

CANADA / JUDGMENT

Janus v. Lachocki Estate

2001 BCSC 1702

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Janus v. Lachocki et al Date:

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2001 BCSC 1702 Docket:

S060971

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEFANIA JANUS

PLAINTIFF

AND:

MICHAEL JAMES LACHOCKI, ADMINISTRATOR OF THE ESTATE OF

JAMES DYMITR LACHOCKI, DECEASED AND THE SAID

MICHAEL JAMES LACHOCKI

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOLMES

Counsel for the Plaintiff J.S.M. MacLeod

Counsel for the Defendants T.G. Kornfeld

N. Hunter

Date and Place of Trial: September 12, 13 & 14, 2001

New Westminster, BC

November 19, 2001

Vancouver, BC

- [1] The plaintiff seeks an order for her provision from the estate of James Dymitr Lachocki, ("the deceased) that the court considers adequate, just and equitable in all the circumstances pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490.
- [2] An alternate claim for damages for unjust enrichment advanced by the plaintiff in the pleadings was withdrawn by counsel during the course of trial.
- [3] The plaintiff is a 72 year old retired lady who at all relevant times lived in Burnaby, B.C. The deceased was a retired gentleman who, prior to his death March 22, 2000, lived in Campbell River, B.C. He was 78 years of age at his death.
- [4] The defendant Michael James Lachocki is the son of the deceased and the Administrator of his Estate.

PRE-RELATIONSHIP HISTORY

- [5] The plaintiff and the deceased were never married to each other, however it is the plaintiff's claim that they lived together in a common-law, or marriage-like relationship, after July, 1996 through to March, 2000.
- [6] The plaintiff came to Canada from Poland in May, 1989. She lived first in Toronto and later moved to British Columbia in August, 1991 with her daughter, Irene. She has two daughters and a son. Her husband died in Poland in 1994.
- [7] The plaintiff's immigration to Canada was sponsored by her youngest daughter, Irene, with whom she lived until 1993, when she obtained her own residence in a subsidized housing development operated by the New Vista Society in Burnaby. Her rent is currently \$320.00 a month.
- [8] The plaintiff was unable to obtain work in Canada as she was 60 years old when she immigrated and did not speak English. She has been maintained on Social Assistance income, which is presently \$920.00 a month.
- [9] The plaintiff has some disability and health problems that followed upon very serious injury sustained in a motor vehicle accident in 1992. She was hospitalized for six weeks and convalesced at home for a year, slowly regaining her mobility.
- [10] The deceased was retired and lived in his own home in Campbell River. He was born in Poland but had lived and worked his adult life in British Columbia. He married his wife Judy in 1957, and the defendant Michael is their one child. The deceased's wife died in 1993.
- [11] Michael left the family home in Campbell River in 1983 after finishing school to obtain work in the Vancouver area. He is married and has two children; a son age 6 and a daughter age 16 months. They live in Burnaby about six miles from the plaintiff's residence.

THE RELATIONSHIP

- [12] The plaintiff and the deceased first met on the Skytrain in July of 1996. The plaintiff was riding with her daughter Irene and they were conversing in Polish. The deceased, travelling with his son, overheard the conversation and introduced himself. When the plaintiff and her daughter reached their station, telephone numbers had already been exchanged and on their departure the deceased gave the plaintiff a hug and a kiss.
- [13] The evidence is the deceased was a friendly, outgoing man. He was proud of his heritage and enjoyed meeting persons who spoke in his native language. A coincidence of this meeting was that both the plaintiff and the deceased came from the same general area in Poland.
- [14] The plaintiff and the deceased were in touch by telephone later that day. The next day the deceased and the plaintiff had a lengthy visit at her home. There was an obvious mutual attraction between them. When the deceased returned to Campbell River, he kept in regular telephone contact with the plaintiff. Approximately two weeks later, he was back in Vancouver to visit his son and they spent the majority of that time together.
- [15] The deceased wanted the plaintiff to visit him in Campbell River. She likely made her first visit in the early fall of 1996 at which time their relationship also became a sexual one. The plaintiff estimates she visited the deceased in Campbell River on six or seven occasions in 1996.
- [16] The relationship developed a pattern. When the deceased came to Vancouver, he would stay with the plaintiff. The plaintiff would in turn go to Campbell River and stay with the deceased. When the plaintiff was at home in Burnaby, and the deceased in Campbell River, he would phone her almost daily to chat.
- [17] They travelled and visited with the deceased's friends together. Victoria, Duncan, Nanaimo, Parksville, Comox/Courtenay, Tofino, and outlying areas of the Lower Mainland, and Bellingham were mentioned in evidence. At least one longer vacation trip was stressed in the evidence. The plaintiff and deceased, together with the deceased's son Michael and his wife, travelled together by car for a holiday in Las Vegas in September, 1997. They stayed together in a twin bed single room, with the deceased and plaintiff sleeping together in one bed; Michael and his wife in the other.
- [18] The evidence of the plaintiff is that she and the deceased were together most of the time from fall of 1996 to his death in March, 2000, either at her apartment in Burnaby or his home in Campbell River. I do not doubt they visited frequently and for varying periods of time. I believe the plaintiff however has exaggerated her evidence. There are telephone records which, reasonably interpreted, support their living apart more than together, and refute the plaintiff's evidence as to certain time periods she suggests they were together.

