

CANADA / JUDGMENT

Austin v. Goerz

2007 BCCA 586

COURT

British Columbia Court of Appeal

DECIDED

29 November 2007

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2007 BCCA 586 Austin v. Goerz

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Austin v. Goerz,

2007 BCCA 586

Date: 20071129

Docket: CA034249

Between:

Linda Pauline Mary Austin

Appellant

(Plaintiff)

And

Catherine Anne Goerz

Respondent

(Defendant)

Before:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Frankel

A. Marsden

Counsel for the Appellant

G.S.K. Lee

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

4 September 2007

Place and Date of Judgment:

Vancouver, British Columbia

29 November 2007

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Donald

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Overview

- [1] James Austin died intestate in 2006. He leaves behind the appellant, Linda Pauline Mary Austin, to whom he was married for 30 years. They separated six years before his death, but never divorced. He also leaves behind the respondent, Catherine Anne Goerz, with whom he lived for most of those six years.
- [2] The issue on this appeal is whether Madam Justice Ballance, of the Supreme Court of British Columbia, was correct in declaring Ms. Goerz a "common law spouse" under the Estate Administration Act, R.S.B.C. 1996, c. 122. More specifically, it involves the question of whether Ms. Goerz and Mr. Austin were in a "marriage-like relationship" as these words are used in the Act.
- [3] Section 1 of the Act contains the following definitions:
- "common law spouse" means either
- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or

- (b) a person who has lived and cohabited with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person's death;

"spouse" includes a common law spouse.

- [4] The chambers judge held that Ms. Goerz met the requirements of clause (b) of the definition of "common law spouse." Mrs. Austin challenges this decision on three bases. First, she submits that a marriage-like relationship cannot exist unless both parties have the legal capacity to marry. Mr. Austin clearly lacked capacity as he was still legally married. Next, Mrs. Austin says that a marriage-like relationship contemplates financial dependence of one party on the other, and here neither Ms. Goerz nor Mr. Austin was so dependent. Finally, she argues that the chambers judge erred in finding that Mr. Austin and Ms. Goerz intended to enter into a "marriage-like relationship."
- [5] I do not accept any of Mrs. Austin's contentions and, for the reasons that follow, would dismiss this appeal.

Factual Background

- [6] Mr. and Mrs. Austin married in 1970. They separated in 2000. That same year, Mr. Austin and Ms. Goerz began living together. They continued to do so until Mr. Austin died in 2006. He left no will and no children.
- [7] In 2003, Mrs. Austin commenced proceedings against Mr. Austin seeking a divorce, division of assets, and related relief. Her grounds for divorce were that they were living separate and apart and that there had been a breakdown of the marriage.
- [8] In 2004, Mrs. Austin was granted an order restraining Mr. Austin from disposing of, or encumbering, family assets. In 2005, she obtained a declaration that there was no possibility of reconciliation between them.
- [9] Mr. Austin and Ms. Goerz initially lived in a house she owned in Victoria. They then moved to a house in Comox, which she purchased after selling the one in Victoria.
- [10] Mr. Austin and Ms. Goerz had a committed relationship and planned to marry after his divorce. During their six years together they lived and presented themselves to their family, their friends, and the public, as if they were married. They vacationed and celebrated significant events such as birthdays and anniversaries together. In her pleadings and affidavits, Mrs. Austin describes them as living as "man and wife."
- [11] In 2004, Mr. Austin was diagnosed with cancer. Ms. Goerz was his primary caregiver. She nursed him through his illness and accompanied him to medical appointments and chemotherapy sessions. She was with him when he died some 16 months later.

- [12] Ms. Goerz and Mr. Austin maintained separate bank accounts. He did not make any financial contribution to either of her houses; she paid the mortgage, utilities, property taxes, and related expenses. What he did contribute was \$200.00 per month towards the cost of groceries.
- [13] Following Mr. Austin's death, Mrs. Austin commenced an action in the Supreme Court of British Columbia seeking various forms of relief, including a declaration that Ms. Goerz "is not a spouse of the Deceased either at common-law or at all."
- [14] The issue of Ms. Goerz's status was brought forward for determination under the summary trial procedure set out in Rule 18A of the Rules of Court, B.C. Reg. 221/90. It was heard on the basis of the affidavits of Mrs. Austin and Ms. Goerz.

