
CANADA / JUDGMENT

D.B.W. v. S.W.B.

2005 BCSC 622

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

D.B.W. v. S.W.B.

2005 BCSC 622

Date: 20050425

Docket: 0422747

Registry: Prince George

Between:

D.B.W.

Plaintiff

And

S.W.B.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the plaintiff:

D.M. Smith

Counsel for the defendant:

C.G. Fletcher

Date and Place of Trial:

April 4 - 8, 2005

Prince George, B.C.

The Facts

- [1] Ms. D.B.W. is 39 years old. She is a native of P.[], B.C. She did not quite graduate from grade 12, having finished that school year one credit short. In 1983 Ms. D.B.W. started working as a teller in a bank. She was then 17 years old. She eventually moved out of direct customer service and began working in the bank's administration department.
- [2] Mr. S.W.B. is 41 years old. He, too, is a P.[] native. Mr. S.W.B. went to work at a P.[] sawmill after finishing grade 11. He has worked at that mill throughout his adult life and he continues to be employed there.
- [3] In 1988 Mr. S.W.B. purchased a house on J.[] Street in P.[] from his parents. He, his father, and a rent-paying roommate lived in the house for the first year of Mr. S.W.B.' ownership.
- [4] Mr. S.W.B. and Ms. D.B.W. met in 1988. They dated for a while. In 1989 Mr. B. Sr. and the roommate moved out of J.[] Street and Ms. D.B.W. moved in. Ms. D.B.W. continued to work at the bank and Mr. S.W.B. continued to work at the mill. Ms. D.B.W. used her income for her personal needs and to buy groceries for the couple. Mr. S.W.B. used his income to pay the mortgage, utilities, taxes, insurance, and all other house-related expenses, and for his own personal needs. They equally shared housekeeping and maintenance chores. This arrangement was satisfactory to the couple.
- [5] In the spring of 1990 Ms. D.B.W. became pregnant. This was an unplanned event, but it was eventually welcomed by the couple. Ms. D.B.W. found that she could not work at the bank while she was pregnant so she quit her job. Mr. S.W.B. supported Ms. D.B.W. in all ways during this time. His income paid all the couple's expenses. In December 1990 Mr. S.W.B. proposed marriage to Ms. D.B.W.. It seems they would have been happy to marry, but they could not agree on what kind of ceremony to have. One wanted a big wedding, the other wanted a small one. It does not matter who wanted what - the upshot is that they allowed a minor concern over cost to scotch their making a major commitment to one another.
- [6] Also in 1990 Mr. S.W.B. started an electrical apprenticeship at the mill. The apprenticeship was fully funded by his employer, and he was fully paid while he attended the eight weeks of classes required for each year of the program. Neither Mr. S.W.B. nor Ms. D.B.W. gave any evidence that Ms. D.B.W. encouraged Mr. S.W.B. to pursue his apprenticeship or that she in any way facilitated his attendance and successful completion of the program. Mr. S.W.B.' employment history at the mill permitted him to complete the program in only three years instead of the usual four. He received his journeyman electrician certificate in 1993. Mr. S.W.B.' pay increased considerably as a consequence of his trade training.

- [7] Wedding or no, Ms. D.B.W.'s pregnancy progressed. As A.'s birth neared Ms. D.B.W. and Mr. S.W.B. talked about their future. They agreed that it was important for their child to be raised at home, at least until she was a year or so old. So they agreed that Ms. D.B.W. should stay a homemaker for at least a year or a year-and-a-half. After that they thought that perhaps she should go to work in some part-time job. A. was born on [], 1991.
- [8] In December 1992 Mr. S.W.B. transferred the J.[] Street property to himself and Ms. D.B.W. as joint tenants. Mr. S.W.B. and Ms. D.B.W. made wills at the same time. Each will left all to the other.
- [9] Ms. D.B.W. returned to work when A. was a year-and-a-half old. She started again at the bank, working part-time. She gradually moved into a job-sharing arrangement with a colleague. Once again she used her income for her own necessities and to buy groceries. Mr. S.W.B. used his income for all other household expenses.
- [10] In the fall of 1996 Ms. D.B.W. became pregnant again, and again she quit her bank job as soon as she realized her condition. Ms. D.B.W. went to work in a less stressful position at a craft and sewing retailer. She worked there until the day before she gave birth to the couple's second child R.. He was born [], 1997.
- [11] Mr. S.W.B. and Ms. D.B.W. agreed that she should remain at home and devote herself to homemaking and raising the children at least until R. started kindergarten. That is what she did. However, this decision had a negative impact on the couple's relationship. Ms. D.B.W. was not earning her own money. The only spending money available to her was whatever Mr. S.W.B. chose to provide. Ms. D.B.W. disliked being wholly dependent upon Mr. S.W.B.. Her disquiet increased as Mr. S.W.B. became increasingly concerned about her spending choices. He resented her spending money on herself without his knowledge, and she resented having to account to him for her decisions. Ms. D.B.W. became increasingly determined to return to the work force. When R. enrolled in kindergarten in the fall of 2002 she began to revive her clerical and computer skills and she began to look for a job.
- [12] Throughout the period from R.'s birth to the fall of 2002, Ms. D.B.W. and Mr. S.W.B. argued constantly about what she considered to be his excessive control over finances and what he considered to be her irresponsible spending. This issue continued to be a source of stress, tension, and conflict between the two. It was not amenable to resolution. By the fall of 2002 both parties must have appreciated that there would be no peace between them so long as Ms. D.B.W. was financially dependent on Mr. S.W.B..
- [13] Mr. S.W.B. has accrued pension credits throughout his employment with the mill. These credits came to him as an adjunct of his employment. The accumulation of the pension is not voluntary in the sense that he could, if he wanted to, opt out of the pension plan. Neither can he voluntarily increase the value of the plan by putting some of his discretionary income into it. His employment pension vested in 1983. At no point during the trial was there evidence that Ms. D.B.W. encouraged Mr. S.W.B. to maximize his employment pension credits, or that she encouraged him to work at the mill rather than pursue other

