

CANADA / JUDGMENT

C.(H.L.) v. L.(M.A.)

2003 BCSC 1461

COURT

Supreme Court of British Columbia

DECIDED

25 September 2003

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2003BCSC1461 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C. (H.L.) v. L. (M.A.), 2003 BCSC 1461 Date: 20030925 Docket: E032422 Registry: Vancouver Between: C. (H.L.) Plaintiff And L. (M.A.) Defendant Before: The Honourable Mr. Justice Bauman Reasons for Judgment C. (H.L.) Appeared in person L. (M.A.) Did not appear Date and Place of Hearing: 26 August 2003 Vancouver, B.C.

- [1] This is a family law proceeding commenced by writ.
- [2] The parties were married on 22 March 2003 and they separated on 21 April 2003.
- [3] The defendant, living in Washington State, was served with the writ and statement of claim on 30 July 2003.
- [4] No appearance or statement of defence has been filed.
- [5] The plaintiff, C., now brings a motion seeking an order annulling the marriage.
- [6] Acting in person, C. cites no rule as supporting her application.
- [7] I will deal with it as though brought under Rule 18 of the Rules of Court (although technically I note that C. has not deposed that she knows of no fact which would constitute a defence to the claim).
- [8] In support of her application, C. files her own affidavit and that of her husband, L.
- [9] Those affidavits are brief and I reproduce the relevant body of each. C. deposes:
2. THE DEFENDANT AND I WERE MARRIED ON MARCH, 22, 2003
 3. WE LIVED TOGETHER FROM MARCH 27 2003 UNTILL [sic] APRIL 21 2003.
 4. I LEFT THE MARRIAGE BECAUSE MY DAUGHTER ACCUSED MY HUSBAND OF TOUCHING HER IN A SEXUAL MANNER. OUR MARRIAGE WAS NOT CONSUMATED DO [sic] TO IMPOTENCY.
- [10] L. deposes:

2. The plaintiff and I were married on March 22, 2003. We lived together from March 27, 2003 until April 21, 2003.
 3. We did not consummate are [sic] wedding vows.
- [11] An action for annulment on the grounds of a failure to consummate may still be brought in British Columbia notwithstanding the legislature's purported repeal of the Divorce and Matrimonial Causes Act, R.S.B.C. 1960, c. 118: *Kleineker v. Guay*, [1976] 4 W.W.R. 213 (B.C.S.C.); *Jackson v. Jackson*, [1972] 2 W.W.R. 321 (S.C.); *Sangha v. Mander* (1985), 65 B.C.L.R. 265 (S.C.); and *C. v. C.* (1974), 17 R.F.L. 96 (B.C.S.C.).
- [12] To succeed, it must be established that one or both of the parties has a physical or psychological incapacity "such as to render intercourse impractical": J. David Fine, "Annulment of Marriage for Impotence in the Common Law of Canada" (1973), 8 R.F.L. 129.
- [13] It is not enough for the parties to simply establish that they have not had sexual intercourse since the date of their marriage (*Trenholm v. Trenholm*, [1989] N.S.J. No. 209 (QL) (N.S.C.A.), *B. v. B.* (1953), 8 W.W.R. 172 (Man. Ct. Q.B.)).
- [14] One or both of the parties must be unable to engage in sexual intercourse because of an incapacity of some kind. This incapacity may either be physical or psychological (*Heil v. Heil* [1942] S.C.R. 160, recently applied by the British Columbia Court of Appeal in *Juretic v. Ruiz* (1999), 126 B.C.A.C. 196, 1999 BCCA 417).
- [15] The incapacity must exist at the time the marriage was entered into (*Rae v. Rae*, [1944] 2 D.L.R. 604 (On. C.A.). Although, in many cases, the courts have recognized psychological impotence which has developed after the marriage has commenced. See for example, *Deo v. Kumzer*, [1993] B.C.J. No. 2051 (QL) (S.C.).
- [16] Impotence need not be a general incapacity to engage in sexual intercourse. The impotence may be with respect to that particular spouse only (*G. v. G.* (1908), 25 T.L.R. 328 (C.A.), *Greenlees v. Greenlees*, [1959] O.R. 419 (Ont. H.Ct.), *Orr v. Orr*, [1956] 2 D.L.R. (2d) 627 (N.S. Divorce Ct.)).
- [17] If a plaintiff alleges that one of the spouses is impotent by reason of a psychological defect, the defect must amount to "an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity," (*Heil*, supra at 163). A mere capricious refusal to consummate the marriage does not qualify as a psychological defect (*Heil*, supra, *Juretic*, supra). However, "the refusal of a defendant to attempt consummation may have been so long continued or under such circumstances as to justify the inference of impotence" (*B. v. B.*, supra).
- [18] If the impotence is curable, and the impotent party is willing to undergo the cure, then that party is entitled to do so (*B. v. B.*, [1994] 3 W.W.R. 113 (Alta. S.C.T.D.)). However, if the impotent spouse refuses to undergo treatment, then this can be equated with impotence (*B. v. B.*, supra).

- [19] As to the evidentiary standard, a court will not grant a declaration of nullity, unless a plaintiff has demonstrated the elements noted above. In *Doueidar v. Dwaydar*, [1994] O.J. No. 1469 (Ont. Ct. Gen. Div.), the court refused to grant an annulment because the plaintiff did not provide sufficient evidence of impotence. In that case, the plaintiff only declared that the parties had not consummated the marriage and she provided no reason for why she sought an annulment. The court held that "the onus is on the person seeking the declaration that the marriage is void to provide sufficient evidence. The evidence is less than clear and incomplete," (at ¶13).
- [20] Even where actions for nullity are undefended, courts have not granted declarations where the plaintiff has failed to establish the relevant facts (see *Falk v. Falk*, 1999 ABQB 570).
- [21] In British Columbia there is a presumption that where there is evidence of cohabitation and a marriage ceremony, a marriage is valid absent evidence to the contrary (*Lehoux v. Woolward* (1994), 2 R.F.L. (4th) 382. This was interpreted in the trial decision in *Juretic*, supra, to mean that a plaintiff alleging psychological impotence must prove that the party who is alleged to be impotent has an invincible aversion to the sexual act in order to obtain a declaration of nullity.
- [22] In light of the evidentiary burden which this plaintiff faces, it is clear that the material before me falls far short of meeting the lowest threshold of proof.
- [23] I would dismiss the motion, but grant leave to the plaintiff to revive it when she has developed an evidentiary record which meets the standard of proof required by the cases.
- [24] In saying all of this, I recognize that the plaintiff is acting in person and that she may be at a loss to understand these reasons, and worse still appreciate exactly what will be required by the court to obtain the requested relief. I suggest that the plaintiff make use of the Lawyer Referral Service of the Canadian Bar Association (B.C. Branch), or one of the legal clinics staffed by British Columbia law students. "R.J. Bauman, J." The Honourable Mr. Justice R.J. Bauman

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