Chamber's Judge's Decision

- [15] Mrs. Austin advanced two main arguments before the chambers judge as to why Ms. Goerz was not a common-law spouse pursuant to clause (b) of the definition. The first was that two persons cannot enter into a common-law relationship unless both have the legal capacity to marry. The second was that Mr. Austin's participation lacked the financial maintenance and contribution that is a hallmark of a "marriage-like relationship."
- [16] In holding that Mr. Austin's lack of capacity to marry did not preclude him and Ms. Goerz from becoming common-law spouses, the chambers judge said:
- [10] That submission is plainly wrong. It is wrong in the face of the clear statutory language, and it is wrong in the context of the history of that provision of the Estate Administration Act, including the amendments that were made to it to encompass same gender couples, effective November 2000.
- [17] With respect to lack of need for financial support she stated:
- [15] The authorities no longer support the principle that the absence of financial maintenance or dependence is conclusive that a relationship does not qualify as a common-law relationship under section 1(b). I suggest that such a principle would be untenable in the world of modern marriages and relationships. There are, as we know, not a small number of marriages today where lawfully married spouses have retained completely independent financial arrangements throughout the entire course of their marriage. The term "marriage-like" must be given a broad interpretation to reflect social norms: it incorporates relationships which have a component of financial intertwining or dependence and those that do not. I reject utterly the contention that the term "marriage-like" was meant to continue to impose a mandatory component of maintenance or financial contribution by the deceased in the definition of "common-law spouse" under section 1(b), as urged by the plaintiff's counsel.

- [16] Indeed, given the looming family law proceedings which had not been resolved, I would think that the separation of the finances of Ms. Goerz and Mr. Austin was a prudent course of action to take.
- [18] With respect to how Ms. Goerz and Mr. Austin viewed their relationship, the chambers judge said:
- [17] I find on the evidence that the mutual intentions of the deceased and Ms. Goerz were that they were in a committed, marriage-like relationship for all purposes up until James Austin's death. To the extent that resorting to evidence of objective factors need be made, and I think they need not, it is overwhelmingly supportive of the intention, despite the lack of sharing of expenses and commingling of assets.

Analysis

Introduction

- [19] The modern approach to statutory interpretation is well known, namely, that "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": Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, cited most recently in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 at para. 37.
- [20] In addition, s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, directs that, "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."
- [21] What is specifically in issue in this appeal is a definition provision in the Estate Administration Act. However, as the expression "marriage-like relationship" appears in numerous other British Columbia statutes dealing with the rights and obligations of unmarried couples, I do not think the present exercise in statutory interpretation can be undertaken without regard to them. In most instances, including the Estate Administration Act, the appearance of the expression "marriage-like relationship" was brought about by the passage of two pieces of legislation, which had the effect of standardizing the definitions of "spouse" and "common law spouse." These are the Definition of Spouse Amendment Act, 1999, S.B.C. 1999, c. 29, and the Definition of Spouse Amendment Act, 2000, S.B.C. 2000, c. 24. Both were proclaimed in force at the same time, partly on July 28, 2000, and partly on November 1, 2000: see B.C. Reg. 280/2000.

Legislative Evolution

[22] An examination of the evolution of a provision can shed light on legislative purpose and intent: *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 at para. 33; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846, 2006 SCC 58 at para. 46; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62 at para. 17. Accordingly, I will review the changes leading to the present version of the Estate Administration Act and several other statutes containing the expression "marriage-like relationship."