opportunities, or that she encouraged or facilitated his completion of the apprenticeship program. Neither did Ms. D.B.W. testify that she expected to enjoy a share of Mr. S.W.B.' pension income when he retired. Indeed, given the fact that Ms. D.B.W. clearly disliked being financially dependent upon Mr. S.W.B. and her resentment of his control over her spending, it is inconceivable that Ms. D.B.W. would have happily planned a retirement under circumstances that would have fostered that source of discord.

- [14] In the years prior to 2003 Mr. S.W.B. used some of his discretionary income to purchase spousal RRSPs for Ms. D.B.W.. Those RRSPs are currently worth \$11,560. Ms. D.B.W.'s evidence with respect to the spousal RRSP was that Mr. S.W.B. bought them for her because his income was relatively high at the time and they were a way to lessen his income tax. She gave no evidence that it was because they planned to retire together and use the money to fund their post-employment years. Mr. S.W.B. testified that by the time A. was born they had joint title in the house, joint wills, and he had bought Ms. D.B.W. RRSPs. He said he thought that the couple would spend the rest of their lives together.
- [15] As noted, Mr. S.W.B. and Ms. D.B.W.'s relationship deteriorated as the years passed after R.'s birth. Ms. D.B.W. complained about Mr. S.W.B.' drinking, and Mr. S.W.B. complained about Ms. D.B.W.'s spending. Each resented the other's attempt at control. Throughout 2002 they did not share much physical intimacy - at night Ms. D.B.W. occupied the master bedroom while Mr. S.W.B. slept on the couch. Mr. S.W.B. deposited something on the order of \$1,800 to \$2,200 per month into a joint account, but kept the rest of his wage (an approximately equal amount) under his sole control. The joint account funded automatic mortgage payments, life and auto insurance, and various other household bills. Those expenses used all but \$200 - \$300 of the monthly deposit. That \$200 - \$300 comprised Ms. D.B.W.'s discretionary income. Ms. D.B.W. had some credit cards and used them regularly. Mr. S.W.B. was unaware of at least one of these cards. He became very upset with Ms. D.B.W. when in October 2002 he discovered that she was using some of the money in the joint account to pay that card account. She, in turn, became very upset that Mr. S.W.B. would not allow her to spend money privately as she wished. A heated argument between the two ensued.
- [16] This argument was a signal event. It happened in or around October 18 - 25, 2003. On October 26 Ms. D.B.W. decamped with A. and R. from J.[] Street and went to stay at her mother's house. Her mother is Ms. R.. Ms. D.B.W. and the kids stayed with Ms. R. for about five weeks.
- [17] During the five-week separation Mr. S.W.B. and Ms. D.B.W. took counselling. Mr. S.W.B.' counsellor told him that in order to save the relationship they had to get into joint counselling. Mr. S.W.B. told Ms. D.B.W. this advice, and proposed that they undertake joint counselling. Ms. D.B.W. flatly refused. She testified that at this time she was seeing her own counsellor and had no interest in going to joint sessions. Upon hearing this and after processing it for a while, Mr. S.W.B. says that he concluded then that his relationship with Ms. D.B.W. was at an end.