- [19] I have also noted in the evidence reason to be generally suspect of the credibility of the plaintiff. She excuses documents that do not contain correct data on the basis she can't read them and therefore signs without knowledge. I can accept this excuse in same instance because of the plaintiff's language handicap.
- [20] I do not however accept the plaintiff's explanation when confronted with inaccurate evidence in an affidavit sworn earlier in this proceeding being that she couldn't understand it and she trusted her lawyer to put in only accurate information. I regret that the plaintiff does not appear to fully accept the responsibility and care required for evidence given under oath.
- [21] In the fall of 1999, the deceased was hospitalized with prostate cancer in Campbell River for two weeks. He was eventually diagnosed as having a lung tumour and he came to Vancouver for treatments at the Cancer Clinic. He stayed with the plaintiff and commuted to the clinic for his treatments.
- [22] The evidence indicates that both the plaintiff and the deceased were ill for periods in the later part of 1999 and early 2000. The plaintiff was suffering from a severe sciatic nerve problem causing pain and a swollen leg, with a loss of mobility. The deceased's illness was presumably cancer related, or reaction to treatments.
- [23] The evidence is that each cared for the other as best they could during this period. The deceased appeared to improve following treatment and in early January, 2000 he returned to Campbell River where he remained alone at his home until February 6, 2000 when he returned to Burnaby to stay with the plaintiff. His health was deteriorating and in the early morning of March 12, 2000, he phoned his son Michael and asked him to take him to the hospital. He remained in hospital until his death.
- [24] There is serious variance in the evidence regarding any stated intention of the parties to marry, their living arrangements, or the manner in which they described their relationship to others. The plaintiff testified the deceased proposed marriage on three different occasions between the fall of 1996 and New Year's Eve, 1998.
- [25] The plaintiff felt she would like to know the deceased better before agreeing to marriage. She said she did finally agree to the proposal made New Year's Eve, 1998. The evidence of the plaintiff is that they did not get married because the deceased wished to sell his house in Campbell River and then move to Vancouver and purchase a new home. He started to make the Campbell River house ready for sale, however the market was bad and his illness with cancer intervened.
- [26] The plaintiff's daughter Irene testified that the deceased had told her prior to his becoming ill that he was thinking of getting married and that he would have to sell his house so that they could then get a new place in Vancouver. She said that her mother had told her of marriage proposals made at the end of 1997 and on New Year's Eve of 1998.