[23] The provisions of the Estate Administration Act relevant to this appeal can be traced back to the Destitute Orphans Act, S.B.C. 1877, c. 28. This statute provided that if a man died intestate, then a judge of the Supreme Court of British Columbia could order the payment of money out of his estate for the benefit of any surviving concubine or illegitimate children. No payment could exceed the greater of \$500.00 or ten percent of the net value of the estate. Section 1 read, in part:

Where any man shall die intestate in the Province of British Columbia, leaving him surviving a concubine who may at the time of his death be actually maintained by him or under his protection, or leaving him surviving any illegitimate child or children under the age of 16 years, reputed to be by him begotten on any woman, and at the time of his decease maintained by him or under his protection, or for the support, maintenance, or advancement of which child he shall have made any provision within the twelve months next before his decease

[24] The Destitute Orphans Act was incorporated into the Intestates Estate Act, R.S.B.C. 1897, c. 106. Although the name of the statute changed over time the provisions were carried forward and eventually became Part V of the Administration Act, R.S.B.C. 1960, c. 3.

[25] Part V of the 1960 Administration Act was repealed by An Act to Amend the Administration Act, S.B.C. 1972, c. 3. The expression "concubine" was replaced by "common law spouse" which was defined in s. 91, to mean:

[E]ither a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than two years immediately preceding his death.

[26] The definition of "common law spouse" immediately prior to the one at issue on this appeal is found in the Estate Administration Act, R.S.B.C. 1996, c. 122. For ease of reference and comparison I will set it out next to the current version:

1996 Version

Current Version

"common law spouse" means either

- (a) a person who is united to another by a marriage that, although not a legal marriage, is valid by common law, or
- (b) a person who has
 - (i) lived and cohabited with another person as a spouse, and
 - (ii) been maintained by that other person for a period of not less than 2 years immediately before the other person's death.

"common law spouse" means either

- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
- (b) a person who has lived and cohabited with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person's death.

[Emphasis added]

[27] The Legislature first used the expression "marriage like relationship" when it enacted s. 1 of the Medical and Health Care Services Act, S.B.C. 1992, c. 76 [now the Medicare Protection Act, R.S.B.C. 1996, c. 286]:

"spouse" with respect to another person means a resident who is married to or living in a marriage like relationship with the other person and, for the purposes of this definition, the marriage or marriage like relationship may be between persons of the same gender.

[28] Prior to the 2000 amendments, "marriage like relationship" had been used in defining "spouse" in several statutes including the Representation Agreement Act, S.B.C. 1993, c. 67 [now R.S.B.C. 1996, c. 405], the Health Care (Consent) and Care Facility (Admission) Act, S.B.C. 1993, c. 48 [now R.S.B.C. 1996, c. 181], and the Family Maintenance Enforcement Amendment Act, 1994, S.B.C. 1994, c. 36, amending the definition of "spouse" in the Family Maintenance Enforcement Act, S.B.C. 1988, c. 3 [now R.S.B.C. 1996, c. 127]. The Family Relations Amendment Act, 1997, S.B.C. 1997, c. 20, amended the definition of "spouse" in the Family Relations Act, R.S.B.C. 1996, c. 128, by replacing the words "a man or woman not married to each other, who lived together as husband and wife" with "marriage-like relationship." This later expression was also used in defining "immediate family member" in the Criminal Injury Compensation Amendment Act, 1995, S.B.C. 1995, c. 36. By virtue of the Definition of Spouse Amendment Act, 2000, the present version of the Criminal Injury Compensation Act, R.S.B.C. 1996, c. 85, defines "immediate family member" as including a "spouse", and defines "spouse" as including "a person who is living and cohabiting in a marriage-like relationship". By virtue of the 2000 amendments, the definitions of "spouse" or "common law spouse" were either changed in, or added to, many other statutes so as to embrace persons living in "marriage-like relationships." In some of these other statutes there is a requirement that the couple have been together for a minimum specified period,

while in others there is no time requirement.

[29] To appreciate how the Legislature changed the definitions it is helpful to examine a representative sample of the statutes affected by the 2000 amendments:

1996 Version

Current Version

Family Compensation Act, R.S.B.C. 1996, c. 126, s. 1

"spouse" means

- (a) a husband or wife of the deceased, or
- (b) a person who lived with the deceased as the husband or wife of the deceased for a period of not less than 2 years ending no earlier than one year before the death of the deceased.

Small Business Venture Capital Act, R.S.B.C. 1996, c. 429, s.1(1)

"spouse" means a person who is

- (a) married to another person, or
- (b) living with another person as husband and wife and has lived as such for a continuous period of 6 months.

