

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20180517
Docket: E172437
Registry: Victoria

Between:

C.F.M.

Claimant

And

**G. L. M., 0262930 BC Ltd., Seawind II Developments Ltd., and Gem Theatre
Limited**

Respondents

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the claimant:

M.S. Jakeman

Counsel for the respondents:

R.L. Neary

Place and Dates of Trial:

Victoria, B.C.
April 25 & 26, 2018

Place and Date of Judgment:

Victoria, B.C.
May 17, 2018

SUMMARY: Claim for property division under the Family Law Act. The claimant and respondent began dating in 2011 and the claimant moved into the respondent's house in 2016. The relationship ended abruptly and permanently in 2017. The claimant argued the parties were in an exclusive, common-law relationship for the entire six-year period, while the respondent argued the relationship was an on-and-off dating relationship.

HELD: Claim dismissed.

Prior to the claimant moving into the respondent's house, they maintained and lived in separate residences. The claimant was a frequent overnight guest at the respondent's house, but they did not live together, and there were regular intervals where the parties separated and dated other people. The claimant owned her own condominium and paid all expenses on it until after the respondent proposed and she moved into his home in 2016. The parties did not have joint accounts and filed their taxes separately and, while they often travelled together, the respondent also spent long periods in the U.S. without the claimant. It was not until the final year of the relationship that the claimant changed her mailing address and filed her taxes as common-law, and the parties opened a joint credit card account. There was believable evidence from the respondent's family and friends that the claimant did not live in the respondent's home until the final year, and from a woman whom the respondent dated exclusively during a lengthy separation in 2015. The parties did not live in a marriage-like relationship for at least two years.

Introduction

[1] The sole issue for determination on this summary trial is whether the claimant is a “spouse” as defined in s. 3 of the *Family Law Act*, S.B.C. 2011, c. 25 (“FLA”). The claimant must establish that she lived with the respondent in a marriage-like relationship for a continuous period of two years.

[2] The parties jointly submitted that the matter is suitable for summary determination. I questioned this on a couple of occasions during the hearing when the claimant alleged that she had not been able to access supporting documentary evidence in the hands of the respondent. The respondent steadfastly and repeatedly denied refusing any disclosure requests and his denials were not rebutted. The claimant declined my invitation to be more specific, to seek a remedy, or to argue that it would be unjust to continue.

[3] In the end, I have been able to find the relevant facts on the evidence provided to me. In my view it is just, expedient, and proportionate to dispose of the case in the manner agreed by counsel.

Background

[4] The parties are both life-long residents of the Saanich Peninsula. The claimant is 50 years old and the respondent is 72. The claimant alleges that she first met the respondent at a car show when she was 9.

[5] The parties began dating in late 2011. At that time the respondent was a retired excavation contractor and businessman. He owns or has an interest in the corporate respondents which the claimant considers to be family property. The claimant was employed full-time as a bank teller but took retirement after the respondent proposed marriage to her on December 23, 2015.

[6] The claimant moved into the respondent’s residence on Lands End Road in North Saanich in April or May of 2016. The parties’ relationship ended abruptly and permanently on April 4, 2017.

[7] The claimant alleges that the parties were involved in an exclusive common law relationship and cohabited continuously from 2011 until they parted company in 2017. The respondent, by contrast, characterised the parties' relationship as an "on-again/off-again" dating relationship in which they separated frequently, had intimate relationships with other partners throughout, did not live together prior to the marriage proposal, and did not do so for a continuous period of two years thereafter.

Applicable Legal Principles

[8] A "spouse" under the *FLA* can claim support and a shared interest in family property. No one factor governs whether a relationship is "marriage-like": *Austin v. Goerz*, 2007 BCCA 586 at para. 58. Every case must be evaluated individually considering all factors supporting or negating spousal status.

[9] In *Dey v. Blackett*, 2018 BCSC 244 at paras. 192-196, Schultes J. provided the following overview of the principles to be borne in mind in determining the question at bar:

[192] The determination of whether a relationship was marriage-like requires a "holistic approach", in which all of the relevant factors are considered and weighed, but none of them are treated as being determinative of the question: *Austin v. Goerz*, 2007 BCCA 586 at paras. 58 and 62.

[193] While a "checklist" approach to this question is not appropriate, it can still be helpful during the analysis to consider the presence or absence of commonly-accepted "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship": *Weber v. Leclerc*, 2015 BCCA 492 at para. 25. A frequently-cited authority has identified these indicators as including "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple": *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59, citing *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 at para. 16 (Ont. Dist. Ct.).

