the estate after a particular estate carved out of it has expired. One who becomes entitled to estate after intervention of precedent estate or on termination by lapse of time of rights of precedent estate created at same time.
>
> The definition conjures up the concept of a bequest of a life estate which comes to a termination at a designated time or the happening of a certain event, and calls for the division of what then remains of the assets which were held in the life estate.

[132] It is clear in the situation created by this clause, that the remainderman is not entitled to possession of the property until the life tenant passes away. Immediate distribution on death of the testator is accordingly impossible. Though Brian is vested in interest, he is only entitled to the estate after the termination of the right of the life tenant. Thus, the clause does not fit the meaning of "distributed immediately" under s. 18(b)(i).

[133] This clause again does not contemplate distribution to a beneficiary who predeceased the testator or a class based on obtaining an age or majority. Therefore, subsections 18(b)(ii) and (iii) do not apply.

2. The 2009 presentation clause

[134] The 2009 seminar materials ("2009 Clause") propose a more complex clause in order to fit within the meaning of s. 18(b)(i). The clause reads:

> LIFE ESTATE
>
> Upon my death, I direct my Executor and Trustee to transfer and deliver any property I may own and occupy as my principal residence to my children, HANS ANDERSON and GRETEL ANDERSON. PROVIDED that this legacy shall be subject to a life estate in favour of my wife, BETTY ANDERSON, until the first of the following occurrences:
>
> A) Betty's death,
>
> B) Betty ceases to live there as her permanent residence for a period of more than nine months.
>
> C) Betty voluntarily releases the life estate.
>
> During the tenure of the life estate, Betty shall be responsible for insurance, utilities, mortgage interest and she must keep the property in good repair. During the tenure of the life estate, my children, shall be responsible for mortgage payments of principal, property taxes and assessments, and any capital improvements required to keep the property in good condition. My children will also be responsible for any Capital Gains if the property increases in value during the tenure of the life estate.

[135] As with the 2007 clause, the intent of the testator is presumed to be a desired creation of a life estate in favour of Betty with his children as the remaindermen.

[136] I note importantly that in contravention of the ruling in *Gravelle* by Bauman J. finding respecting trusts being impermissible to be drafted by notaries public, this clause clearly implies that one has been created by the reference to my "Trustee".

[137] Leaving that issue aside, however, it is not objectively clear what type of interest this clause creates. Arguably, this clause creates a trust with a trust term. It is not a true life estate, but rather a determinable interest that could collapse before the interest passes. The clause endeavours to dictate who is paying the costs; however, it is more akin to being (as the 2007 clause also appears to be) a trust. The 2009 clause differs from the 2007 clause only in being more detailed.

[138] In *Waters' Law of Trusts in Canada* (4th ed. Waters, Gillen and Smith, Carswell: Toronto 2012), the authors write the definition of trust emerges from principles in equity:

> Another familiar definition, and one that has been cited with judicial approval, is:
>
> > A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him (called trust property) as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries, or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.
> >
> > Approved by Romer L.J. in *Green v. Russell*, [1959] 2 Q.B. 226, [1959] 2 All E.R. 525 (Eng. C.A.) at 226 [Q.B.], by Cohen J. in *Re Marshall's Will Trusts*, [1945] Ch.217, [1945] 1 All E.R. 550 at 219 [Ch.], and approved in Canada in several decisions such as *Tobin Tractor (1957) Ltd. v. Western Surety Co.* (1963), 42 W.W.R. 532, 40 D.L.R. (2d) 231 (Sask. Q.B.) at 542 [W.W.R.]; *Zeidler v. Campbell* (1988), 88 A.R. 321, 29 E.T.R. 113 (Alta. Q.B.), affirmed (1998), 91 A.R. 394, 53 D.L.R. (4th) 350 (Alta. C.A.); *Ford v. Laidlaw Carriers Inc.* (1993), 1 E.T.R. (2d) 117 (Ont. Gen.Div.), varied on other grounds (1994), 12 C.C.P.B. 179 (Ont. C.A.), leave to appeal to S.C.C. refused (1995), [1995] S.C.C.A. No. 34, 191 N.R. 400 (note) (S.C.C.); *Boulos v. Boulos* (1986), 57 Nfld. & P.E.I.R. 181, 24 E.T.R. 56 (Nfld. T.D.); and by both the trial judge and LeDain J. in the Federal Court of Appeal in *Guerin v. R*. (1981), [1982] 2 F.C. 385 (Fed. T.D.), reversed (1982), [1983] 2 F.C. 656, 143 D.L.R. (3d) 416 (Fed. C.A.), reversed [1984] 2 S.C.R. 335, 20 E.T.R. 6 (S.C.C.); *Goreki v. Canada (Attorney General)*, 2005 CarswellOnt. 3683, [2005] O.T.C. 712 (Ont. S.C.J.) at

