

CANADA / JUDGMENT

Der Woon v. Zadorozny

2020 BCCA 95

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 95 Der Woon v. Zadorozny COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Der Woon v. Zadorozny, 2020 BCCA 95 Date: 20200316 Docket: CA46529 Between: Gerald Der Woon Appellant (Claimant) And Laura Zadorozny Respondent (Respondent) Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Griffin The Honourable Madam Justice DeWitt-Van Oosten On appeal from: An order of the Supreme Court of British Columbia, dated November 22, 2019 (Der Woon v. Zadorozny, 2019 BCSC 2004, Vancouver Docket E162384). Oral Reasons for Judgment Counsel for the Appellant: G.W.D. Abrams Counsel for the Respondent (via teleconference): C. Alvarez Gomez Place and Date of Hearing: Vancouver, British Columbia March 16, 2020 Place and Date of Judgment: Vancouver, British Columbia March 16, 2020 Summary: This is an appeal from an order dismissing the appellant's claim for a division of property under the Family Law Act because it was brought more than two years after the parties separated. The appellant says the chambers judge erred in determining the separation date by focusing on the respondent's stated intention to separate rather than the steps taken to carry out that intention. Held: Appeal dismissed. The separation date is a question of mixed fact and law and the appellant identifies no basis to interfere with the judge's decision.

- [1] WILLCOCK J.A.: This is an appeal from an order dismissing Mr. Der Woon's action for a division of property as statute barred because it was commenced more than two years after the parties separated.
- [2] The relevant limitation provisions of the Family Law Act, S.B.C. 2011, c. 25 read as follows:
- 198 (1) Subject to this Act, a proceeding under this Act may be started at any time.
- (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, , no later than 2 years after,
- (a) in the case of spouses who were married, the date
- (i) a judgment granting a divorce of the spouses is made, or (ii) an order is made declaring the marriage of the spouses to be a nullity, or
- (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

- [3] This provision must be read in the light of s. 3, which provides: 3 (4) For the purposes of this Act,
- (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.
- [4] The parties began cohabiting in 2006 but never married. They separated in 2014 on terms described by the chambers judge as follows:
- [8] It is not disputed that on June 17, 2014, the respondent made the claimant a nice dinner and then told him that their relationship was over. She said that they had not resolved any of their issues and needed to end it.
- [9] After that, the claimant and respondent did not sleep together and talked infrequently. About three days later, the claimant asked the respondent if she was resolved in her decision and she said she had never been more resolved. They no longer went out socially together; they didn't travel nor did they have family or friends visit them for dinner and they no longer had meals together other than once or twice.
- [10] Early in July 2014, the respondent told her brother-in-law that her relationship with the claimant was over.
- [11] The respondent was told by her counsellor to give the claimant a firm time to leave her house and she told him that he should leave by August 1, 2014. The claimant said that would not be long enough for him to arrange to move so she said he could stay until September 1, 2014. He left the house on that date.
- [13] On June 18, 2014 she met with her ex-husband about her circumstances and told him that she and the claimant had split up the day before. He confirmed this in his testimony. In an email to him on June 19, 2014 she told him about an appointment she had made with a lawyer to find out her rights and, referring to the claimant, said, "He could linger here for a while till he gets his shit together and I just want him out asap."
- [14] At a gathering of her co-workers early in July 2014 she told some of them that she and the claimant had broken up.
- [15] The claimant filed a notice of family claim on August 18, 2016.
- [5] After referring to the applicable provisions of the Act, the chambers judge succinctly analyzed the case as follows:

- [18] Although the claimant left the family home on or about September 1, 2014, I have concluded that the parties separated on June 17, 2014. (C.P v. K.W.A., 2018 BCSC 332 (CanLII) and *Nearing v. Sauer*, 2015 BCSC 58).
- [19] On June 17, 2014 the respondent clearly expressed her intention to end the relationship of the parties and her actions following her expressed intention were entirely consistent with her statement that she intended to separate. Although in the same residence, they talked infrequently, they slept in separate beds and they stopped socializing as a couple with friends or family. Shortly after her declaration to the claimant, she announced their separation to her father, her ex-husband and her co-workers. She also took steps to deal with her financial circumstances as she was unemployed at the time.
- [20] In my view, it was not incumbent upon the respondent to take steps to have the claimant removed from her house. She acted fairly and reasonable in allowing him to stay until September 1, 2014 so that he could find another place to live. A meeting of the minds is not required as to the date of separation. The claimant did not testify that the respondent did anything to lead him to believe that the relationship continued after June 17, 2014. Quite the contrary, a few days after her declaration that their relationship was over she said she had never been more resolved about a decision.
- [6] The appellant contends the judge erred in finding the parties separated on June 17, 2014 arguing as follows in his factum: They agreed to separate at the end of August, 2014, and did so. Until the end of August, 2014, they continued to live in the [family] home as they had for several months prior in that the Appellant continued to contribute financially to the maintenance of the home, performed some work in the home by way of upkeep, and was invited to do other such work.
- [7] The appellant says there was a financial incentive for the respondent to "acquiesce" to continuing cohabitation. He suggests the trial judge placed inappropriate weight upon the respondent's stated intentions, and not enough (or any) weight upon steps taken to carry out that intention. He argues: "[w]hether separation has occurred remains a question of fact, not merely (or primarily) of declaration".
- [8] There is no basis for the submission the chambers judge erred in principle by failing to consider the respondent's actions in addition to her declarations of intent. That submission is fully answered by the trial judge's enumeration of the actions evidencing the respondent's intention to separate from the appellant on June 17, 2014.
- [9] There is no suggestion the chambers judge misdirected himself. The factors he considered closely mirror the factors enumerated in *Nearing v. Sauer*, 2015 BCSC 58 and applied in *C.P. v. K.W.A.*, 2018 BCSC 332. In *Nearing*, Fleming J. wrote:
- [56] Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and

sharing significant family events: [Sachdeva v. Sachdeva, 2013 BCSC 313] at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: Newth v. Booth, 2011 BCSC 317 at para. 17.

- [10] I agree with that description of the focus of the court's analysis. The factor relied upon by the appellant, the contribution to household finances, is but one of the factors to be weighed and certainly would not overwhelm what is referred to in Nearing as the "generally accepted characteristics of marriage" which were considered by the chambers judge. As Groberman J.A., for this Court noted in Weber v. Leclerc, 2015 BCCA 492 at para. 25, "a checklist approach is not appropriate" for addressing this question and the trial judge must look to "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship".
- [11] The question when the parties separated is a question of mixed fact and law. It requires the application of the legal test to the facts as found by the trial judge. Seeing no basis to the argument that the finding in this case was founded upon an error in principle, or a palpable and overriding error, I would dismiss the appeal.
- [12] GRIFFIN J.A.: I agree.
- [13] DEWITT-VAN OOSTEN J.A.: I agree.
- [14] WILLCOCK J.A.: The appeal is dismissed. "The Honourable Mr. Justice Willcock"

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