[194] While financial dependence was at one time considered an essential aspect of a marriage-like relationship, this is no longer so: *Austin* at paras. 55-56.

[195] The intentions of the parties, particularly whether they saw the relationship as being "of a lengthy, indeterminate duration", will be important to the determination of whether the relationship was marriage-like. However, evidence of their intentions must be tested against objective evidence of their lifestyle and interactions, which will provide direct guidance on the nature of the relationship: *Weber*, at paras. 23, 24. In other words, "subjective or conscious intentions may be overtaken by conduct such that whilst a person

living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such": *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.) leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 238, at para. 53.

[196] In weighing the various factors, it is also an error to give undue emphasis to the future plans of a couple, in contrast to the current realities of their respective situations: *Takacs* at para. 58.

[10] A party to a relationship that lacks such characteristics is not entitled to pursue *FLA* remedies. A person is a "spouse" or not. There is no middle ground: *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.) at para. 16. People may live together continuously and interdependently and yet fail to establish that they developed "the kind of psychological and emotional union" associated with marriage: *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.) at para. 55, leave to appeal ref'd, [1998] S.C.C.A. No. 238.

[11] The "marriage-like" commitment must be combined with sufficient evidence of two years of continuous cohabitation. The *FLA* has no application to more transitory connections. There is, of course, substantial unpredictability in the progress of nascent relationships and this is why the legislature fixed a two year standard before imposing legal matrimonial obligations on common law couples without children: *Parke v. Veale*, 2015 BCSC 2554 at para. 79.

Discussion

[12] Having considered and evaluated all of the evidence, I find that prior to April or May of 2016 the parties maintained and lived in separate residences. The respondent lived in a house at 409 Lands End Road in North Saanich and the claimant in condominiums on Fifth Street in the Town of Sidney. The claimant sold her first condominium in 2015 and purchased a second one, also on Fifth Street, in the same year. The claimant was a regular overnight guest at the respondent's home between 2011 and 2016, but she did not live with him on anything like a continuous basis until the spring of the latter year. There were regular, perhaps annual, intervals where the parties separated and saw other people.

[13] The plaintiff owned her condominiums in Sidney. They were registered solely in her name. She paid all the expenses related to their operation and maintenance until after the respondent proposed marriage. After his proposal, the respondent assisted her in paying the mortgage on the second condominium. The condominium address was on her driver's licence. This is where she kept her clothes and furniture and received her mail. Neither party was ever listed as a beneficiary in the other's will or insurance policies. The claimant's understanding was that she would be "on her own" if the respondent unexpectedly passed away. They had no joint banking or credit accounts. They filed their taxes separately with the claimant declaring her status as "divorced" rather than "common-law".

[14] The parties went on frequent trips together, once for as long as six months, but during most of their dating lives together the claimant was working full-time at the bank while the respondent travelled on his own in the U.S. for approximately half of every year. The claimant joined him with some regularity as her work schedule permitted for periods ranging from a few days to a couple of weeks. I was told nothing about how these trips were funded. When the respondent was away and the claimant was in Sidney working at the bank, she did not stay at the Lands End Road property except, possibly, for one occasion in 2014.

[15] The claimant maintained in her affidavit evidence that she and the respondent made a commitment to one another in 2011 to the exclusion of all others. She deposed that she only became aware of the respondent's frequent infidelities after they separated on April 4, 2017. Her sworn testimony on this subject during examination for discovery on October 2, 2017, however, was directly contradictory. There, she acknowledged that the parties broke up frequently, that the respondent had regular affairs with other women, and that she herself had sexual dalliances with other men in each of the years 2012, 2013, 2014, and 2015. I find as a fact that the parties separated repeatedly during their relationship and that these estrangements sometimes lasted a number of months.

[16] This evidence was corroborated by a witness named L.E., who said that she was involved in what she mistakenly thought was a committed monogamous

relationship with the respondent from the beginning of August to the end of November, 2015. It turned out that the respondent was carrying on with other women – including, in all likelihood, the claimant – during this same period, but L.E. lived with the respondent fairly consistently throughout, in his residence and elsewhere, and she said that as far as she could tell the claimant was nowhere on the scene.