- [18] However, on or around November 29 and without any advance notice, Ms. D.B.W. returned to J.[] Street and took up residence there again. Ms. D.B.W. maintains that, at least for a while after her return home, her relationship with Mr. S.W.B. got onto better footing. She says that they communicated better, and while he continued to control her spending (going so far as to reduce deposits to the joint account, her only source of discretionary income, to just enough to make the pre-authorized payments) and while he continued to drink some, their relationship was, on the whole on the mend. Ms. D.B.W. maintains that they resumed living together as a couple the same as before the separation. In support of that proposition, Ms. D.B.W. points to the fact that in the summer of 2003 they arrived separately but attended together at a lakeside house party, and that they went together to Ms. D.B.W.'s employer's Christmas dinner. She says that they went on family picnics and generally acted like a family. Mr. S.W.B. and she were, according to her, sexually intimate.
- [19] Mr. S.W.B., on the other hand, says that from late-November 2002 on he and Ms. D.B.W. were only roommates. He testified that Ms. D.B.W. had no interest in carrying on a mutually supportive relationship. He points to her refusal to undertake joint counselling as evidence of her determination to abandon him emotionally. Mr. S.W.B. says that they were not sexually intimate after November 2002, and that as soon as she returned to the house he resumed sleeping on the couch. He acknowledges accompanying Ms. D.B.W. to the summer party, but says that he did that to support her in her effort to ingratiate herself with her new employer. He says that he went to the Christmas party with Ms. D.B.W. only because he was the designated driver that night.
- [20] Ms. D.B.W. argues that Mr. S.W.B. is not credible because Ms. D.B.W.'s doctor noted that in the fall of 2003 she told the doctor that she was using condoms for birth control. Ms. D.B.W. would argue that this puts the lie to Mr. S.W.B.' assertion that they were not having sex at the time, and that his credibility generally must therefore be suspect. I reject this proposition for several reasons. Firstly, Ms. D.B.W. herself did not testify to condom use, and most particularly she did not say that she was using the condoms with Mr. S.W.B.. Secondly, the clinical note was not put to Mr. S.W.B. when he was on the stand, and he had no opportunity to comment on it. It flies squarely in the face of the principle in *Brown v. Dunn* to attack a party's credibility without first giving the party an opportunity to respond to allegedly incriminating evidence. It is not, therefore, open to Ms. D.B.W. to attack Mr. S.W.B.' credibility on the basis of the doctor's note.
- [21] I accept that Ms. D.B.W. advised Mr. S.W.B. on the day or shortly after she returned home that she came back because living at home was easier on her and the children. I also accept that Ms. D.B.W. told him that she intended to remain in the home only so long as it took her to find a full-time job so that she could afford to move out. I further accept Ms. J.B.' evidence that at the end of July 2003, Ms. D.B.W. advised her that Ms. D.B.W. was seeking a full-time job and that as soon as she got one she intended to move out of the J.[] Street house. I note that Ms. D.B.W. got a part-time job as a receptionist in March 2003, and that she became full-time in January 2004. Ms. D.B.W. testified that it was in January 2004 that she decided once

and for all that she was going to move out of the house. She actually moved out with the kids on June 27, 2004.

- [22] In the months following November 2002, Mr. S.W.B. put only enough money in the joint account to cover pre-authorized payments for life insurance and auto insurance on Ms. D.B.W.'s vehicle, as well as small amounts to pay for her medication and eye examination. Mr. S.W.B. did not supply Ms. D.B.W. with any spending money.
- [23] From March 2003 on Ms. D.B.W. used the income from her job for personal expenses and to buy items for the children. She bought a few groceries for the house too. In July 2003 Ms. D.B.W. set about to replace the older Bronco she had been driving and which had been destroyed in a collision. Ms. D.B.W. was injured in that collision and was unable to go car shopping herself. Mr. S.W.B. scouted a number of vehicles for her. He recommended that Ms. D.B.W. buy a car with her ICBC cash settlement and that she not commit herself to financing a vehicle. His view was that, given her limited means, Ms. D.B.W. should be content to drive a car she could afford. Ms. D.B.W. had a different idea. At the end of July Ms. D.B.W. purchased a 1995 Jeep for a price of approximately \$29,000. The loan payments for this vehicle amount to approximately \$600 per month, and about \$21,000 remained outstanding on that loan by the trial date. Ms. D.B.W. made this purchase without consulting Mr. S.W.B. and with the knowledge that by committing so much of her income to car payments she would be unable to contribute much money to the household.
- [24] Mr. S.W.B. continues to work as an electrician at a P.[] sawmill. He earns \$29.45 per hour. His income varies somewhat from year to year depending upon the amount of overtime available. Mr. S.W.B. sees the children regularly, and quite properly declines overtime work on shifts when the kids are with him. Mr. S.W.B.' 2004 income for child support purposes was \$64,000. He pays \$888 per month for child support. He testified that he expected his 2005 income to be on the order of \$73,000. He estimates his annual expenses to be approximately \$87,000. He lives on his own at the J.[] Street house.
- [25] Ms. D.B.W. presently works full-time as a receptionist for Commonwealth Mortgage Corporation. She makes on the order of \$22,000 per year. She also receives an annual child tax credit of \$6,312. A. and R. live with Ms. D.B.W. in an apartment she has rented at a cost of \$650 per month. Ms. D.B.W. puts her annual expenses at approximately \$64,000. Included in that amount is about \$7,200 for car payments.
- [26] Against the background of these facts, Ms. D.B.W. has made a claim for spousal support and for a declaration that a portion of Mr. S.W.B.' employment pension is impressed by a constructive trust in her favour. Mr. S.W.B. and Ms. D.B.W. also seek an order defining the children's custody, guardianship, and access.

The Issues

Custody, Guardianship, Access

- [27] The parties agree that the children should reside primarily with Ms. D.B.W.. They also agree that they are currently unable to communicate with each other and that an order for joint custody would not, therefore, be practical.
- [28] Mr. S.W.B. argued that the order following trial should be silent on custody. I think such an order would simply invite future trouble. Out-of-country travel might, for example, require the children to have passports. Getting passports, or even simply crossing the US border, may be complicated by the lack of a clear direction on who has custody of these children.
- [29] Accordingly, and while recognizing that Mr. S.W.B. may see it as a 'win' to Ms. D.B.W. and a corresponding 'loss' to him, I think it is in the children's best interests for the court to clearly state who has custody of the children. Given that the kids will live with Ms. D.B.W. it is sensible, in my view, for the court's order to stipulate that she have custody.
- [30] As for guardianship, the parties agree that joint guardianship on some form of the Joyce model should apply. Their concern, again, is that they are presently unable to communicate with one another, and so the terms of the joint guardianship order should not require that they do. The order on guardianship shall, therefore, be:
- a) the parties shall be joint guardians of the estate of the children;
 - b) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the children;
 - c) each parent will have the obligation to advise the other parent of any matters of a significant nature affecting the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the children;
 - f) in the event of disagreement on a decision, the custodial parent shall have the right to make that decision;
 - g) the non-custodial parent shall have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which that parent considers contrary to the best interests of the children; and
 - h) each parent will have the right to obtain information concerning the children directly from third parties, including teachers, counsellors, medical professionals and third-party care-givers.
- [31] Finally, Mr. S.W.B. shall have reasonable and generous access to the children. Both parties will give appropriate weight to the children's wishes on the time they spend with each party.

