

CANADA / JUDGMENT

Conquergood v Dalfort

2007 BCSC 1556

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1556 Conquergood v. Dalfort

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Conquergood v Dalfort,

2007 BCSC 1556

Date: 20071030

Docket: E43172

Registry: Nanaimo

Between:

Karen Lee Conquergood

Plaintiff

And

Jon George Dalfort

Defendant

Before: The Honourable Mr. Justice Shabbits

Reasons for Judgment

Counsel for the plaintiff:

B. MacLaughlin

Counsel for the defendant:

A. Reid

Date and Place of Trial:

August 14 - 18, 2006,

May 28 - 31 & June 01, 2007

Nanaimo, B.C.

Introduction

- [1] This is a family law proceeding. The plaintiff and the defendant were never married. The plaintiff seeks spousal support and compensation.
- [2] There are five issues:
1. Were the plaintiff and defendant spouses?
 2. If they were spouses, is the plaintiff entitled to spousal support? If so, what is its quantum and duration?
 3. Was the defendant unjustly enriched by the plaintiff?
 4. Does either party have a claim against the other arising from their joint ventures?
 5. Is the plaintiff entitled to recover damages from the defendant for assault?

Background

- [3] The plaintiff was born in May of 1948. She is 59 years old.
- [4] The plaintiff has had a variety of occupations over the years. She has farmed. She did office work and real estate related work, both in Canada and the Dominican Republic. She did telemarketing. She ran a service station. She has been involved in a number of business ventures.
- [5] The plaintiff married in 1987. She and her husband were in a long-term common-law relationship before they married. They had two children. Her daughter, Anik, is in her mid 30s. Her son, Carl, is deceased. Her husband died in 1988.
- [6] When she met the defendant, the plaintiff was about to begin employment with HealthQuest Vocational Services Ltd., a health service company.
- [7] The plaintiff had few assets when she met the defendant in March, 1998. At that time her assets included the following.
1. She owned acreage on the Gaspé Peninsula. In 2006, the plaintiff declared that its value was \$12,000. The plaintiff still owns this acreage.
 2. She had a Royal Bank of Canada Registered Retirement Savings Plan account of about \$21,000.

3. She had a 1986 or 1987 Pontiac Grand Am.
4. She had about \$5,500 in bank accounts.
- [8] The defendant was born in December of 1939. He is 67 years old.
- [9] The defendant has had a variety of work during his lifetime. He worked as a truck driver, and as an equipment operator. He was employed in a saw mill. He worked as a soil tester. He had a business producing cement forms for construction. He was a hotel operator. He had a body shop business and an automotive glass shop. He bought and sold houses, profiting by renovating them. He fished commercially.
- [10] The defendant was married and divorced prior to meeting the plaintiff. He and his wife had three children.
- [11] After his divorce, the defendant met a woman named Jean Hawkins. He lived with her in a common-law relationship for a number of years, until she died unexpectedly.
- [12] The defendant was receiving Employment Insurance payments when he met the plaintiff.
- [13] When the parties met, the defendant owned a house that he and Jean Hawkins had bought together.
- [14] He owned a 1960 Bellanca Viking airplane.
- [15] He was plaintiff in two lawsuits. One of the lawsuits was a claim against an insurance company related to the theft of a commercial fishing vessel. The other was a malpractice suit against an Alberta lawyer.
- [16] He had an investment portfolio.
1. Were the Plaintiff and the Defendant Spouses?
- [17] The plaintiff and the defendant met in March, 1998 when they accompanied a mutual friend to the Dominican Republic for a holiday. The plaintiff was then almost 50. The defendant was 58. They entered into a romantic relationship during the vacation.
- [18] After they returned to British Columbia, the plaintiff and the defendant continued to see each other socially. The defendant moved into the apartment in Vancouver where the plaintiff was living at the end of July, 1998.
- [19] The plaintiff and the defendant's relationship continued until January 5, 2005, when it was abruptly terminated.
- [20] Section 2 of the Family Relations Act provides that "spouse" means a person who lived with another person in a marriage-like relationship for a period of at least two years.

- [21] The longest period of time that the plaintiff and the defendant could have been considered to have been living together in a marriage-like relationship was six years, five months and one week.
- [22] I will, for the sake of convenience, refer to this period of time as the time during which they cohabited.
- [23] When the defendant first moved into the apartment in which the plaintiff was living, he moved into her room and he slept with her. During their cohabitation, the plaintiff and the defendant often occupied the same bed. At other times they did not. They had sexual relations or attempted sexual relations on a number of occasions. Their sexual activity was limited because of the defendant's sexual dysfunction, but their relationship was exclusive.
- [24] The plaintiff and the defendant were partners in a number of ventures.
- [25] In August, 1998, they bought a sail boat. Their intention was to live on it and to use it for business purposes, perhaps for chartering. They lived on it at different times during their cohabitation.
- [26] They were partners in an escort agency business, and in a crabbing business. They worked together under contract in respect of a Canada census.
- [27] The plaintiff and the defendant did not pool their financial resources. They did have joint bank accounts and co-mingle funds. On occasion, one of them used the banking or credit facilities of the other. But those events arose for reasons of convenience. Overall, the plaintiff and the defendant maintained financial independence of each other.
- [28] During cohabitation, the parties together visited mutual friends, or friends of one of them, and relatives. They went to family gatherings together. They visited with each others children. They entertained and socialized together.
- [29] They travelled together to Eastern Canada, to the prairies, to New Orleans and to the Dominican Republic.
- [30] The defendant made a will leaving the plaintiff his interest in their sailboat.
- [31] Their relationship was sometimes tempestuous; they did not always get along.
- [32] The plaintiff had longstanding connections with the Dominican Republic.
- [33] During the period of cohabitation, there were lengthy periods of time in 2002, 2003 and 2004 when the plaintiff and the defendant did not live together. These separations arose because the plaintiff periodically lived and worked in the Dominican Republic.