[17] Also in marked contrast to her recent affidavit evidence, the claimant testified on examination for discovery that she was aware that the respondent had regular sexual relationships with other women while he was away on holidays without her. She testified that she would confront him with her suspicions after she had been drinking, and when the respondent confessed his infidelities it was followed invariably by a breakdown in their relationship and a separation of some length. In the claimant's words the respondent would "kick me to the curb" and indulge his sexual appetites elsewhere during these times.

[18] The respondent's examination for discovery was conducted on the same day as the claimant's, and aspects of the claimant's theory concerning the nature of their relationship were put to him, including the suggestion, with which the respondent agreed, that the couple split up frequently, even annually. Counsel would not have made such a suggestion in the absence of instructions to this effect from her client, and yet, months later, with a second lawyer running the brief, the claimant deposed that she and the respondent lived together continuously from 2011 until 2017 without any separations or awareness of infidelities. This claim is manifestly untrue and I reject it.

[19] It is not disputed that after the respondent's December 23, 2015, engagement proposal the parties entered a "marriage-like" status that lasted until the final breakdown of their relationship on April 4, 2017. The claimant moved into the respondent's residence full-time in the spring of 2016. This was unprecedented even though, as I have said, the claimant had stayed there on many past occasions. She also changed her mailing address and driver's licence and for the first time filed a tax return declaring her status as "common-law" instead of "divorced". They opened a

joint credit card account. There was also some evidence, though not detailed, that the parties became involved together in the redevelopment of a multi-unit residential building on Henry Avenue in Sidney.

[20] There is no doubt that the respondent was contemplating a long-term commitment to the claimant. After his marriage proposal he renovated his bedroom so that there was space for her to store her things. He paid off her condominium mortgage. He gave her a monthly allowance of \$1,000 and paid a large sum of money to buy out her pension at the bank. His intention, though obviously he changed his mind over the ensuing months, was that the claimant should join him in retirement and share his life and travels. I reject as self-serving fabrication his discovery evidence that he never intended to marry the claimant and only proposed so that other men would stay away from her.

[21] I was presented with evidence, by the way, to the effect that the parties were “swingers” and sometimes engaged in group sexual activity with people who responded to their solicitations posted on the internet. No part of my decision is based on this shared lifestyle. A solid, devoted, long-term couple might well agree to have an “open” relationship of this sort while remaining firmly within a marriage or a psychological and emotional union akin to marriage.

[22] In my view the parties did not have such a union whether or not they were “swingers”. To the contrary, theirs was a tumultuous liaison frequently interrupted by sometimes lengthy hiatuses brought on by illicit infidelities and betrayals that were divisive and hurtful. It seems to have been a “dysfunctional” rather than “open” relationship in which alcohol abuse on both sides appears to have been a salient characteristic along with promiscuity and the absence of exclusivity.

[23] I have no reason to disbelieve the evidence of the respondent’s family and friends that the claimant did not live with him at Lands End Road until the spring of 2016. The claimant herself agreed that she and the respondent were separated before the death of the respondent’s father in July 2015, and I accept L.E.’s evidence confirming that she, and not the claimant, was the leading female in the

respondent's life from early August to the end of November of that year. This lengthy separation during which the respondent was principally and demonstrably occupied with another woman was fully within the two year period before the parties split up for good on April 4, 2017. I am satisfied on all of the evidence, furthermore, including that of the claimant on examination for discovery, that hiatuses of a like quality were more or less an annual occurrence in her relationship with the respondent.

[24] As previously stated the claimant's recent affidavit evidence that the parties lived together at Lands End Road continuously from the fall of 2011 until April 2017 is out of synch with the preponderance of credible evidence to the contrary, including the depositions of family and friends, and the claimant's own discovery testimony about the parties' frequent break-ups and separations, combined with the established fact that she did not live with the respondent or at his residence during roughly half of every year while the respondent was out of the country. I will add for the sake of completeness that, in the face of this body of evidence, the claimant's father's deposition that the Lands End Road property was the claimant's main residence after 2012 comes across as misinformed and clearly wrong.

Conclusion

[25] On the totality of the evidence I am not persuaded that the parties lived together in a marriage-like relationship at any time prior to December 23, 2015, and it is common ground that they did not live together in such a state for a continuous period of at least two years after that date. I hereby order that the claimant does not qualify as a "spouse" within the meaning of that term in s. 3 of the *FLA*.

[26] The respondent will have his ordinary costs.

"Baird J."