- [27] The evidence of Walter Medvedev, and his common-law wife, Alina Natejczuk, provides support for the plaintiff's claim that the relationship between her and the deceased was of a marriage-like nature. The Medvedevs first met the deceased shortly after the deceased's wife had died. Mr. Medvedev is of Russian origin, and Alina is Polish. They became good friends and the deceased spent a lot of time at their home in Comox. The deceased and Mr. Medvedev would go fishing sometimes two or three times a week. They picked wild mushrooms together in the fall. Alina and the plaintiff spent many hours together when she was visiting the deceased at his home.
- [28] Mr. Medvedev testified that the deceased had confided in him and sought his advice. The deceased told him he had met the plaintiff, but he didn't know what to do, because his son was upset about the relationship, didn't like the plaintiff, and was rude to him.
- [29] Mr. Medvedev's advice was to do what he and the plaintiff wanted as they had their life and the son had his own. He said the deceased talked of putting his house in order, selling it, and moving to Vancouver so he and the plaintiff could purchase a new home. The market at the time for house sales was not good.
- [30] Mr. Medvedev said that they visited often with the deceased and the plaintiff in Comox, the deceased's home in Campbell River, and at the plaintiff's home in Burnaby. He said the deceased and the plaintiff, in his view, lived like husband and wife. He said the deceased told him he wanted to marry the plaintiff.
- [31] He said that on four or five social occasions he had heard the deceased introduce the plaintiff, or refer to her, as his wife. He also heard the deceased tell the plaintiff how he was going to sell the Campbell River house so he could then buy what he referred to as "our house".
- [32] Alina Natejczuk confirmed that they had seen a lot of the deceased when he was alone following his wife's death and later would see the deceased and the plaintiff on visits. Her evidence was that the deceased told her they would sell his Campbell River house and get married. He also said that he had never had a better person to look after him. The deceased spoke of disliking his son's wife, but that he adored his grandson.
- [33] The evidence of Peter Timciszyn, Ms. Szreder and the deceased's son Michael, however, does not support the plaintiff's allegation of a common-law relationship existing.
- [34] Irena Szreder was a long time friend of the deceased and his wife Judy. Their friendship dates to the late 1950's when they lived in Ocean Falls. The Szreders and the deceased and his family both moved to Campbell River in 1973. Mr. Szreder and the deceased were good friends and fished together. Mrs. Szreder and the deceased's wife were friendly.
- [35] The Szreders remained friends and kept in touch after the deceased's wife died in 1993. Mr. Szreder died in 1998. The deceased was very helpful to Mrs. Szreder and would come to her house to help her out with house maintenance and yard chores.

- [36] Mrs. Szreder never met the plaintiff but had heard of her from others. Mrs. Szreder felt she knew the deceased well and she talked with him before he became ill in 1999 about the plaintiff and his plans. The deceased told her the plaintiff was a friend, and very nice to be with. He denied that their relationship was serious, that they were living together, or that they planned marriage. He told her he was "...too old to get married".
- [37] Mrs. Szreder said he denied, when she directly asked him, that he was sleeping with the plaintiff in the same bedroom in which he kept the urn with his wife's ashes.
- [38] Mrs. Szreder said the deceased referred to the plaintiff's children as being gold diggers. He also spoke to her about how proud he was of his son, daughter-in-law and grandson. Mrs. Szreder testified that she had never heard the deceased and plaintiff referred to as "a couple" in the Campbell River community.
- [39] Peter Timciszyn, a retired pulp worker, has known the deceased over many years. The deceased is the uncle of Mr. Timciszyn's wife. He recalls that the deceased's wife, Judy, came from Hungary in 1957 and she married the deceased in 1957 or 1958. The Timciszyns and the deceased lived in Ocean Falls where they socialized often. The deceased's family moved to Campbell River in 1973. The Timciszyns moved to Gold River in 1980, and then to Campbell River in 1990. After the deceased moved to Campbell River, the families kept in contact by telephone and the Timciszyns spent many of their days off in Campbell River as houseguests of the deceased and his wife.
- [40] The Timciszyns lived very close to the deceased after moving to Campbell River in 1990 and they again visited and socialized frequently.
- [41] Mr. Timciszyn recalls first meeting the plaintiff in 1996 in Campbell River. The deceased introduced her as a friend, and continued to his death to refer to her as a friend. He never called the plaintiff his wife, or introduced her to others as his wife.
- [42] Mr. Timciszyn always looked after the deceased's house when he was away from Campbell River, which occurred once or twice a month. The deceased would tell him when the plaintiff was coming to Campbell River and he estimates that occurred perhaps once a month or so. The longest he recalls the plaintiff staying with the deceased in Campbell River would be a week at the outside.
- [43] Mr. Timciszyn observed that the deceased when living alone after his wife's death kept his house spotless. He never saw the plaintiff working around the deceased's house or yard.
- [44] Mr. Timciszyn said he asked the deceased if he intended to get married and he had responded that he was too old. He told him that he "...needed marriage like he needed a hole in the head". He also recalls that the plaintiff, in the presence of he and his wife, and the deceased, said she had her own apartment and didn't want to get married.