- [34] The plaintiff travelled to the Dominican Republic at the end of August, 2002, and she was alone there for almost four months before the defendant joined her. The plaintiff and the defendant were then together in the plaintiff's accommodation for about four and one-half months. The defendant returned to Canada in May of 2003, and the plaintiff returned about one month later.
- [35] At the beginning of September, 2003, the plaintiff again returned to the Dominican Republic. She was alone there for six months. She was joined by the defendant in March, 2004. The defendant then stayed with the plaintiff in the Dominican Republic for about three months. He returned to Canada ahead of the plaintiff.
- [36] The plaintiff returned to the Dominican Republic near the end of August, 2004. The defendant joined her after about four months. The parties separated about ten days later.
- [37] The plaintiff could have worked in Canada. She preferred to be in the Dominican Republic.
- [38] When the defendant was with the plaintiff in the Dominican Republic, he stayed in her accommodation without paying her, and he made use of her vehicle. They shared some expenses.
- [39] The plaintiff asserts that their relationship was marriage-like.
- [40] The defendant submits that they did not have a marriage-like relationship.
- [41] The defendant says that he never wanted to marry the plaintiff and that he had always made it clear to the plaintiff that he did not want a marriage-like relationship.
- [42] In *Gostlin v. Kergin* (1986) 3 B.C.L.R. (2d) 264 (B.C.C.A.), Lambert J.A. set out tests to determine whether the parties were spouses within the definition of the Family Relations Act: He said this at pages 267-268:

In deciding whether a couple lived together as husband and wife, I would be guided by the scheme and intention of the Act itself. The purpose of the legislative scheme is to impose on an unmarried couple the same obligations under s.57 as are voluntarily undertaken by a married couple. So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of s.57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes," then they are living together as husband and wife. If the answer would have been "No," then they may be living together, but not as husband and wife.

Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives?

[43] In *Takacs v. Gallo* (1998) 48 B.C.L.R. (3d) 265, 157 D.L.R. (4th.) 623 (B.C.C.A.), Newbury J.A., for the majority, said this at paras. 53 and 55:

The starting point in this province for the analysis required in cases of this kind is the judgment of this court in *Gostlin v. Kergin* (1986) 3 B.C.L.R. (2d) 264 (B.C.C.A.), and in particular, the comments of Lambert J.A. at 267-8 which are quoted in Madam Justice Huddart's judgment. I read those comments as focussing first on the intentions of the parties to live "as husband and wife", or in a marriage-like relationship. Such an intention may or may not include financial dependence. The various "objective indicators" referred to in *Gostlin* were advanced as a means of divining those subjective intentions where the latter "prove elusive". By the same token, of course, 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.

...

In both *Gostlin* and *Fitton*, the question of whether person were living together as spouses notwithstanding that they were not legally married involved the court in an examination of their intentions and not simply an objective assessment of whether their financial and living arrangements were "intertwined". If the Legislature had intended the latter, it would have been an easy matter to so state. Objective factors will of course be relevant to determine the parties' intentions as Lambert J.A. noted in *Gostlin* but those factors will rarely be determinative in and of themselves. Many combinations of people may live together and meet many of the criteria set forth in *Molodowich v. Penttinen* (1980) 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), but without intending or in fact entering the kind of psychological and emotional union that one associates with marriage.

[44] Whether or not parties were in a marriage-like relationship turns on the facts: *Thompson v. Floyd* 2001 BCCA 78, 86 B.C.L.R. (3d.) 56 at para. 34.

[45] The plaintiff and the defendant never strictly accounted to each other for living expenses or for day to day expenditures. They used each others' possessions as their own. They stayed in each others' homes without any thought of compensation. The defendant stayed without payment at the plaintiff's lodgings in the Dominican Republic and the plaintiff stayed at the defendant's house in Sayward before it was sold. When they were involved in joint business ventures, the plaintiff and the defendant divided or allocated between them what they gained on a rough and ready basis.

- [46] The parties maintained financial independence, but every other aspect of their relationship bore the hallmarks of a marriage-like relationship. This included living together, an exclusive sexual relationship, joint recreational activities, joint vacations, and joint entertaining.
- [47] In my opinion, the plaintiff and the defendant did not live together only as business partners, as room-mates or as friends. They lived as marriage partners. The defendant may not have wanted to enter into a marriage-like relationship, but the reality is that he did; his intentions were overtaken by his conduct. His assertion that he did not want to be living in a "common-law" relationship can not by itself change the nature of the relationship.
- [48] I am of the opinion that the plaintiff and the defendant were spouses within the meaning of Family Relations Act:

2. The Plaintiff's Spousal Support Claim

- [49] The plaintiff submits that she is entitled to an order for spousal support on the basis of compensation and on the basis of need.
- [50] Both parties were previously in long term relationships. When they met, the plaintiff was coming to terms with the death of her son, Carl, who died in April, 1997. The defendant, in turn, was coming to terms with the sudden death of his long time partner, Jean Hawkins.
- [51] This relationship suited both parties. Each of them had wide variety of experiences in business and in life. They initially joined forces as much for business reasons as for personal reasons.
- [52] The parties were together for several years. They were partners in a number of business ventures.
- [53] By the end of their relationship, the plaintiff had settled into a pattern of working for part of the year in the Dominican Republic, and returning for part of the year to Canada. She had done this at times before she entered into this relationship.
- [54] For his part, the defendant is now retired. He may try his hand in some future business activity, but he is now 69 years old and his prospects of earning significant employment or business income are not great. The defendant's future income will now include his CPP and Old Age Pension benefits as well as what he earns from his investments and savings.
- [55] In asserting a claim for spousal support based on compensatory reasons, the plaintiff says that she changed her lifestyle to enter into or pursue this relationship, and that but for the relationship, she would be financially better off today than she is.
- [56] The plaintiff submits that but for the relationship she would have continued to work for HealthQuest for longer than she did and that that would have been of financial benefit to her.