Unjust Enrichment & Consequent Relief

- [32] As a general principle where one party suffers a detriment by supplying a benefit to another and where there is no legal reason to compel that person to confer the benefit, then the first is entitled to some kind of compensation from the second. That compensation should preferentially be a money judgment but, if that is impractical, the compensation may comprise a declaration that the enriched party holds the property to which the person contributed in trust for the benefit of that person. This principle and those remedies apply to relations between individuals, whether they are strangers, neighbours, or unmarried persons who live together as man and wife.
- [33] In *Peter v. Beblow* [1993] 1 S.C.R. 980 the Supreme Court of Canada considered unjust enrichment in the context of the latter sort of relationship. In *Peter v. Beblow* the court held that there were several clearly defined steps that must be followed to analyze an unjust enrichment claim. The first step is to determine whether one spouse enriched the other, and if so, whether that enrichment was unjust. If it was, then the court held that equity requires the second party to compensate the first for his enrichment. That compensation should preferentially be a monetary award. However, in some circumstances it may be impractical to make a monetary award. When that is so the court may impose a constructive trust. A constructive trust can only be ordered where the claiming party can show that he or she actually contributed to the property affected by the trust. Absent such contribution, no trust may be declared. Finally, if after concluding that there was unjust enrichment, that a monetary award is impractical, and that the pre-conditions for a constructive trust exist, the court must then set the value of the trust in accord with the value of the asset on the day of imposition of the trust and not by toting up the value of the claimant's contribution to the acquisition of that asset (aka the value survived over the value received approach). I note that the value survived approach is applicable to determining the amount of a monetary award as well: *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C.C.A.).
- [34] Applying those steps to this case, then, the first question to ask is whether, as the party claiming relief, Ms. D.B.W. can show that she bestowed a benefit upon Mr. S.W.B.. The evidence shows that the parties lived together in a mutually supportive and supporting relationship up to the point where Ms. D.B.W. became pregnant with A.. Mr. S.W.B. paid all household expenses other than groceries, and Ms. D.B.W. lived in the J. [] Street house and bought the groceries. They equally shared household tasks. On that evidence I find that between 1988 and 1990, Ms. D.B.W. conferred a benefit on Mr. S.W.B. but that benefit was wholly offset by benefits flowing from Mr. S.W.B. to Ms. D.B.W..
- [35] Ms. D.B.W. stayed at home after the onset of her pregnancy in 1990. She took on most of the household tasks. Most importantly she became mother and caregiver to A. and later to R.. Mr. S.W.B. quite rightly acknowledges that he derived great benefit from Ms. D.B.W.'s devotion to hearth and home. He enjoyed that benefit throughout the 1990's and into 2002.

- [36] The next question to ask is whether Ms. D.B.W. suffered a detriment as a consequence of her homemaking tasks. The fact is that she abandoned her banking career to become a mother and homemaker. Her decision resulted in her losing her financial independence. By any measure those decisions visited a detriment upon her.
- [37] Next, one must ask whether there was a juristic reason for Ms. D.B.W. to confer this set of benefits upon Mr. S.W.B.. In 1992 Mr. S.W.B. gave her a one-half interest in the J.[] Street house. A purely linear and coldly rational analysis of that fact could lead one to conclude that Ms. D.B.W. was 'paid in advance' for her homemaking, thus birthing a juristic reason for her doing what she did.
- [38] Having listened to and observed Ms. D.B.W. and Mr. S.W.B. as they gave their evidence, I conclude that in and around the early to mid-1990's they were genuinely happy with each other. They did not stop to wonder, in a mercenary way, who might be getting the better deal out of the relationship - they simply did what they thought was right in the circumstances. I do not, therefore, think that it would be right to impute to Mr. S.W.B.' transfer of a one-half interest in the house an intent to make advance payment for future wifely services. The same applies to Mr. S.W.B.' decision to purchase spousal RRSPs for Ms. D.B.W..
- [39] Instead, the house transfer and the RRSP purchases were manifestations of Mr. S.W.B.' desire to give a general benefit to Ms. D.B.W. in recognition of all aspects of their relationship. I am not certain whether those benefits should be accounted as an offset to the benefit Ms. D.B.W. gave to Mr. S.W.B., or whether they go to reduce the detriment Ms. D.B.W. suffered as a consequence of giving up her financial independence to become a stay-at-home mother. In either case the fact remains that Mr. S.W.B. supplied considerable benefit to Ms. D.B.W., and she continues to enjoy those benefits today.
- [40] In my view, the benefit Ms. D.B.W. received from Mr. S.W.B. by way of the house transfer, and by way of his paying all the household expenses and groceries and supplying Ms. D.B.W. with some (albeit limited) discretionary income between 1990 and 2002, and his giving her savings by way of spousal RRSPs, matches the benefit Ms. D.B.W. bestowed on Mr. S.W.B. by looking after that house, taking care of the household accounts, and caring for the children.
- [41] If, as here, matching benefits are given by one party to the other, no party can be said to have realized a net enrichment from the relationship. It follows that Ms. D.B.W.'s claim does not survive the first step of the Peter v. Beblow analysis. In this case there was no unjust enrichment.