- [45] Mr. Timciszyn testified that the deceased first had prostate cancer, but later learned he had a tumour on his lung. The deceased had to go to Vancouver for treatment at the Cancer Clinic and told Mr. Timciszyn said he stayed with the plaintiff rather than at the home of his son Michael because both his son and daughter-in-law worked and he would be alone all day in their house.
- [46] Mr. Timciszyn saw the deceased when he came back to Campbell River in January, 2000 to look after his house. He looked healthy at that time and was well able to look after himself. He last saw the deceased in early February, 2000 prior to his return to Vancouver.
- [47] It is not possible to rationalize the differences that arise in the evidence of the Medvedevs on the one hand and Mrs. Szreder, Mr. Timciszyn, and the deceased's son Michael on the other. I note, however, that one basic difference between these persons is that the Medvedevs became friends of the deceased after the death of his wife, whereas the others had long-standing friendships with both the deceased and his wife. The Medvedevs themselves are not married and have lived many years in a common-law relationship.
- [48] It is possible the deceased acted and spoke differently to persons within different categories of friendship or family.
- [49] There are several other aspects of the relationship however that must be explored in considering the plaintiff's claim.
- [50] The deceased and the plaintiff each had their own separate residence when they met; and each maintained their separated residence throughout the relationship. There was no legal merger of their separate interests in either real property or personal property. They did not mix their property to any degree. Each of the parties, when in the home of the other, was a guest and carried their clothing and personal effects back and forth as would travellers on vacation.
- [51] The plaintiff's residency agreement with New Vista allowed for only one occupant, and no guest was allowed for more than a two week period. The plaintiff never made any disclosure that the deceased was living with her and she declared throughout that it was only her income that was to be attributed to the unit for purpose of calculating the subsidized monthly rent.
- [52] There was some evidence that the deceased spoke of selling his Campbell River home, it was however never placed for sale, and apparently no suggestion by the deceased to his family or Campbell River friends and neighbours that he contemplated selling or moving.

- [53] The financial affairs of the parties were never merged. The plaintiff was a person of relatively limited means; the deceased was much more financially secure. The deceased bought groceries and household items when he stayed with the plaintiff, and he paid the expenses when they travelled. The evidence suggests the intent of the deceased was to pay, perhaps over-pay, his share of expenses so that when staying with the plaintiff he was not a financial burden to her.
- [54] The deceased paying entertainment and travel expenses I attribute basically to the deceased following the more conventional practice of his generation that the man was responsible for these expenditures in a "dating" or man and woman social relationship.
- [55] The evidence is clear that the deceased never undertook the maintenance of the plaintiff, even in part, nor did the plaintiff ever become financially reliant upon the deceased in any degree.
- [56] The plaintiff consistently filed income tax returns categorizing her status as "widow" during the course of the relationship and never declared the common-law relationship she now contends existed. The deceased did not declare on his tax returns any change to his widower status throughout the relationship.
- [57] There is no evidence either party instructed any change to medical plan or benefit plan authorities regarding the changed status the plaintiff alleges.
- [58] In short, there is no evidence of any indication by either party to any bureaucratic or private authority with a legitimate interest in a person's status that they were living in a common-law or marriage-like relationship.
- [59] I find the evidence of Mr. Hunter, the solicitor who attended upon the deceased in hospital prior to his death highly relevant in regard to determining the deceased's view of the relationship existing between himself and the plaintiff.
- [60] Mr. Hunter was asked by the deceased's son to draw and request the deceased execute a Power of Attorney. I was impressed with the highly professional manner in which Mr. Hunter acted in this matter. He first contacted and obtained a written verification from the deceased's doctor that he was mentally competent to deal with his financial affairs. He then drafted four different forms of Power of Attorney, as he presumed neither the type of Power of Attorney the deceased might authorize, nor the person to whom he might wish to empower.
- [61] Mr. Hunter attended the hospital and had the deceased's son introduce him, but then asked the son wait in another part of the hospital while he took instructions from the deceased in privacy.
- [62] The deceased did not hesitate in appointing his son as Attorney and granting to him the widest form of authority.