- [57] The plaintiff's actual income from HealthQuest has not been established. The plaintiff estimated her 1998 HealthQuest income at about \$3,000 per month gross. The plaintiff's claim that her employment with HealthQuest was a relatively high paying job is supported only by an oblique letter from HealthQuest to a financial institution "projecting" the plaintiff's earnings at about \$4,000 per month. The HealthQuest income of a co-employee, Ms. Harvey-Gregor, was much more modest. Ms. Harvey-Gregor was at HealthQuest at the same time as was the plaintiff. Ms. Harvey-Gregor testified that her employment relationship with HealthQuest was different than was that of the plaintiff. Still, Ms. Harvey-Gregor received only about \$2,000 in total for the six months that she was at HealthQuest. The plaintiff did not file an income tax return for the year that she worked at HealthQuest.
- [58] The plaintiff left her employment with HealthQuest near the start of her relationship with the defendant. However, in my opinion, it has not been shown that the plaintiff left in order to advance the relationship, nor has it been shown that the plaintiff would have been better off financially if she had stayed at HealthQuest or had she not entered into the relationship. The plaintiff changed jobs because of the opportunity to pursue more lucrative returns in an escort agency business, and because of the opportunity to embark on a business venture involving a sail boat. Furthermore, it is likely the plaintiff did earn more income by changing employment.
- [59] At the end of the relationship the plaintiff still had her Gaspé Peninsula property. Her Royal Bank RRSP was worth \$29,799. She had an interest in the vessel Erica. She had assets in the Dominican Republic.
- [60] The plaintiff has not shown that her relationship with the defendant caused her to earn less income than she would have earned had she not entered into the relationship, nor has she shown that she would have had more assets. In my opinion, the plaintiff has no claim for compensatory support.
- [61] However, in my opinion, the plaintiff does have a claim for spousal support based on need. She is 59 years of age, and she is far from being financially secure.
- [62] The evidence at trial was that the plaintiff has never been a high income earner. She reported taxable income in 1996 of about \$27,000, and in 1997 her reported taxable income was approximately \$10,500. She did not file income tax returns for 1998 or 1999. She reported taxable income of about \$27,000 in 2000, \$8,300 in 2001, \$5,500 in both 2002 and 2003, \$6,000 in 2004, \$9,000 in 2005, and income of about \$6,200 in 2006.
- [63] The plaintiff receives CPP benefits related to the death of her husband. Those receipts explain why several of her income tax returns show annual income of \$5,500 or so. That reflects CPP income. It appears that the plaintiff did not report income that she earned in the Dominican Republic.

- [64] The plaintiff testified that she earned significant sums of money in Canada in 1998 and 1999. The plaintiff did not produce any documentation showing what she earned in those years. She did not file income tax returns for those years.
- [65] The plaintiff is presently working in the Dominican Republic. Her current income in the Dominican Republic was not documented at trial.
- [66] The plaintiff said that she used to be paid \$1,000 per month in the Dominican Republic, but she testified that she now receives room and board and reimbursement for some transportation and telephone costs, and that she pays for all other things herself.
- [67] The plaintiff testified that she earns so little income in the Dominican Republic that she was told she need not even bother to include it on her income tax returns. That assertion is not credible. As can be seen from her returns and from her failure to report any income in 1998 and 1999, the plaintiff has often not reported income. I draw the inference that she has not reported income in order to avoid paying income taxes.
- [68] The plaintiff asserted that she can not return to Canada because of her fear of the defendant. She bases that assertion on her allegation that the defendant assaulted her.
- [69] I do not accept that there is any rational basis for the plaintiff not returning to Canada to work. The plaintiff's claim in that regard is not supported with any medical evidence. In my opinion, the plaintiff's assertion that a single altercation with the defendant some years ago has caused her to be so fearful of the defendant that she cannot even today return to Canada is without merit. Furthermore, for the reasons that I will set out later, I am of the view that it has not been established that the defendant assaulted the plaintiff.
- [70] In my opinion, it is more likely than not that the plaintiff is presently earning income in the Dominican Republic comparable to what she was earlier earning there, that is, about \$1000 per month.
- [71] In my view, the plaintiff is capable of earning income of \$1000 per month in Canada. That is in addition to her CPP benefits.
- [72] I fix the plaintiff's income at \$18,000 per year.
- [73] The defendant's income in 2006 was \$55,662. The defendant's 2006 income included income from Old Age Security pension benefits, CPP benefits, and returns of \$45,286.10 on his investment portfolio. The defendant's investment portfolio with TD Waterhouse was \$357,171.94 on March 31, 2007.
- [74] The defendant's 2006 portfolio returns consisted of \$45,286.10 earned from T3 or income trust payments. The defendant referred to changes in the taxation regime relating to income trusts and he expressed concern that his portfolio returns may be less in the future than they were in 2006. The year-to-date returns on the portfolio to March 31 2007 were \$11,596.53. That is about the same as in 2006. However, the defendant's returns were lower before 2006. I am of the view that it is more likely than not that the returns on the

defendant's portfolio will be somewhat less in the future than they were in 2006.

- [75] I fix the defendant's income at \$50,000 per annum.
- [76] The Spousal Support Advisory Guidelines provide a guide to the appropriate order for spousal support.
- [77] The total length of cohabitation was six years, five months. Although it is true that the parties did not embark on a marriage-like relationship when they first got together, the Guidelines include periods of cohabitation before marriage. In my view, the same reasoning applies to marriage-like relationships. The relevant period of cohabitation includes the time period that these parties were together before their relationship could truly have been said to have become marriage-like.
- [78] The plaintiff was 56 when they separated. The rule of 65 is not of application.
- [79] As noted in Gostlin, a relationship is either marriage-like or it is not marriage-like. There is no half measure, with some marriage-like relationships resulting in full spousal support obligations, and others resulting in reduced obligations. The guidelines provide that in this case the spousal support payments should be in the range from a low of \$260 per month to a high of \$347 per month, and that the duration of spousal support should be from three years, three months to six years, six months.
- [80] I am of the opinion that the appropriate order is for quantum near the mid-range of the guideline amounts. Given that the parties were already establishing themselves in separate lives before separation, with the plaintiff working for long periods of time alone in the Dominican Republic, the duration of spousal support should be towards the lower end of the suggested range.
- [81] I order that the defendant pay spousal support to the plaintiff in the sum of \$300 per month for a period of four years. The defendant shall pay the first of those payments on the first day of November, 2007, and spousal support payments shall continue monthly thereafter for a total of 48 months.
3. Was the Defendant Unjustly Enriched by the Plaintiff?
- [82] The plaintiff claims damages pursuant to her submission that her relationship with the defendant unjustly enriched him. The unjust enrichment claim relates to two lawsuits in which the defendant was plaintiff, and to the defendant's sale of a house that he owned when this relationship began.
- (i) Insurance Lawsuit
- [83] The defendant's "insurance" lawsuit involved a claim by the defendant against the insurers of a commercial fishing boat, the "Fraser Belle", arising from the theft of the Fraser Belle on December 13, 1995. The lawsuit included a claim for damages arising from the forced sale of the vessel, loss of prawn income, and damages for breach of fiduciary duty.