Pensions & RRSPs

- [42] I have found that there was no unjust enrichment in this case because each spouse received roughly equal benefits from the other. It follows that there is no ground upon which to order either a monetary award or a constructive trust. Against the possibility that I may be wrong, I will go on to consider Ms. D.B.W.'s claim for a trust interest in Mr. S.W.B.' employment pension.
- [43] If Mr. S.W.B. was unjustly enriched by Ms. D.B.W.'s efforts between 1990 and 2002, she would be entitled to a monetary award (the preferable remedy - *Peter v. Beblow* supra) or a constructive trust. Ms. D.B.W.'s pleadings and her argument at trial rejected a monetary award in preference to a claim for constructive trust. That is her prerogative; however, by committing her claim to a particular remedy she likewise committed herself to satisfying the particular prerequisites of that remedy.
- [44] The law is clear that before a constructive trust may be imposed with respect to property the claimant must show that she contributed to the acquisition or accumulation of that property. In *Peter v. Beblow* McLachlin J. considered whether that requirement might be set aside. She said:

Moreover, the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust.

- [45] The courts have consistently held that it is a necessary element of a constructive trust claim on a pension that the claimant demonstrates her contribution to the acquisition or accumulation of that pension. So in *Wong v. Spencer* [1995] B.C.J. No. 2571 B.C.S.C. Romilly J. said:

[para 43] Regarding the plaintiff's claim for constructive trust against the pension, however, I am satisfied, based on the law reviewed above and the facts before me, that she has not succeeded in establishing a claim for constructive trust. It is clear from the evidence that the plaintiff and defendant kept their finances separate. Apart from that the plaintiff is unable to show that she made any contribution towards this pension or the defendant's ability to contribute to it.

- [46] In *Nemeth v. Timperly* (1997), 33 B.C.L.R. (3d) 8 (B.C.S.C.) Koenigsberg J. considered the plaintiff's claim on the defendant's RRSP savings, and said:

15 Finally, I must note a further difficulty. Even if I had found a benefit conferred without compensation -- using the *Everson v. Rich*, supra, analysis -- I would not have sufficient facts to declare a constructive trust. There is no evidence to suggest a nexus between anything done by the Plaintiff in contributing positively to the Defendant's life and the accumulation of his pension. Thus, one would be left with entitlement to a monetary damage award. Here, as in *Everson v. Rich*, one would have to "settle up" the contributions. In my view distinguishing this case from *Everson v. Rich* however, the contributions by the Defendant to the Plaintiff's financial situation over the 16 years of cohabitation outweigh those of the Plaintiff to the Defendant.

Further the Defendant has no present means of paying an award. Each party's present personal and financial situation is unfortunate but neither appears to be in any better position than the other.

[Emphasis added]

[47] And, in *Carmichael v. Douglas* (2003), 37 R.F.L. (5th) 259 (B.C.S.C.) where the plaintiff claimed a constructive trust in the defendant's pension, Ross J. said:

101 I am not satisfied that Ms. Carmichael has established that she made any contribution to Mr. Douglas's pension or to his ability to contribute to it. Thus there is no enrichment and corresponding deprivation in relation to the pension and no basis for the imposition of a constructive trust, see *Wong v. Spencer*, [1995] B.C.J. No. 2571 (B.C.S.C.). I dismiss her claim to an interest in his pension.

[Emphasis added]

[48] There have been cases in this Province in which plaintiffs have received a declaration of trust over an interest in the defendant's pension. Those cases are distinguishable from the present. For example, in *Thompson v. Floyd* (2001), 17 R.F.L. (5th) 450 (B.C.C.A.) the plaintiff supported the defendant while he was a student and encouraged him to contribute the maximum to his pension savings when he obtained a job commensurate with this education. In *Manley v. Buckmaster*, [2000] B.C.J. No. 1619 (B.C.S.C.), where the plaintiff obtained a beneficial interest in the defendant's pension, the evidence showed that the parties intended to retire together and use the defendant's pension to purchase a recreational vehicle and travel together.

[49] In the present case Ms. D.B.W. gave no evidence to the effect that she planned to retire with Mr. S.W.B. or that she expected share in his employment pension. Mr. S.W.B. had his job at the mill before the relationship started. There was no evidence that Ms. D.B.W. encouraged Mr. S.W.B. to work at the mill or to undertake his electrical apprenticeship. There was no evidence suggesting that, but for the relationship, he would have worked elsewhere, worked for a lesser wage, opted out of the pension, or forgone his apprenticeship opportunity. In short, there was no evidence that Ms. D.B.W. did anything to affect Mr. S.W.B.' accumulation of his employment pension. Absent such evidence there is no basis upon which I can find the necessary connection between the parties' relationship and Mr. S.W.B.' employment pension.

