

CANADA / JUDGMENT

Jones v. Davidson

2020 BCSC 1371

COURT

Supreme Court of British Columbia

DECIDED

15 September 2020

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2021 BCSC 1371 Jones v. Davidson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jones v. Davidson,

2020 BCSC 1371

Date: 20200915

Docket: S185623

Registry: Vancouver

Between:

Eric Jones

Plaintiff

And

Tracey Ann Davidson and Tracey Ann Davidson

in her capacity as Administratrix of the Estate of

Larry Daniel Jones, Deceased

Defendant

Further Corrected Judgment: The text of the judgment was corrected at paragraphs 1, 126(d) and 126(g) on February 24, 2021.

Corrected Judgment: The text of the judgment was corrected on the front page on October 7, 2020.

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

J.M. Richter

D.M. Rogers

Counsel for the Defendant:

L. Anjos

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 10-13 and 17-19, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 15, 2020

- [1] This is an estate case concerning the right to administer and to receive proceeds from the estate of Larry Jones. Larry Jones died on March 18, 2014 at the age of 66, without having made a will. At the time of his death his principle asset was his riverfront home located at 1769 Sleeping Beauty Lane in Terrace, British Columbia.
- [2] Larry Jones moved to Canada in the early 1970's to avoid the military draft in the United States. For many years before his death he worked as a financial analysist with Community Futures in Terrace, a federally funded non-profit organization that assists in economic development initiatives in the Terrace area. Before that he worked as a tree-faller in northwestern British Columbia.
- [3] Larry Jones had only one child, Eric Jones, who was born in the United States in 1971 shortly before Larry Jones moved to Canada. Larry had very little communication with Eric when he was growing up, which included only speaking by telephone on only a few occasions when Eric was a young boy and on one final occasion when Eric was in his teens. Larry never paid child support to Eric's mother.
- [4] In the mid 1990's Larry Jones developed a friendship with the defendant Tracey Davidson. At that time, they were both students at Northwest Community College in Prince Rupert and were in other relationships. They kept in touch over the years that followed.

- [5] In either late 2010 or early 2011 Larry Jones and Tracey Davidson started a romantic relationship. To begin with they communicated by phone and text message and would see each other when Larry travelled to Vancouver for work or medical appointments. Tracey Davidson made two trips to Terrace to visit Larry Jones, the first in February 2012 and later during the summer of 2012 before giving up her rented home in North Vancouver and permanently moving to Terrace with her daughter Grace at the end of April 2013.
- [6] Tracey Davidson is currently 58 years old and Grace is 16. Since they moved to Terrace they have lived only in Larry Jones' home.
- [7] After Larry Jones' death Tracey Davidson applied for and was granted letters of administration in respect of Larry Jones' estate by order of this Court dated July 25, 2014 (the "Letters of Administration"). This order was granted on the basis that Tracey Davidson was Larry Jones' lawful common law wife.
- [8] In a Statutory Declaration of Common Law Union, sworn March 25, 2014, Tracey Davidson swore that she had lived together with Larry Jones for a continuous period of three years, starting on September 15, 2010. In her July 10, 2014 affidavit filed in support of her application for grant of the Letters of Administration she swore that she was the spouse (which includes common law spouse) of Larry Jones.
- [9] On July 31, 2014 Tracey Davidson transferred Larry Jones' Terrace home into her own name as administratrix of his estate.
- [10] Eric Jones disputes that Tracey Davidson was Larry Jones' common law spouse for the requisite two-year period prior to his death on March 18, 2014 - that is, by no later than March 18, 2012. He concedes that they became common law spouses in or about April 2013 when Tracey and Grace Davidson moved from North Vancouver to Terrace.
- [11] For this reason, he seeks the following orders:
- an order revoking the Letters of Administration granted to Tracey Davidson;
 - an order granting Letters of Administration to him,
 - an order that Larry Jones' property be transferred to him;
 - an order that Tracey Davidson pay occupational rent for the use of Larry Jones' home from the time of Larry Jones' death;
 - an accounting and tracing of the assets and monies that formed or should have formed part of the estate of Larry Jones and judgment in his favour for this property, or alternatively and order transferring this property to the estate of Larry Jones;
 - An order that Tracey Davidson, in her capacity as administratrix of the estate of Larry Jones, pass her accounts before a Registrar of this Court;
 - Damages for fraudulent, negligent or innocent misrepresentation; and

h) Interest and costs.