- [84] After involving other counsel, the defendant retained a law firm in Richmond to prosecute the claim. On December 1, 1997, that firm advised the defendant it would not accept the retainer on a contingency fee.
- [85] In February of 1998, the defendant paid the law firm \$2,000 against its fees.
- [86] On December 3, 1998, the law firm warned the defendant about the possible cost of proceeding with the litigation. The defendant was told the legal fees to prosecute the action could be as high as \$64,000.
- [87] The defendant continued with the claim. He paid the law firm a further \$5,570.33 in January, 1999.
- [88] On April 14, 2000, the defendant accepted his lawyer's advice to compromise the claim and to accept \$47,500 in satisfaction of the claim.
- [89] The defendant paid over \$15,000 in fees and disbursements to make that recovery.
- [90] The plaintiff claims an interest in this recovery on the basis of quantum meruit.
- [91] The plaintiff asserts that she was the defendant's sounding board. She says that she provided him moral support. She alleges that on one occasion she accompanied the defendant to a library to "do research". The research involved an attempt to discover whether the insurer had had similar claims advanced against it by others.
- [92] The defendant retained the law firm before he met the plaintiff. The defendant assumed sole liability for the legal fees. The litigation was with considerable financial risk to the defendant. He provided the law firm with instructions in respect of the prosecution of the claim. The amounts recovered relate to an asset that the defendant owned before he met the plaintiff.
- [93] The defendant denies that the plaintiff had any involvement whatsoever in his insurance claim. He denies that the plaintiff did any research that advanced the claim. He denies that he was in need of "moral support", or that the plaintiff did anything that was of benefit to the claim, or that she suffered any deprivation in doing what she asserts she did.

(ii) Malpractice Lawsuit

- [94] The litigation in the malpractice lawsuit was commenced by the defendant in about 1992. The cause of action preceded 1992 by some years.
- [95] There were many steps taken in this proceeding before the parties met. In January 1997, the defendant deposited \$5,000 for security for costs in order to allow the proceeding to continue. He was later required to increase this security to \$15,000. The defendant alone met with the lawyers acting for him. The defendant financed this proceeding, he instructed counsel, and he made all the decisions in respect of the prosecution.

- [96] The plaintiff made no financial contribution to the prosecution of the proceeding and she assumed none of the financial risk involved with the potential failure of the claim. This proceeding was settled on the eve of trial on November 14, 2002 for the all inclusive sum of \$206,000. The settlement occurred when the plaintiff was in the Dominican Republic.
- [97] The plaintiff asserts an interest in this lawsuit because she says that not only did she provide the defendant with moral support, but she helped the defendant with "paper work" inasmuch as she helped him write a letter to his lawyer. Furthermore, the plaintiff asserts that she was "Plan B" whereby if the law suit was unsuccessful, the defendant would be financially ruined, and he would join her in the Dominican Republic where she would support him.
- [98] The defendant flatly denies this evidence. He says there was no "Plan B". He says he did have other savings and resources, and that the loss of that lawsuit would not have ruined him financially. He says that the plaintiff's income in the Dominican Republic was not adequate to support them there, and that there never was any thought that she might. The defendant denies that the plaintiff provided him with any benefit in advancing this claim, and he denies that the plaintiff suffered any deprivation.

(iii) Sayward Property

- [99] The defendant and Jean Hawkins purchased a residence in Sayward, British Columbia in October, 1993. The adjusted purchase price was \$87,700. The property was placed in their names as joint tenants. The property was bought subject to a mortgage in favour of a Credit Union for \$66,000. The defendant became the owner upon Ms. Hawkins' death.
- [100] The defendant sold this property in October 2004. He received sale proceeds of \$11,605.35, after paying out the existing mortgage.
- [101] During the course of their relationship, the plaintiff and the defendant occasionally stayed in this residence as it was sometimes convenient for them to stay there.
- [102] This property was at times rented out by the defendant. It was damaged by tenants on more than one occasion.
- [103] The plaintiff's claim in quantum meruit against this residence rests on two prongs.
- [104] On one occasion after the residence was damaged, the plaintiff's daughter, Anik, and her husband Dan, lived in the residence for about six weeks and they did cleaning and they made repairs to it.
- [105] The plaintiff personally assisted the defendant in making repairs to the house and in cleaning it and in going out and purchasing items for the residence. The defendant reimbursed the plaintiff for money she spent on the property.

- [106] The value of the plaintiff's actual personal contributions in work to the property is difficult to quantify in monetary terms, but it was modest. In my opinion, the evidence showed that if an outsider had been hired to do what the plaintiff did, the total cost could not have been more than a few hundred dollars.
- [107] The defendant submits that the plaintiff did receive some benefit from the house, as she stayed there from time to time without paying rent.
- [108] The defendant says that the plaintiff's daughter and her husband stayed on the property under an arrangement whereby they received free rent against repairs. He says that he is not indebted to them or that if he is, that it would be a matter between him and them.
- [109] I agree with that submission. Anik and Dan did not stay at the property to assist the parties. They were in need of accommodation, and they received free rent for their repair work.