[50] Ms. D.B.W. argued that in past cases the court has ordered a constructive trust over all assets accumulated by a long-term common law couple, and that the 'value survived' approach to assessing the quantum of the plaintiff's award establishes a proposition that the myriad global contributions by the plaintiff to family life entitle her to a trust interest in the myriad assets accumulated by the couple during their relationship. Thus in *Wong v. Wong* 1999 B.C.C.A. 344 the long-term common law plaintiff spouse obtained an order for a beneficial interest in all property acquired by the defendant during the years of their relationship.

With the greatest of respect to Ms. D.B.W., her analysis of the Wong decision is flawed. The 'survived value' principle is a tool to quantify a claim; it comes into play after the plaintiff has established entitlement to a constructive trust. That is to say, the plaintiff must first establish unjust enrichment and contribution to the asset claimed. Only then will the court look at the surviving value of the asset in question to measure the plaintiff's beneficial interest in that asset. In Wong the evidence clearly established that the plaintiff actively contributed to the couple's family life and to various real property assets which the defendant bought and sold and eventually turned into a handsome estate. In this case Ms. D.B.W. did not testify that she made Mr. S.W.B.' work-day lunch, much less that she somehow played a role in his accumulation of his employment pension.

- [51] Ms. D.B.W.'s claim for a constructive trust over a portion of Mr. S.W.B.' employment pension is dismissed.

Disposition of the House

- [52] The house on J.[] Street is owned jointly by Mr. S.W.B. and Ms. D.B.W.. Oddly, neither party claimed Partition of Property Act relief in this proceeding. Nevertheless, they both took the position that something should be done with the house. They also agreed that the house has a present value of \$117,500. There is a small mortgage of slightly over \$4,000 against its title.
- [53] Mr. S.W.B. has offered to purchase Ms. D.B.W.'s interest in the house. That is a sensible suggestion. I fix the equity in the property at \$113,500. Ms. D.B.W.'s share is \$56,750. Mr. S.W.B. will have until July 30, 2005 to arrange to pay Ms. D.B.W. \$56,750, upon receipt of which sum Ms. D.B.W. shall transfer her one-half interest in the property to Mr. S.W.B.. Mr. S.W.B. shall bear the cost of that transfer. In the event that on August 1, 2005 that transaction has not taken place, either party shall be at liberty to make an application in this proceeding for an order for conduct of sale of the property. Naturally, neither party shall encumber its title until the property is transferred except as may be necessary to purchase the other's interest.

Child Support

- [54] Mr. S.W.B.' 2005 employment income will be on the order of \$73,000. He presently pays child support of \$888 per month, but that figure is based on his somewhat lower income in the previous year. Under the Child Support Guidelines Mr. S.W.B.' obligation to pay support for the two children is \$952 per month. There will be an order that he pay that sum commencing May 1, 2005 and on the first of every month thereafter.

Spousal Support

- [55] Ms. D.B.W. and Mr. S.W.B. agree that up to October 26, 2002 they were spouses as defined by the Family Relations Act. Ms. D.B.W. says they continued to be spouses right up to June 27, 2004 when she left the home. Mr. S.W.B. says they separated on October 26, 2002 and were

never spouses again after that. Ms. D.B.W. commenced her suit for support in August 2004. If Mr. S.W.B. is correct about the separation date then they ceased to be spouses in October 2002, and Ms. D.B.W.'s application for support is beyond the one year cut-off stipulated by the Family Relations Act.

Separation

[56] I think it is useful to start my analysis of the limitation question by reminding myself just what a common law relationship is, and how an outsider to the relationship might recognize it. In *Gostlin v. Kergin*, [1986] B.C.J. No. 365 (B.C.C.A.) Lambert JA. considered the nature of a common law relationship in light of the Family Relations Act and in the context of a childless couple. He said:

The legislature has accommodated the diverse interests of different couples by use of the words "who lived together as husband and wife" in the definition of "spouse". If a couple marry, then they are committed to the maintenance and support obligations of s. 57, no matter on what terms they live together. But if they do not marry, they are not committed to those obligations unless they live together for not less than two years, and unless they do so as husband and wife.

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? And, perhaps most important of all, did one of them surrender financial independence and become economically dependant on the other, in accordance with a mutual arrangement?