Forest Act, R.S.B.C. 1996, c. 157, s. 53(1)

"spouse" means each of 2 persons who

- (a) are married to each other, or
- (b) are living together as if married, having done so continuously throughout the immediately preceding 2 years.

Wills Variation Act, R.S.B.C. 1996, c. 490, s. 1

No definition of "spouse"

"spouse" means a person who

- (a) was married to the deceased at the time of death, or
- (b) lived and cohabited with the deceased in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years ending no earlier than one year before the death.

"spouse" means a person who

- (a) is married to another person, or

- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a continuous period of 6 months.

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has been living and cohabiting in that relationship for the immediately preceding 2 years.

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

[Emphasis added]

- [30] With this background in mind, I now turn to the task of interpreting the expression "marriage-like relationship."

Consistency in Interpretation

- [31] As discussed by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002), there is a presumption that when a legislature uses the same words in several statutes it intends them to have the same meaning each time. This is referred to as "The Presumption of Consistent Expression": at 162 - 167.
- [32] Here I do not think it can be denied that the Legislature intended the expression "marriage-like relationship" to have the same meaning in all cases where it is used to describe the status of two persons who have chosen to live together in a certain way. This is obvious from the fact that, except for the few statutes in which the expression already appeared, it was introduced into more than 30 enactments at essentially the same time. It presently appears in 37. There is nothing to indicate that the adoption of this contemporary descriptor was, in and of itself, intended to alter the substantive meaning of terminology which it replaced, e.g., living as husband and wife, living together as married, living as spouses.
- [33] Although, as noted by Rothstein J. in *A.Y.S.A. Amateur Youth Soccer Association v. Canada* (Revenue Agency), 2007 SCC 42, 2007 D.T.C. 5527 at para. 12, legislative debates "may or may not reflect the parliamentary intention to be deduced from the words used in the legislation", the statements made by the respective Attorneys General of British Columbia in introducing the amending acts are consistent with what is evident on the face of them.

[34] The Honourable Ujjal Dosanjh, Q.C., in introducing Bill 100 (i.e., the 1999 Act), stated:

The Definition of Spouse Amendment Act, 1999, contains amendments that will modernize selected provincial legislation by expanding the definition of spouse to include persons in a marriage-like relationship, including marriage-like relationships between persons of the same sex. The Cemetery and Funeral Services Act, the Coroners Act, the Estate Administration Act, the Family Compensation Act and the Wills Variation Act are amended to include in the definition of "spouse" a relationship between a man or a woman living in a marriage-like relationship with either a member of the opposite sex or the same sex for a period of not less than two years.

(British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), Vol. 16, No. 21 (8 July 1999) at 14228)

[35] Almost a year later, the Honourable Andrew J. Petter, Q.C., said this in introducing Bill 21 (i.e., the 2000 Act):

I'm pleased to introduce the Definition of Spouse Amendment Act, 2000. This bill amends a number of British Columbia Statutes to extend the rights and obligations of common-law couples to same-sex couples. In particular, the bill amends the definition of spouse in those statutes that already apply to common-law relationships, so that same-sex relationships are included, and builds on earlier legislative enactments that were brought forward to achieve the same objective.

...

Finally, the bill amends the wording of statutes that already refer to all three types of spouse to ensure that a consistent definition is used throughout British Columbia legislation.

(British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), Vol. 20, No. 9 (12 June 2000) at 1642)

[36] In any event, even absent omnibus amending legislation, in construing the expression "marriage-like relationship" in the Estate Administration Act, I would have had regard to statutes using identical or similar wording to define relationships corresponding to marriage, with a view to arriving at a harmonious interpretation: see *McEvoy v. Ford Motor Co.* (1988), 31 E.T.R. 55 (B.C.S.C.) at 59, 60, affirmed (1992), 63 B.C.L.R. (2d) 397 (C.A.), wherein Gibbs J., as he then was, in interpreting the definition of "spouse" in the Family Compensation Act, R.S.B.C. 1979, c. 120, considered the definitions in the Estate Administration Act, R.S.B.C., 1979, c. 114, and Family Relations Act, R.S.B.C. 1979, c. 121.