Discussion of Claim in Quantum Meruit

- [110] Unjust enrichment was discussed in *Peter v. Beblow* [1993] 1 S.C.R. 980. A claim in unjust enrichment has three essential elements: an enrichment, a corresponding deprivation, and the absence of a juristic reason for the detriment.
- [111] In *Toth v. de Frias* (1996) 78 B.C.A.C. 34 the British Columbia Court of Appeal said that in determining whether there has been an enrichment and a corresponding deprivation, the court should consider the totality of what passed between the parties.
- [112] In *Massincaud v Logie* 2005 B.C.S.C. 1665, [2006] B.C.W.L.D. 673, Madam Justice Ballance, at paras. 42 and 43, said that where contributions were minimal, a deprivation might not be presumed even if there was a finding of enrichment to a defendant.
- [113] In *Fuller v. Matthews* 2007 B.C.S.C. 444, Madam Justice Arnold-Bailey said that deprivation usually, but not always, follows a finding of enrichment.
- [114] Madam Justice Ballance, at paragraph 44 of *Massincaud*, said that courts may assess whether the contributions of one spouse have been off-set by the benefits he or she obtained during the relationship. She held that "(this) approach is sometimes followed in the context of evaluating whether there has been an enrichment or deprivation, and other times under the rubric of juristic reason".
- [115] In *Thomas v. Fenton* 2006 BCCA 299, 228 B.C.A.C. 82, the British Columbia Court of Appeal at paragraphs 23 and 25 said that a court must undertake a broad view of the relationship, a "global analysis of the circumstance of (the) parties" to determine whether an unfair enrichment has occurred. It dismissed Mr. Thomas' claim because Ms. Fenton had conferred more benefits on Mr. Thomas than he had provided to her. It decided the case on the basis that there was juristic reason for the enrichment.

- [116] In my opinion, the plaintiff has not established that she did anything of real benefit to the defendant in respect of either of the two lawsuits. Furthermore, the two specific events the plaintiff referred to, that of accompanying him to a library for "research" and either writing or assisting him in writing a letter to his lawyer, are of such little note that they could not possibly justify a finding of unjust enrichment.
- [117] The plaintiff did not suffer any deprivation by providing the defendant with "moral support" or by being his sounding board. Anything that the plaintiff did in respect of the lawsuits related to her relationship with the defendant whereby both parties benefited fairly equally from mutual emotional support.
- [118] The plaintiff did assist the defendant, albeit to a very limited extent, in repairs to the Sayward residence. The Sayward residence was not a property of great value. The plaintiff's involvement with the property arose because she was in a marriage-like relationship with the defendant, and each of them was conferring benefits on the other without expecting to be paid. The parties involved themselves in a number of joint enterprises. They divided what they gained on an ongoing basis. The plaintiff may well have received more than the defendant from these ventures, particularly in respect of an escort agency business and a pyramid scheme. She has not shown that the defendant benefited more from the relationship than she did. In my opinion, there is no reason to separate out what the plaintiff did in respect of the Sayward house property, and find that the defendant was unjustly enriched by the plaintiff over those few days.
- [119] I am of the view that the defendant was not unjustly enriched by the plaintiff. The plaintiff derived financial benefits from the relationship that offset her contributions to the defendant's property.

4. The Claims Relating to the Parties Joint Ventures

(i) The Motor Vessel Erika

- [120] In August of 1998, the plaintiff and the defendant agreed to purchase the Erika for \$145,000. The Erika is a 1983, 45-foot Crealock Excaliber sail boat, equipped with a 60-horsepower diesel engine and a 20-horsepower auxiliary diesel engine.
- [121] The purchase price included the vendor's acceptance of a Bellanca Viking, 14-19-3 aircraft, Canadian Registry C-FJWS owned by the defendant. The terms of that arrangement set out that if the aircraft was not acceptable to the vendor, it would not be included in the deal, and the purchasers would pay an additional \$35,000. If this were the case, the purchase price of the Erika would be \$135,000, rather than \$145,000.
- [122] I have concluded that the value of the Erika when the parties acquired it was \$135,000. The purchase price included a payment of \$100,000 to the vendor and the trade of the defendant's aircraft worth \$35,000.

- [123] Each of the parties contributed to the purchase of the Erick. I have concluded that the plaintiff's contribution included the proceeds of a \$50,000 loan that she obtained on her own account and \$5,000 from her RRSPs. The defendant's contribution included the \$35,000 from the aircraft and \$40,000 in cash. The \$5,000 balance came from the escort business. I conclude that the \$5,000 balance was money they possessed together. The defendant therefore contributed \$20,000 more to the Erika than did the plaintiff.
- [124] The Erika was placed in the names of both the plaintiff and the defendant. Each became the registered owner of an undivided one-half interest.
- [125] The plaintiff and the defendant lived on the Erika for extended periods of time during their relationship.
- [126] The parties did not keep good accounts regarding who contributed what to the operation of the vessel, its improvement, or its maintenance.
- [127] I find that the Erika was acquired by the parties for two reasons. It was, first, a place where they could live, and second, a means of earning profits.
- [128] On March 18, 2005, the parties consented to a court order that the defendant have exclusive occupancy of the Erika, and that he thereafter make the monthly payments required of the plaintiff under her line of credit associated with the vessel. As well, the defendant became solely responsible for all moorage fees and insurance and for keeping up the Erika in a condition comparable or superior to its then existing condition. The defendant then paid off the plaintiff's debt of \$23,000. The parties agree that she is liable to account to him for that amount.
- [129] The defendant's evidence is that although he continues to reside on the Erika, its maintenance costs are a financial drain. The defendant could have applied earlier to sell the vessel. Instead, he continued to live on it pursuant to the terms of the March 18, 2005 court order.
- [130] The plaintiff could also have applied earlier to have the Erika sold.
- [131] Both parties now wish to realize on their equity in the Erika.
- [132] I order that the Erika be sold forthwith and that the plaintiff and the defendant have joint conduct of its sale. If they cannot agree as to how the sale should be effected, each party, on notice to the other, has leave to apply to me for directions.
- [133] The proceeds of sale shall be divided between the plaintiff and the defendant as follows:
1. First, the defendant shall be entitled to recover the additional \$20,000 that he contributed to the acquisition of the Erika.