- [63] Mr. Hunter also asked the deceased if he was aware that he might not have long to live and inquired if he had a Will. The deceased said he had a Will dating to 1973. Mr. Hunter explained that with the death of the deceased's wife that Will would have the effect of leaving his entire estate to his son, Michael. The deceased told Mr. Hunter that is what he wanted to happen, and hence Mr. Hunter advised him it was unnecessary to change the Will.
- [64] I believe that if the deceased considered that the Plaintiff was his common-law wife, or that they had been living in a committed marriage-like relationship, that there would definitely have been some discussion with Mr. Hunter about the plaintiff, her status, or the wish for some provision to be made for her.

THE LAW

- [65] The plaintiff was not married and to bring her claim within the parameters of the Wills Variation Act, *supra*, she must show that she was a common-law spouse.
- [66] *Harris v. Willie Estate* [2001] B.C.J. No. 169, a decision of Parrett J. bears some factual similarity to the present circumstances in that the parties spent a good deal of time together but each maintained their separate residence. It differs in many aspects, however, including in *Harris v. Willie Estate*, *supra*, neither party was interested in the possibility of being married to the other.
- [67] Parrett J. adopted the reasoning of Mr. Justice Lambert in *Gostlin v. Kergin* (1986) 3 B.C.L.R. (2d) 264 in analyzing a "marriage like relationship" within the context of the definition of "spouse" under then section 57 of the Family Relations Act (now s. 89).
- [68] I also consider the reasoning of Lambert J.A. to be the appropriate framework for the resolution here of the issue as to whether a common-law union has been proven.
- [69] Mr. Justice Lambert discussed certain features of the relationship to be examined and considered.

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 dependent on the other, in accordance with a mutual arrangement?

All those questions, and no doubt others, may properly be considered as tending to show whether a couple who lived together for more than two years have done so with the permanent mutual support commitment that, in the relevant sense of the Family Relations legislation, constitutes living together as husband and wife.

ANALYSIS AND CONCLUSION

- [70] On the evidence here the deceased and the plaintiff had an enduring and affectionate friendship, with a sexual component, that existed over 3 1/2 years. They may have considered marriage but if so the plaintiff initially rejected it. If eventually there was any agreement to marry, the intent was not further acted upon.
- [71] I find on the whole of the evidence the parties did not generally refer to themselves as being married and were not generally regarded within their communities as actually living common-law or in any marriage-like relationship.
- [72] They did not treat their residences as having merged in any sense; each maintained their own separate residence just as they had prior to meeting. If there was any intention to share residency in the future, that intention was never fulfilled.
- [73] The parties did not share their property and their finances always remained separate. There was no financial maintenance of the plaintiff undertaken by the deceased, nor did the plaintiff rely upon any financial support from the deceased.
- [74] The plaintiff did not surrender financial independence and become economically dependent upon the deceased in accordance with a mutual agreement.
- [75] The parties visited frequently at the other's residence. They were, however, apart more than together and it cannot be appropriately described as living together.
- [76] I appreciate the evidence that for a few months prior to his death, the plaintiff cared for the deceased when his health was in decline and that the deceased had also earlier cared for the plaintiff for a period of time when she had a disabling illness. I do not, however, consider that the evidence indicates that their relationship had reached the level of commitment where each could be said to have committed themselves to life-long financial and moral support of the other.

[77] The plaintiff has failed to discharge the burden of proving a common-law or marriage-like relationship existed with the deceased that would found an entitlement for her under the Wills Variation Act, *supra*.

[78] The plaintiff's claim is dismissed.

COSTS

[79] The plaintiff was unsuccessful in her action however the relationship and the length of the relationship in issue reasonably warranted a proceeding be taken so that all circumstances and factors could be objectively reviewed.

[80] Therefore the plaintiff and the defendants will be entitled to their costs from the estate.

"R.R. Holmes, J."

The Honourable Mr. Justice R.R. Holmes

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