Is Capacity to Marry a Requirement?

- [37] Mrs. Austin submits that because she and Mr. Austin were legally married he could not enter into a "marriage-like relationship" with Ms. Goerz. She points to the fact that the definition of "common law marriage" deals with two situations: (a) a "marriage . . . valid at common law", and (b) a "marriage-like relationship." Mrs. Austin's position is that since capacity to marry is required for a common-law marriage it is equally required for a "marriage-like relationship." She says it would be contradictory to conclude otherwise.
- [38] The requirements of a common-law marriage are discussed in detail in *Keddie v. Currie* (1991), 60 B.C.L.R. (2d) 1 (C.A.). As Mr. Justice Cumming noted at the outset of his analysis in that case, the terms "common law marriage", "common law relationship", and "common law union" are sometime confused and used with imprecision by both the general public and the judiciary: paras. 13, 14.
- [39] It is not necessary to discuss what constitutes a valid common-law marriage other than to say that it is based on an agreement into which both parties have the capacity to enter: *Desjarlais v. Macdonell Estate* (1988), 23 B.C.L.R. (2d) 195 (C.A.) at 198; *Keddie* at paras. 45, 46. As Mr. Austin was not divorced from Mrs. Austin he lacked the capacity to enter into a common-law marriage. Ms. Goerz concedes this in her factum.
- [40] While capacity is necessary for a common-law marriage, it does not follow that it is required for a statutorily created marital equivalent. Absent specific inclusionary or exclusionary language, this will depend on the application of the relevant principles of statutory construction to the words chosen by the Legislature.
- [41] Nothing in the history of the statutory recognition of common-law relationships, as distinct from common-law marriages, supports the proposition that the Legislature intended to restrict these relationships to persons who could legally marry. Although the terminology has changed over time - living as husband and wife, living together as married, living as spouses, living in a marriage-like relationship - the focus has always been on the nature and character of the relationship.
- [42] From 1877 until 1972, intestacy legislation made provision for payments to be made to a "concubine", being a woman who cohabited with a man to whom she was not married. That one or both of these persons lacked the capacity to marry was not relevant: *Manson v. Heaslip* (*Administratrix of Quinn Estate*), [1949] 1 W.W.R. 717 (B.C.S.C.) at 719; *Concise Oxford English Dictionary*, 11th ed. (revised), s.v.
- [43] Further, intestacy legislation has always recognized that concurrent claims can be made by both the lawfully married partner of the deceased and by a person whose entitlement is advanced on the basis of a marital-equivalent relationship with the deceased. By reason of s. 3 of the *Destitute Orphans Act*, notice of a claim by a "concubine" was required to be given to a surviving "widow." This requirement was carried forward and appeared in 1972 in what was then s. 94 of the *Administration Act*, when the term "common law spouse" was first used in this statute. Since by reason of these amendments a deceased "common law spouse" could now be a man or a woman, notice was required to be given to either the surviving "widow"

or "widower." There would have been no need to maintain the notice provision if capacity to marry had been considered necessary for two persons to become common-law spouses, because it would have been impossible for a deceased to have been both a husband or wife, and a common-law spouse.

[44] Presently, s. 85.1 of the Estate Administration Act, which was enacted by the Definition of Spouse Amendment Act, 1999, specifically recognizes there can be more than one spouse on intestacy:

For the purposes of section 85, if 2 or more persons are entitled as a spouse they share the spousal share in the estate in the portions determined by the court as the court considers just.

This provision would have been unnecessary if the Legislature had intended capacity to be a prerequisite to a "marriage-like relationship." Indeed, s. 85.1 is a positive indication that the Legislature contemplated that a deceased could leave behind both a lawfully married spouse and a common-law spouse.

[45] Mrs. Austin relies on the following statement by Leggatt L.J.S.C., as he then was, in *Sudar v. McKay Estate* (1990), 36 E.T.R. 83 (B.C.S.C.) at 86:

The law seems clear that one of the essential ingredients to establish a common-law relationship is that each party must have the capacity to enter into such a marriage. It means the parties must not have subsisting marriages with anyone else.