2. The remaining balance shall be divided equally between the parties, provided that the first \$23,000 of the plaintiff's share shall be paid to the defendant to reimburse him for paying off the plaintiff's loan that she took out to acquire the Erika.
3. The defendant shall have no claim for contribution for any monies that he has spent on the Erica since March 18, 2005, nor shall he be required to account for his use of the vessel since then.

(ii) Escort Agency

- [134] The plaintiff testified that during the summer of 1998, she was given the opportunity to acquire an escort agency. She said that this opportunity arose because the agency in question was owned by an acquaintance who wished to dispose of it. The plaintiff said that at the defendant's urging, she and the defendant acquired the agency together.
- [135] The parties operated the escort agency from July of 1998 to August of 1999.
- [136] The plaintiff testified that the defendant gave her \$5,000 to partially fund the acquisition of the agency, and that she provided a further \$5,000 from her line of credit for the purchase.
- [137] The plaintiff described how the agency operated. Both the plaintiff and the defendant were involved in its operation.
- [138] The parties disagree as to how successful the agency was. The plaintiff estimated that after accounting for expenses, she and the defendant earned a profit of \$60,000 to \$70,000. The defendant's evidence was vague in respect of profits. His impression was that the agency was only marginally profitable.
- [139] Neither party declared earnings from the escort agency on income tax returns. The plaintiff testified that she sent her 1998 and 1999 paperwork to her accountant for the purpose of filing income tax returns, and that it was only in 2006 that she discovered that her income tax returns had not been filed. That evidence was not credible. I do not accept it.
- [140] The plaintiff did not pay any income tax for 1998 and 1999. The plaintiff could not have mistakenly believed that she had filed and paid tax for those years, given her evidence that she had earned a very large amount of money. The plaintiff admitted that she has not declared her Dominican Republican income. I do not accept the plaintiff's evidence that she thought that she did not have to declare that income because it was not significant enough to report. The plaintiff is largely living on that income, and she must have known that it should have been declared. The plaintiff's income history is not completely documented, and, in my opinion, the plaintiff's evidence as to her income was not reliable. The result is that the plaintiff's income history is, at least to some extent, a matter of speculation.
- [141] The parties had a safety deposit box.

[142] The plaintiff said that it was used to keep part of their escort agency proceeds. The defendant's evidence in respect of the safety deposit box was vague. He said it was a fund for emergency purposes.

[143] My conclusions arising from the parties' operation of the escort agency are as follows:

1. Neither party advanced convincing evidence as to what the escort agency earned. I accept that the both parties were involved in this undertaking on a partnership basis. The plaintiff may have received more than one half of the escort agency proceeds, but the evidence does not demonstrate that either party received an unfair share of the proceeds from the agency.
2. I do not accept the plaintiff's assertion that she thought that she had filed the appropriate income tax documentation for the period of time relating to the operation of the escort agency. Her evidence that she thought income tax matters had been attended to is not credible.
3. I do not accept the defendant's evidence as to why there was a safety deposit box, or why cash was placed within it. It seems to me that the more plausible explanation for putting cash in the safety deposit box was that agency proceeds could be set aside for the benefit of the parties without the cash coming to the attention of others, including taxation authorities.
4. I do not accept that the agency was as profitable as the plaintiff alleges. I have reached that conclusion not only because there is no plausible evidence as to how this money might have been spent, but because both parties decided to give up the agency in mid-1999. I draw the inference that they would not have done so had the agency been earning the kind of profits described by the plaintiff.

(iii) Pyramid Scheme

[144] In about the spring of 1999, the plaintiff became involved in a pyramid scheme. The evidence was not clear as to the extent of the defendant's involvement in it. The plaintiff said that this was one of their joint ventures, and that she used money from the escort agency to enter into the pyramid scheme. She said that some of the returns from their involvement in the pyramid scheme went into the safety deposit box.

[145] Entry into the scheme involved an initial payment of \$5,000. The plaintiff explained that the potential profit would be generated by attracting eight other people into the scheme, with a cost to each of them of \$5,000, leaving the first entrant with a profit of \$35,000 taking into account the cost of entry.

[146] The plaintiff said that she understood that this was a program of women empowering other women, and that she did not realize that others would lose money. Catherine Dalfort, one of the defendant's daughters, refused the plaintiff's overtures to become involved in the scheme. She said she told the plaintiff it was illegal. She said that the plaintiff continued to promote the scheme.

- [147] The plaintiff said that she received \$40,000 from the scheme, but that she paid \$1,500 from that sum to two other people who entered into the scheme.
- [148] The plaintiff's evidence was that the parties' involvement in the pyramid scheme resulted in a profit of \$33,500.
- [149] The plaintiff's evidence was that the whole of the \$33,500 that was generated by their involvement in the scheme was spent by about the end of 1999. She said that some money was given to their children, some was applied against debt, and the balance was put in the safety deposit box and then spent.
- [150] The defendant's evidence was that the plaintiff became involved in the pyramid scheme by using \$5,000 of money that came from the escort service.
- [151] The defendant said he had his "suspicions" that the venture was a pyramid scheme. He said that the plaintiff earned some money from the scheme, but certainly not \$33,500. The defendant's evidence was that no money from either the escort agency or the pyramid scheme came to him. He said none of went into his bank accounts, or his investments.
- [152] Neither party declared as income for tax purposes any of the earnings from the pyramid scheme.
- [153] The amounts that the plaintiff and/or the defendant received from the pyramid scheme were not documented. Whatever was earned from the pyramid scheme was spent by them during the first part of their relationship. In my opinion, neither party has established any right to recover from the other any monies that were obtained by the parties' involvement in the pyramid scheme.