> para. 56, reversed 2006 CarswellOnt. 1745, 265 D.L.R. (4th) 206 (Ont. C.A.); *Alessandro v. R.*, 2007 CarswellNat. 2019, 2007 CarswellNat 6036, [2007] 5 C.T.C. 2172, 2007 D.T.C. 1373 (T.C.C. [General Procedure]) at para. 62; *General Motors of Canada Ltd. v. R*., 2008 T.C.C. 117, 2008 Carswellnat 3153, 2008 CarswellNat 454 (T.C.C. [General Procedure]), at para. 39, (affirmed 2009 FCA 114, 2009 CarswellNat 880, 2009 CarswellNat 3282 (F.C.A.); *VanDenBussche*, *supra*, note 3, at para. 8.

[139] This is because the three possible conditions do not necessarily lead to the same conclusion. If condition A (Betty's death) were considered in isolation, the clause could create a life estate. If condition C (Betty voluntarily releases the life estate) was the sole condition, then the clause would still create a life estate as a beneficiary has a right to disclaim a testamentary gift: see *British Columbia (Public Guardian and Trustee of) v. Engen (Litigation guardian of)*, 2009 BCSC 24 at para. 18. Condition B (Betty ceases to live there as her permanent residence for a period of more than nine months) is the problem. The Supreme Court of Canada in *Moore v. Royal Trust Co.*, [1956] S.C.R. 880 considered a will which granted the use and enjoyment of a property to two people "as long as either of them shall occupy the same". The Court found that rather than granting a life estate to the parties, the will gave them a license to occupy such property personally so long as one or both occupied it. Such a license may or may not be granted by a clause based on condition B alone. For the purposes of this case however, it is unnecessary to determine whether the above clause actually creates a life estate. It is sufficient to note that that the interests cannot be "distributed immediately".

[140] As the 2009 Clause is drafted, there is no class of beneficiaries because the children are named; and furthermore, even if the Clause referred to a class of children, the problem would lie in the fact that, at the time of drafting, it would be impossible to know if the life estate beneficiary would pass away before or after the youngest of the class reached the age of majority. Accordingly, ss. 18(b)(iii) does not provide for the drafting of this Clause.

[141] It is arguably a determinable interest on the events set out in the clause and not a life estate - which is just that, an estate for the life of the person.

[142] Furthermore, following the decision in *Gravelle*, it is common ground that notaries public are not permitted to draft trusts. Even if a life estate clause does not create an express trust, creation and implementation of the life estate contemplated in the 2009 Clause creates and implements a trust. Even were the clause not to "my Trustee", similar issues arise in cases in a clause that omitted that, including the need to maintain a balance between the trust and the beneficiaries and, in life estates, a balance between the owner in fee simple and the life estate. This balance as argued by the Law Society, which I accept, is arguably more challenging to maintain in the instance of a life estate if there is no third party trustee to maintain this balance. The 2009 clause clearly recognizes certain matters must be taken into account such as the cost and the responsibility for repairs, insurance, taxes, mortgage principal, mortgage interest, and other expenses. The funding of these expenses is often contentious, and it is the supervision of these requirements that would typically motivate the creation of a trust, which notaries public may not prepare: see, for example, discussion of "quasi-fiduciary" obligations owed by life tenant in *Chupryk v. Haykowski* (1980), 110 D.L.R. (3d) 108 (Man.C.A.), at pp. 113-114.

[143] The argument in favour of the 2009 Clause fitting the meaning of "distributed immediately" is that the clause is explicit in distributing responsibilities to both the life tenant or licensee and the holders of the remainder of the property. The will directs the "Executor and **Trustee**" (emphasis added) thereby implying the creation of a trust exists somewhere in the will. Nonetheless, apart from that, as the clause notes, the holders of the remainder interest are responsible for mortgage payments of principal, property taxes, assessments, capital improvements and capital gains.