However, it is clear from the immediately preceding part of the judgment that this was said in the context of considering whether Ms. Sudar and Mr. McKay had entered into a common-law marriage.

[46] *McEvoy v. Ford Motor Co.* is more germane. Mr. McEvoy was killed in a single-vehicle accident. Mrs. McEvoy, who was legally married to someone else at the time of the accident, sued under the Family Compensation Act on the basis that she was a "spouse", defined in s. 1 of the Act as:

- (a) a husband or wife of the deceased, or
- (b) a person who lived with the deceased as the husband or wife of the deceased for not less than 2 years ending no earlier than one year before the death of the deceased.

[47] In upholding Mrs. McEvoy's entitlement to sue, Mr. Justice Goldie found that Mr. McEvoy's lack of capacity to marry Mrs. McEvoy did not prevent them from becoming "spouses" by reason of their having lived together as husband and wife:

13 I agree the legislature intended there be but one claimant. This is apparent not only from the definition but from s. 3(1) of the Family Compensation Act which stipulates the action "shall be for the benefit of the spouse, parent or child."

14 I think it equally clear that the person who enjoyed the legal status of a husband or wife should be first in line. But in the absence of a person possessing that status a person who meets the evidentiary requirements set out in cl. (b) of the definition qualifies as the spouse. This is evidenced by the disjunctive "or" separating cls. (a) and (b) of the definition.

15 In the absence of a husband or wife there is nothing in the definition to suggest that the person who meets the evidentiary requirements set out in cl. (b) is barred simply because he or she lacks the capacity to enter into a marriage.

[Emphasis added]

[48] Next is the fact that when the Legislature first used the expression "marriage like relationship" in the 1992 Health Care and Medical Services Act, with respect to opposite-sex couples, it also, and for the first time, recognized such relationships between couples of the "same gender." At this time, same-sex couples were understood to lack the ability to legally marry: *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251, 13 B.C.L.R. (4th) 1 (C.A.) at paras. 50 - 56,166. This continued to be the understanding when the omnibus legislation was passed in 1999 and 2000. Given that the Legislature intended the expression "marriage-like relationship" to apply to cohabiting, same-sex couples who could not marry, it would be incongruous to attribute to it an intention to exclude comparable living arrangements between opposite-sex couples who could not marry. This would defeat the object of the legislation, which is to extend certain rights and obligations to all persons living in marital-equivalent relationships.

[49] The last statute I wish to mention is the Workers Compensation Act, R.S.B.C. 1996, c. 492. It is unusual in that although it contains the expressions "common law wife" and "common law husband", neither is defined. This is clearly an anomaly. Indeed, as reflected in a Workers' Compensation Appeal Tribunal decision, recommendations to change the Act by adding a definition of "spouse" which would include "marriage-like relationship" have not been implemented: *WCAT Decision Number 2006-04467* (December 4, 2006), British Columbia at 3, 4.

[50] What is significant for present purposes is that the Workers Compensation Act accepts that a worker can be married and in a common-law relationship at the same time. For example, the following is found in Division 3 - Scale of Compensation:

17(12) Where

- (a) a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband for the period set out in subsection (11);
- (b) the worker also left surviving a dependent widow or widower from whom, at the date of death, the worker was living separate and apart; and

- (c) there is a difference in the amount of compensation payable to the widow or widower by reason of the separation and the amount of compensation that would have been payable to that person if that person and the worker had not been living separate and apart,

the Board may pay compensation to the common law wife or common law husband up to the amount of the difference.

[Emphasis added]

Again, it is evident the Legislature did not restrict marital-equivalent relationships to persons who are in a position to enter into a lawful marriage.

- [51] In summary, having regard to the evolution, history and purpose of the various enactments which recognize what are described today as "marriage-like relationships", and to the context in which this expression is used, I conclude that such relationships can exist even though one or both partners lacks the capacity to marry.

Is Financial Dependence a Requirement?