(iv) Crabbing Business

- [154] In 1999, the plaintiff and the defendant acquired the use of a crabbing boat, the "Going Home", and a crabbing business.
- [155] The business was acquired in the defendant's name on a short-term basis under an unusual arrangement with Alfred E. Deans. Mr. Deans owed the defendant \$10,000. The arrangement reached was designed to facilitate the repayment of the \$10,000 debt and to restore the Going Home to a sea-worthy condition and to compensate the defendant (and the plaintiff) for their efforts in working on the boat and in fishing it for the 1999 fishing season.
- [156] The defendant was named skipper of the crabbing vessel, and the plaintiff was named deckhand. The fishing proceeds were paid to them on that basis, with the defendant receiving the boat's shares of receipts as well as the skipper's share of receipts, and the plaintiff receiving a deckhand's share.
- [157] The parties used the Erika to assist them in the operation of this business.

- [158] I am satisfied that the plaintiff did more than a deckhand would have done in this venture, and that her involvement in the project was not just that of a deckhand. The plaintiff advanced a claim at trial for compensation to equalize the parties' receipts.
- [159] Both parties provided extensive evidence in respect of this business undertaking. The plaintiff and the defendant gave evidence about receipts and expenditures, referring to banking records and fishing receipt statements.
- [160] The defendant admitted that he received more than one half of the crab fishing receipts. However, he pointed to evidence showing that he made the expenditures for the repair and maintenance of the vessel, as well as the expenses related to its operation and the crabbing business. In addition, the defendant gave evidence that he made payments to the plaintiff during the time they operated the business together.
- [161] The defendant paid most of the \$50,000 he received from the crabbing venture at the end of the season into accounts he held jointly with the plaintiff. The parties argued over the accounting. The defendant made a further small payment to the plaintiff in satisfaction of the crabbing operations. The plaintiff told him more than that was due her. She asked for a further small payment. The defendant did not agree that she was entitled to more.
- [162] The parties did not keep a separate accounting of their receipts and expenditures in respect of this undertaking. They have attempted to reconstruct what occurred.
- [163] None of the crabbing returns went into the defendant's investment accounts.
- [164] In my opinion, the plaintiff has not shown that the defendant is indebted to her in respect of the crabbing operations.
- (v) The Canada Census and the Employment Insurance Programme
- [165] The parties used the Erika to carry out a contract for a Canada census, and they took a government sponsored course intended to facilitate their entrance into a sailing business.
- [166] The plaintiff was an enumerator for the census. The defendant was the "skipper" of the Erica while the census work was being carried out, and he received the boat's share of payments for this work. The defendant paid the boat expenses. He deposited most of his receipts from the census into the parties' joint accounts.
- [167] Both parties received payments from the census and both received assistance benefits from the EI programme. In my opinion, neither has established a claim against the other in respect of these ventures.
- (vi) The Defendant's Claim for the Plaintiff Use of Joint Funds
- [168] Near the end of 1999, the plaintiff withdrew the sum of \$16,000 from the parties' joint funds. On December 29, 1999, she used \$12,243.83 of that money to pay off one of her personal lines of credit.

- [169] The plaintiff did not repay that money to a joint account.
- [170] The defendant says that he had understood that the plaintiff withdrew that money to loan to her daughter Anik money so that Anik and her husband could start a business.
- [171] The plaintiff says that the loan to Anik was made on July 2, 1999, which was long before she received the \$16,000 from the joint account. She says that because she had already lent the money to Anik, it follows that she did not "borrow" money from joint funds to lend to Anik.
- [172] I have concluded that the plaintiff should be made to account for most of the portion of the \$16,000 that the plaintiff used to pay down her personal line of credit.
- [173] The arrangement between the parties was that each of them was entitled to write cheques against the joint account, and neither was required to strictly account to the other for expenditures. In my opinion, the plaintiff was entitled to make regular monthly payments against her loans, but it was not the arrangement that either of the parties could appropriate large lump sums from the joint account for their own investments or to repay personal debts. I order that the plaintiff pay the defendant the sum of \$6,000, that being about one half of what she applied against her line of credit.

Conclusion in Respect of Joint Venture Claims

- [174] I order that the Erika be sold in accordance with paragraphs 132 and 133 of these reasons.
- [175] I order that the defendant recover \$ 6,000 from the plaintiff.
- [176] I am of the opinion that other than the \$6,000 payment discussed above, neither party has shown that the other is indebted to them in respect of their various joint business ventures or their joint bank accounts. It appears to me that the parties did divide what they were receiving over the years, and that before they separated neither expected that the other would be accounting to them further in respect of any of their joint endeavours or their joint living expenses.

5. The Plaintiff's Claim for Damages for Assault

- [177] In her statement of claim, the plaintiff seeks compensation for injuries she received as a result of an assault by the defendant on or about January 3, 2005.
- [178] The plaintiff had gone to the Dominican Republic near the end of August, 2004. The defendant joined her on December 26, 2004. The incident giving rise to this claim occurred in the plaintiff's apartment.
- [179] The plaintiff testified that after doing the laundry during the day, she and the defendant went to a bar for drinks. She said that during the evening she and the defendant consumed alcohol at more than one establishment. She estimated that during the evening she had three glasses of wine, and two or three "light" gin and tonics.