[144] Even apart from the Trust issue respecting this clause, the flaw in the intervenor's proposition is that it confuses immediate responsibilities with immediate distribution. The life tenant or possessor of the license is entitled to the use and enjoyment of the property until one of the three conditions stated occurs. Those with the remainder interest are not. Despite the responsibilities attached to the remainder interest, the clause does not grant them immediate possession of the land.

Possession is conditional on one of the three conditions occurring. There can accordingly remain something that fails to be distributed. All rights of possession remain with the life tenant until her interest terminates. Consequently, this clause fails to draw a will in which the testator's estate is distributed immediately on death. It is not permitted by s. 18(b)(i).

[145] The clause does not provide for a situation in which a beneficiary predeceases the testator. Therefore, s. 18(b)(ii) does not apply.

[146] Subsection 18(b)(iii) applies to the limited situation in which a testator or testatrix leaves assets to beneficiaries as members of a class.

[147] The 2009 Clause does not provide assets to members of a class. Subsection 18(b)(iii) is thus inapplicable.

3. Conclusions regarding the 2007 and 2009 Clauses

[148] I conclude, based on the above discussion, that ss. 18(b) and (f) exhaustively define the situations in which notaries public may draft wills which create a life estate. By 18(b)(i) the assets must be distributed immediately, meaning as soon as practicable given the legislative duties imposed on executors in respect of estates. I find that purposive analysis must be applied in construing this provision.

[149] In conclusion, the respondent would be in breach of s. 15 of the *Legal Profession Act* if she drafts a will which employs either the 2007 Clause or 2009 Clause.

D. ISSUE 4 - Whether the respondent engaged in the practice of law through her conduct on behalf of Ms. Kamper following Mr. Blom's death

[150] Ms. MacDonald maintains that throughout her dealings with counsel and the beneficiaries and her client Ms. Kamper that she was only doing so as a mediator, a role specifically exempted from the practice of law by notaries public.

[151] I find, however, that her actions were not that of a mediator and were rather than of an advocate. Ms. MacDonald in one of the letters even referred to Ms. Kamper as her "client".

[152] There is no dispute that she wrote the letters to counsel in respect of the correspondence they had addressed to Ms. Kamper. It is difficult to see the letters as anything other than adversarial in a manner which best puts forward her client's interests.

[153] Ms. MacDonald was instrumental in seeking the release to ensure that her client, Ms. Kamper, would not be held responsible in respect of personal items of the Blom estate.

[154] Even were the above actions not to be considered acting in probate matters, as she argued that her actions came long after the grant of probate had occurred, she nonetheless amended the release and witnessed it thereby acting in a matter connected with probate.

[155] In *Gravelle*, Bauman J. (as he then was) expressly found that acting in matters connected to probate was part of the practice of law and not exempted by the *Notaries Act*.

[156] I find that Ms. MacDonald was not acting as a mediator on the basis of her actions including the meeting with her client and the beneficiaries of the Blom Will and her amending the release. I find that the respondent was engaging in the practice of law in violation of the *Legal Profession Act*. The fact that probate was already granted is not determinative. Her acts would still be captured if related to the probate on the estate of a deceased person.

VI. SHOULD THE PETITIONER BE GRANTED AN INJUNCTION PROHIBITING THE DRAFTING OF ANY WILL THAT IS NOT PERMITTED BY THE *NOTARIES ACT*?

[157] The Law Society seeks an injunction in the terms noted above against Ms. MacDonald precluding her from engaging in the practice of law. The respondent

submits that an undertaking to the Court would be a preferable solution and urges that the Court can accept an undertaking.

[158] I find that the respondent's conduct with regard to her earlier undertaking demonstrates that an undertaking is not an appropriate means to resolve the issues before the Court.

[159] Section 85 of the *Legal Profession Act* stipulates:

> 85 (1) A person commits an offence if the person
>
> (a) contravenes section 15...