- [52] Mrs. Austin submits that the relationship between Mr. Austin and Ms. Goerz was not marriage-like because Ms. Goerz was neither financially dependent on, nor interdependent with, Mr. Austin; to the contrary, she was financially independent. Mrs. Austin says that some form of financial dependence is necessary before a couple can be found to be living in a "marriage-like relationship."
- [53] It is significant that for nearly 100 years, intestacy legislation did require a person claiming as a marital-equivalent partner to have been financially dependent on the deceased. From 1877 until 1972, provision was made for a "concubine", or, to use another antiquated expression, a "kept woman." Even when the Legislature began to modernize the statutory language in 1972, it retained the need for a period of financial dependence for another 28 years. For example, the definition of "common law spouse" in the 1996 Estate Administration Act read:

"common law spouse" means either

- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
- (b) a person who has
 - (i) lived and cohabited with another person as a spouse, and
 - (ii) been maintained by that other person for a period of not less than 2 years immediately before the other person's death.

[Emphasis added]

While the current version of the Act retains the two-year cohabitation period, there is no longer a requirement that the deceased have "maintained" the surviving partner for this period.

- [54] As Mr. Justice Esson, as he then was, pointed out in *Desjarlais v. Macdonell Estate*, the maintenance requirement was the "second limb" of the definition of "common law spouse": at 200. To meet the criteria, a surviving partner had to show not only that he or she had cohabited with the deceased "as a spouse", but also that he or she had been "maintained" by the deceased for two years. In essence, Mrs. Austin's position is that a maintenance or dependency requirement remains as an essential aspect of a "marriage-like relationship."
- [55] While financial dependence may at one time have been considered an essential aspect of a marital relationship this is no longer so. Today marriage is viewed as a partnership between equals and there is no principled reason why marital-equivalent relationships should be viewed differently.
- [56] Mrs. Austin relies on *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.), and *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.). While the need to examine the financial relationship between the parties is discussed in both, in neither do I find support for the proposition that a marital-equivalent relationship cannot exist absent some level of financial dependence.
- [57] Apposite is the more recent decision of the Supreme Court of Canada in *M. v. H.*, [1999] 2 S.C.R. 3, which concerned that portion of the definition of "spouse" in the Family Law Act, R.S.O. 1990, c. F. 3, conferring certain rights on either a man or woman who are not married to each other but who live together in a "conjugal relationship." In discussing the requirements of conjugal (i.e., marriage-like) relationships, Cory J. indicated that while financial dependence is a factor it is but one of many to be considered:

59 *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[Emphasis added]

- [58] It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages. In this regard I respectfully agree with the following from the judgment of Ryan-Froslic J. in *Yakiwchuk v. Oaks*, 2003 SKQB 124:

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

[Emphasis added]

[59] *Yakiwchuk v. Oaks* was followed in *Ruskin v. Dewar*, 2003 SKQB 514, 48 R.F.L. (5th) 123, varied 2005 SKCA 89, 23 R.F.L. (6th) 310. In that case, the trial judge found that the parties had cohabited as "spouses" notwithstanding a lack of intermingling of finances: paras. 36 - 40. This aspect of the decision was unanimously upheld on appeal: paras. 31, 32, 113, 114.

[60] For these reasons, I conclude that financial dependence is not a necessary aspect of a "marriage-like relationship." How the parties arrange their financial affairs is but one factor to be considered.

Was There an Intention to Enter into a Marriage-Like Relationship?

[61] This ground is a variation of the immediately previous one. Mrs. Austin submits that because Ms. Goerz and Mr. Austin kept their financial affairs separate it could not have been their intention to enter into a marriage-like relationship.

[62] The chambers judge properly took a holistic approach in finding that Ms. Goerz and Mr. Austin "were in a committed, marriage-like relationship for all purposes." She had regard to all aspects of their relationship, including that there was minimal sharing of expenses and no commingling of assets. Based on the evidence it was open to the chambers judge to reach the conclusion she did and there is no basis on which this Court can interfere: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at para. 22.

Conclusion

[63] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Prowse"

I AGREE:

"The Honourable Mr. Justice Donald"

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