- [57] Mr. S.W.B. and Ms. D.B.W. agree that before October 2002 they were a common law couple. That was so despite their ongoing disagreements about finances and other things. How they lived their lives before October 2002 defined the nature of their relationship. We must have that definition in hand so that we can apply it to the couple's circumstances when they lived together again after November 2002.
- [58] Although they were in some respects unhappy with each other before October 2002, they were by all accounts committed to their children and reasonably committed to one another. I cannot say with certainty how one would have responded to disability of the other, but on the balance of probabilities I think that each would have believed him or herself committed to providing the kind of long-term support contemplated by Lambert JA. in *Gostlin*. Leaving that indicator aside, Mr. S.W.B. and Ms. D.B.W. certainly shared the legal rights to their accommodation, they shared their property and to a degree their finances, and in accord with their mutual agreement Ms. D.B.W. had definitely surrendered her economic independence to Mr. S.W.B..
- [59] Then came October 2002. There is no doubt that Mr. S.W.B. and Ms. D.B.W. lived apart for the five weeks between October 26th and approximately the end of November that year. Was that an uppercase separation in the sense that it marked the permanent end of their relationship, or a lowercase separation marking a period of re-evaluation and assessment, but not a termination of the relationship?
- [60] From the time that R. went into kindergarten (and perhaps before) Ms. D.B.W. felt increasing resentment to Mr. S.W.B.'s near total control over the family's finances. She started looking for employment as soon as September 2002, but she was unsuccessful. She became more depressed as summer became fall that year. Sometime during the week before October 26th Mr. S.W.B. discovered Ms. D.B.W. was using money from the joint account to pay for credit card purchases about which Mr. S.W.B. knew nothing. A major fight ensued.
- [61] I find that it was this fight that led to Ms. D.B.W. leaving J.[] Street with the kids. I do not think her leaving was caused, as she says, by her negative reaction to some anti-depressant drug. Ms. D.B.W. produced clinical records from her family physician who noted that she was panicky around October 26th. The doctor recommended that she cease her anti-depressant medication, which she immediately did. If Ms. D.B.W. fled J.[] Street due to drug induced panic, and shortly after she stopped taking the offending drug, then one would expect her to return home when the panic subsided. Ms. D.B.W. did no such thing, but remained away for roughly a month. Furthermore, I note that Ms. D.B.W.'s mother, Ms. R., with whom Ms. D.B.W. stayed for those five weeks, did not testify at the trial despite her apparent availability. Had the prime cause of Ms. D.B.W.'s leaving home been a negative drug reaction, then I would have expected Ms. R. to have endorsed Ms. D.B.W.'s story. I draw an adverse inference from Ms. R.'s failure to testify on this point. I find that had she testified she would have said that her daughter complained about her relationship with Mr. S.W.B. and that she attributed the separation to difficulties in that relationship, not to a side effect of her medication. Also, Ms. R., who had previously welcomed Mr. S.W.B. into her home, did

not invite him to visit while Ms. D.B.W. and the kids were with her in October and November. This confirms that the separation was a 'her side' / 'his side' kind of affair and that naturally enough Mrs. R. adopted her daughter's side, which in turn led equally naturally to a cooling of her hospitality to Mr. S.W.B..

- [62] That said, I do not accept that the period October - November 2002 marked a permanent end to the couple's relationship. Ms. D.B.W. did not, so far as the evidence indicates, express an intention to forever sever her connection to Mr. S.W.B.. She did not move her belongings (other than clothes and personal effects necessary for everyday life) out of J.[] Street. Ms. D.B.W. made no move during this time to find an apartment or house of her own. She did not propose division of their jointly held personal property and real estate. The couple's banking arrangement continued unchanged in the sense that they continued to use the same accounts and money flowed in the same way from one account to another. Mr. S.W.B. unilaterally changed the amount of that flow, but the fact remains that some of couple's financial obligations were paid with money in the joint account. Her stay with her mother could only have been a temporary thing.
- [63] Mr. S.W.B. argues that the couple did separate in October and November and that period marked a permanent end to their relationship. Mr. S.W.B. relies on a note in his diary as evidence of his subjective state of mind in mid-November; a state of mind that left no room for the relationship to continue. Mr. S.W.B. says that the terms on which a couple live together and their commitment to their relationship determine whether they are or are not common law spouses. He says if one party lacks that commitment, then the relationship must be over. He says that his diary note and his testimony at trial demonstrated that in November his commitment to his relationship with Ms. D.B.W. expired. He says that upon that expiry the relationship lost its legal status and was permanently over.
- [64] I accept that at that time Mr. S.W.B. was discouraged - he had asked Ms. D.B.W. to undertake joint counselling with him as his own counsellor had recommended, but Ms. D.B.W. had refused. Mr. S.W.B. no doubt felt defeated and held out little hope for the repair of his relationship with Ms. D.B.W.. However, one despairing note an end does not make. I note that Mr. S.W.B. did not adduce evidence that he told anyone at the time that he believed the relationship was permanently over. Like Ms. D.B.W., Mr. S.W.B. took no steps to move Ms. D.B.W. out of the J.[] Street house, and he did not make plans to quit the place himself. Similarly, he did nothing to divide their property between them. When Ms. D.B.W. reappeared at the end of November Mr. S.W.B. did not demur to her living with him again.
- [65] While I do not think that they were sexually intimate after November 2002, they did live together under much the same circumstances as before. In that regard, I note that they resumed joint care for their children, their sleeping arrangements were roughly the same as before, Mr. S.W.B. continued to provide money for at least some of Ms. D.B.W.'s needs such as medication and an eye examination, and that he continued to pay for all the household expenses and groceries. They attended two social functions together in that year. I doubt very much that Mr. S.W.B. would have exerted himself to go out with Ms. D.B.W. those two

times had he genuinely thought that they were two strangers living under the same roof. Mr. S.W.B. did not know anyone at either party, he had no business or social connection with them, and he had no reason other than an ongoing relationship with Ms. D.B.W. to go to either engagement.