[160] That section also provides the mechanism by which the Law Society can seek an injunction against a person who contravenes s. 15. Section 85 states:

> (5) The society may apply to the Supreme Court for an injunction restraining a person from contravening this Act or the rules.
>
> (6) The court may grant an injunction sought under subsection (5) if satisfied that there is reason to believe that there has been or will be a contravention of this Act or the rules.

[161] The test for injunctive relief is aptly summarized by Madam Justice Dardi in *Law Society of British Columbia v. Targosz*, 2010 BCSC 969 at para. 41:

> [41] The Law Society need only establish that there is "reason to believe" that there has been or will be a contravention of the *Legal Profession Act*. The court must have reasonable grounds for such a belief. This must be assessed objectively and must be supported by the evidence. It requires more than mere suspicion but less than proof on a balance of probabilities: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114.

[162] In the present case, there is no doubt that there has been a contravention of the *Legal Profession Act*; Ms. MacDonald impermissibly created a trust and a life estate, provided legal advice, and amended a probate document.

[163] Additionally, I find there is a reasonable belief based on the facts deposed to in the affidavits that there has been or will be a contravention of the *Legal Profession Act* found in the materials if an injunction is not granted.

[164] It is clear that "practising law" includes matters relating to probate and the fact that the probate had been granted prior to her involvement following Mr. Blom's death is of no consequence. There is no mediator exception enabling her to draw, revise or settle a document relating to a probate or letters of administration or the estate of a deceased person.

VII. CONCLUSION

[165] In all of the circumstances, I find that the respondent engaged in the practise of law and is in violation of the *Legal Profession Act*. I grant the injunction on the following terms:

> The Respondent, Gail Joan MacDonald, until such time as she becomes a member in good standing of The Law Society of British Columbia, be prohibited and enjoined from:
>
> (a) Drawing, revising or settling a will, deed or settlement, trust deed, power of attorney or a document relating to any probate or letters of administration or the estate of a deceased person;
>
> (b) Giving legal advice relating to a will, or a document relating to any probate or letters of administration or the estate of a deceased person;
>
> (c) Offering to hold herself out in any way as being entitled or qualified to provide to a person the legal services set out at (a) and (b) above;
>
> for or in the expectation of a fee, gain or reward direct or indirect, from the person for whom the acts are performed, provided that nothing herein will prevent the Respondent from providing services as permitted by the Notaries Act while she is a member in good standing of the Society of Notaries Public of British Columbia.

[166] If counsel are unable to agree, they may contact the Registry within 60 days of this ruling to arrange to speak to costs.

"Maisonville J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Law Society of British Columbia v. MacDonald,* 2013 BCSC 1204

Date: 20130919
Docket: S092624
Registry: Vancouver

Between:

The Law Society of British Columbia

Petitioner

And

Gail Joan MacDonald

Respondent

And

The Society of Notaries Public of British Columbia

Intervenor

Before: The Honourable Mr. Justice Burnyeat

Corrigendum to Reasons for Judgment

Counsel for the Petitioner:	E.B. Lyall, M.J. Kleisinger
Counsel for Respondent:	D. Sands
Counsel for the Intervenor:	A.A. Hobkirk
Place and Date of Hearing:	Vancouver, B.C. December 12 and 13, 2012 February 12 and May 21, 2013
Place and Date of Judgment:	Vancouver, B.C. July 8, 2013
Place and Date of Corrigendum:	Vancouver, B.C. September 19, 2013

[167] In paragraph 165 of my Reasons for Judgment released July 8, 2013, (2013 BCSC 1204), the indented text is removed and replaced with the following:

> "The Respondent, Gail Joan MacDonald, until such time as she becomes a member in good standing of The Law Society of British Columbia, be prohibited and enjoined from:
>
> (a) Drawing, revising or settling a will, deed or settlement, trust deed, power of attorney or a document relating to any probate or letters of administration or the estate of a deceased person;
>
> (b) Giving legal advice relating to a will, or a document relating to any probate or letters of administration or the estate of a deceased person;
>
> (c) Offering to hold herself out in any way as being entitled or qualified to provide to a person the legal services set out at (a) and (b) above;
>
> for or in the expectation of a fee, gain or reward direct or indirect, from the person for whom the acts are performed, provided that nothing herein will prevent the Respondent from providing services as permitted by the Notaries Act while she is a member in good standing of the Society of Notaries Public of British Columbia."

"Maisonville J."
Maisonville J.