- [180] The plaintiff testified that after they returned to her apartment, which was at about 10:30 in the evening, she was making up the bed in the apartment when the defendant asked her to do something. The plaintiff said that she told him to do it himself. The plaintiff said that the defendant then attacked her.
- [181] She said that the defendant was screaming at her and calling her names and threatening her. She said that the defendant straddled her on the bed and had a fist in her face.
- [182] She said that after the defendant got off her, she headed for the door trying to escape. She said the defendant grabbed her and pulled her back in again. She said she was thrown and landed on the floor. The plaintiff said she got up again. She said the defendant picked up a CD player, or a device similar to a CD player, and smashed it. The plaintiff said she tried to talk to the defendant, although she was terrified. She said he attacked her again and that she landed against the fridge and then again on the bed with the defendant straddling her.
- [183] The plaintiff said she was terrified and escaped outside.
- [184] The plaintiff said she went to a neighbouring apartment and stayed there until long after the defendant had left and that she then returned to the apartment and phoned a friend.
- [185] The plaintiff said that after returning to Canada, she attended at the Ladysmith Hospital, where she was seen by a physician. She said that she had difficulties with her knees and shoulder, and she had bruising. She said she experienced fear, anxiety and depression.
- [186] The emergency room note from the hospital shows a diagnosis of "mild concussion" and "bruising."
- [187] The plaintiff testified that the purpose of her going to emergency at the Ladysmith Hospital upon her return to Canada was to document her injuries. She was not prescribed medication nor was she given a course of treatment. She did not visit a doctor again after the emergency visit. She was in Canada for about four weeks before returning to the Dominican Republic.
- [188] The defendant's evidence in respect of this incident is quite different. He testified that during the course of the evening he and the plaintiff went out for supper, and that they drank a couple of glasses of wine with the meal. He thought they had two glasses each. He said that they then went to a lounge, where they consumed three large gin and tonics. He said that after leaving the lounge, they stopped off at another bar, where they each had two more gin and tonics.
- [189] The defendant said they were drinking over three hours or so, and that the plaintiff was very intoxicated.
- [190] The defendant said that as they were returning to the apartment, they got into an argument over money. He said that the plaintiff backhanded him across the face. He said that the plaintiff hit him before on one or two other occasions.

- [191] The defendant said that after returning to the apartment, he turned on the television. He said that he and the defendant then argued because the plaintiff had gone to bed and she said the television was too loud. The apartment was a small open studio.
- [192] The defendant said that there was no argument involving the making of the bed, or in respect of the defendant doing something for himself.
- [193] The defendant said the plaintiff then made disparaging comments about the defendant's three children. The defendant said he lost his temper, and threw a radio on the floor. He said the plaintiff then lost control and attacked him.
- [194] The defendant said he held her back and put her on the bed, but only to restrain her. The defendant said the plaintiff was uncontrollable, but he held her on the bed for a couple of minutes to keep her from hitting him.
- [195] The defendant said he did not threaten the plaintiff.
- [196] The defendant said the plaintiff then ran to the kitchen and opened a drawer. The defendant said he then restrained her again because it concerned him that she was looking in the drawer. The defendant said the plaintiff then left the apartment, screaming, and out of control.
- [197] The defendant said he did not throw the plaintiff against the fridge or a wall.
- [198] The defendant said that after the incident he left the apartment and took a room in town.
- [199] The friend who picked the plaintiff up at her apartment was Ms. Colleen Misner. Ms. Misner took a picture of the plaintiff's injuries. Ms. Misner agreed that she sided with the plaintiff, and that she discounted the defendant's protestations, which he made at the time of the incident, that it had been the plaintiff who attacked him. Ms. Misner said that she was protecting her friend, the plaintiff. Ms. Misner said that the defendant did have a cut on his lip, and that the defendant did tell her that the plaintiff had struck him. Ms. Misner said that she chose not to believe the defendant.
- [200] Ms. Misner said that she took pictures of the plaintiff's back, although she could not see any injury there. Ms. Misner took pictures of the plaintiff's arms and of the bruising, and she said that she saw "something" on the plaintiff's knees.
- [201] This incident occurred when the plaintiff and the defendant were both intoxicated. The plaintiff's explanation as to how the altercation started strikes me as being far less probable than the defendant's account.
- [202] The defendant said that the plaintiff struck him on the face. The defendant did have a split lip. That injury is inconsistent with the plaintiff's account of what happened.
- [203] On the other hand, the plaintiff's injuries seem to me to be as consistent with the defendant's account of what occurred as with the plaintiff's account.

- [204] In my opinion, the plaintiff was not a particularly credible witness.
- [205] There were several parts of her evidence that I did not believe.
- [206] The plaintiff's explanation as to why she did not file income tax returns in 1998 and 1999 is not credible. The plaintiff's assertion that she had not even realized that she had not filed returns is not credible.
- [207] I do not accept the plaintiff's assertion that she believed that her income in the Dominican Republic need not be reported.
- [208] The plaintiff testified that she was not aware that the pyramid scheme was illegal. There was direct evidence at trial that the plaintiff was told that the scheme was illegal, but that she continued to promote it.
- [209] The plaintiff's evidence at trial was that the assault profoundly affected her mental well being. In my opinion, the plaintiff's evidence regarding how she has been affected is not credible and I did not believe it.
- [210] I am of the opinion that the plaintiff exaggerated evidence or embellished evidence in order to advance her cause in this proceeding. I am of the view that she exaggerated or embellished when describing what she did on the Going Home, at the Sayward residence, and in respect of the lawsuits.
- [211] I am also of the opinion that the defendant's evidence was not completely reliable. I do not accept his evidence in respect of the safety deposit box, nor do I believe that he was unaware of what was going on with the escort service business and the pyramid scheme. The defendant did not record or declare income from those ventures on his tax returns. I do not accept as credible his assertion that he did not know whether there were profits.
- [212] I am, however, of the view that it is more likely than not that the altercation occurred as described by the defendant.
- [213] The plaintiff has not established on a balance of probabilities that she was assaulted by the defendant.
- [214] The plaintiff's claim for damages for assault has not been made out. I therefore dismiss it.

Orders

- [215] The defendant shall pay the plaintiff spousal support in the sum of \$300 per month for a period of four years commencing November 1, 2007.
- [216] The plaintiff's claim in unjust enrichment is dismissed.
- [217] The motor vessel Erica shall be sold and the proceeds of its sale shall be divided between the parties in accordance with these reasons.
- [218] The defendant shall recover \$6,000 from the plaintiff.

[219] The plaintiff's claim for damages for assault is dismissed.

[220] The parties have enjoyed mixed success. Unless there is some reason for the parties to speak to costs, I would order that the parties share equally in the disbursements relating to court hearing fees, and that the plaintiff and the defendant otherwise bear her or his own costs of this proceeding.

Mr. Justice S.J. Shabbits

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