- [66] Ms. D.B.W. found a job in March 2003 and began to earn her own money. In July 2003 she bought a Jeep without Mr. S.W.B.' assistance and contrary to his advice. Also in July 2003 she told Mr. S.W.B.' sister that she hoped she would find a part-time job so she could earn enough money to move out. At that time, then, Ms. D.B.W. certainly felt she was financially dependent on Mr. S.W.B., and it cannot be said from that remark that at that time she felt the relationship was permanently over.
- [67] I find that the relationship was actually permanently over when Ms. D.B.W. determined that even with her job and own money things were not going to ever go well with Mr. S.W.B.. I accept that in or around January or February 2004 Ms. D.B.W. lost her commitment to the relationship and began to make concrete plans to separate from Mr. S.W.B.. Ms. D.B.W. commenced her action for spousal support in August 2004 and it was, therefore, brought within the Family Relations Act one-year time limit.

Ms. D.B.W.'s Need

- [68] Ms. D.B.W. earns on the order of \$23,000 per year. She receives a child tax benefit of \$6,312 per year. As of May 1st Mr. S.W.B. will pay child support of \$11,424 per year. Her total annual income will, therefore, be on the order of \$40,700. Ms. D.B.W. puts her annual expenses at approximately \$64,000.
- [69] She testified that she intends to take some training and seek a promotion at work. She plans to become qualified as a mortgage broker by taking a 6-month course. Her employer will underwrite the cost of that training. In her first year of brokering mortgages she can expect to earn on the order of \$30,000 to \$40,000 less perhaps \$12,000 for business expenses. If she is successful as a mortgage broker she expects her income to increase in subsequent years until her fifth year of practice when it should be in the \$50,000 to \$60,000 range less approximately \$12,000 for business expenses.

Mr. S.W.B.' Means

- [70] Mr. S.W.B.' annual income will be on the order of \$73,000 this year. He puts his annual expenses at a rounded \$87,000, but that is based on his present child support payments of \$888 and on his present mortgage payment of \$300. The former figure will increase to \$952 per month and the latter will likely change if Mr. S.W.B. purchases Ms. D.B.W.'s interest in the house.

[71] I do not rely too heavily upon either party's expense estimates. They are, after all, no more than educated guesses. Nevertheless Ms. D.B.W., even in her modest lifestyle, does experience a significant disparity between her income and expenses. Mr. S.W.B.' shortfall of income to expense is, on the other hand, of a lower magnitude. On these facts I conclude that Ms. D.B.W. has a need for and Mr. S.W.B. has the means to pay spousal support.

[72] The Family Relations Act stipulates the principles upon which a spousal support order may be made. The relevant provision is:

89(1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
 - (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
 - (c) custodial obligations respecting a child;
 - (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
 - (e) economic circumstances.
- (2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

[73] Mr. S.W.B.' after-tax and child support monthly disposable income will be very approximately \$3,400. On the assumption that the majority of the child support will be spent on the children, Ms. D.B.W.'s after-tax plus child tax benefit monthly disposable income will be very approximately \$2,000. I do not think it is necessary for a support order to equalize those two incomes, but given the length of this pair's relationship and the significant role Ms. D.B.W. played in raising the children during their early infancy, and the cost of that role to her independence, the ratio should, in my view, be closer to equal than not. A spousal support order of \$450 per month would bring Ms. D.B.W.'s net disposable income to about 45% of Mr. S.W.B.' net disposable income. That would, in my view, adequately provide for Ms. D.B.W. while not imposing an unfair burden on Mr. S.W.B..

[74] Ms. D.B.W. wishes to be economically self-sufficient. If she pursues her plan successfully she will achieve that goal in three to four year's time. I will, therefore, order that she receive support payments for four years. On the fourth anniversary of this order the spousal support order shall be reviewed. Upon review Ms. D.B.W. will bear the onus of showing that spousal support should continue. The parties may in the meantime make application to vary, suspend, or terminate this order due to a change of circumstance.

Conclusion

- [75] Ms. D.B.W.'s claim for a beneficial interest in Mr. S.W.B.' employment pension is dismissed. Ms. D.B.W. will transfer her interest in the J.[] Street house upon receipt from Mr. S.W.B. of \$52,750. In the event that Mr. S.W.B. does not purchase Ms. D.B.W.'s interest in the house before August 1, 2005 either party may apply to the court for directions to have the house sold and the net proceeds equally divided between them. I am not seized of that application. Ms. D.B.W. shall have custody of the children and they shall be primarily resident with her. Mr. S.W.B. will have reasonable and generous access to the children. Both parties will give appropriate weight to the children's wishes on the time they spend with each party. Mr. S.W.B. and Ms. D.B.W. will have joint guardianship of the children on the terms earlier described. For the purposes of the Child Support Guidelines Mr. S.W.B.' income for 2005 is \$73,000, and he shall pay child support of \$952 on May 1, 2005, and on the first of every month after for so long as the provisions of the Family Relations Act require. Mr. S.W.B. will pay Ms. D.B.W. spousal support of \$450 per month on May 1, 2005 and on the first of every month after until the fourth anniversary of this order. Upon the fourth anniversary of this order Ms. D.B.W.'s spousal support shall be reviewed. During that review Ms. D.B.W. will bear the onus of establishing that spousal support should continue.
- [76] Success in this matter was divided. Ms. D.B.W. obtained an order for spousal support but failed in her attempt to gain an interest in Mr. S.W.B.' employment pension. The issues of custody, guardianship, access, and division of the J.[] Street house were not seriously disputed. Subject to submissions the parties may wish to make that a pre-trial offer should result in a different division of costs, the parties will bear their own costs and disbursements.

"P. Rogers, J."

The Honourable Mr. Justice P. Rogers

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