[12] Tracey Davidson contends that she was the common law spouse of Larry Jones during the relevant two-year period. In addition, she contends that Eric Jones' claim is statute barred or alternatively that he is prohibited from proceeding with it by application of the doctrine of laches. She also contends that Eric Jones has not made out a case in fraud and is not entitled to seek occupational rent. For these reasons she says that Eric Jones' claim should be dismissed.

Relevant Statutory Provisions

[13] The relevant estate statute in effect at the time of Larry Jones' death is the Estate Administration Act, R.S.B.C. 1996, c. 122 [the "Act"].

[14] Under s. 6(1) of the Act if a person dies intestate the court may grant the administration of the estate to the surviving spouse, one or more next of kin, or both.

[15] Section 1 of the Act includes a common law spouse within the definition of spouse. Common law spouse is defined in s. 1 of the Act as follows:

"common law spouse" means either

- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
- (b) a person who has lived and cohabited with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person's death;

[16] Larry Jones and Tracey Davidson were not united to each other by a marriage and therefore subsection 1(a) of the Act does not apply. The definition under subsection 1(b) is relevant in this case.

[17] Under s. 84 of the Act if an intestate dies leaving issue (that is, a "lineal descendant"), subject to the rights of the spouse, if any, the person's estate must be distributed per stirpes among the issue.

[18] Under s. 85 of the Act if an intestate dies leaving a spouse and issue the net value of the proceeds of an estate are divided as follows:

- (3) If the net value of the person's estate is not greater than \$65 000, the estate goes to the spouse.
- (4) If the net value of the person's estate is greater than \$65 000, the spouse is entitled to \$65 000, and has a charge on the estate for that sum.
- (5) After payment of the sum of \$65 000, the residue of the estate goes as follows:
 - (a) if the intestate dies leaving a spouse and one child, 1/2 goes to the spouse;

- (b) if the intestate dies leaving a spouse and children, 1/3 goes to the spouse.
- (6) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the spouse takes the same share of the estate as if the child had been living at the date.
- [19] Under s. 96(2) of the Act in an intestacy a surviving spouse is entitled to a life estate in the spousal home.

Issues

- [20] The main issue to be decided in this case is whether Larry Jones and Tracey Davidson lived and cohabited with each other in a marriage-like relationship for a period of at least two years immediately before Larry Jones' death on March 18, 2014. That is, were they common law spouses as defined in the Act during this period?
- [21] If it is found that they were not common law spouses during the relevant period is it appropriate to grant the other relief sought by Eric Jones?
- [22] Are the claims of Eric Jones statute barred or alternatively, should his claims be dismissed pursuant to the doctrine of laches?

Was Tracey Davidson the Common Law Spouse of Larry Jones?

Legal Principles

- [23] Tracey Davidson bears the burden of proving that she was Larry Jones' common law spouse, as that term is defined in subsection 1(b) the Act, during the relevant two year period: *Janus v. Lachocki et al*, 2001 BCSC 1702 at para. 65; *Souraya v. Kinch*, 2012 BCSC 1252 at para. 141; *Voth v. Martin*, 2019 BCSC 834 at para. 67.
- [24] In an estate case, *Austin v. Georz*, 2007 BCCA 586, the specific issue addressed by the Court of Appeal was the definition of "marriage-like relationship" in the Act: *Austin*, at para. 21.
- [25] The Court of Appeal stated that "the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages". A holistic approach is to be taken in determining the presence or absence of a marriage-like relationship: *Austin*, at paras. 58 and 62.
- [26] The Court of Appeal found that financial dependence is not an essential requirement of a marital relationship but one factor to be considered: *Austin*, at paras. 55 and 60.
- [27] In a subsequent decision, *Weber v. Leclerc*, 2015 BCCA 492, the Court of Appeal considered whether parties were in a marriage-like relationship and therefore spouses for the purposes of the Family Law Act, S.B.C. 2011 c. 25. The Court of Appeal stated that the intention of the parties, particularly an expectation that a relationship will be of lengthy, indeterminate duration, may be of importance in determining whether a relationship is marriage-like but this evidence is to be tested with reference to the objective evidence. Although a strict

checklist approach is not appropriate, such objective evidence may be helpful indicators of a marriage-like relationship: Weber, at paras. 23 and 25.

- [28] The factors set out in an Ontario decision, *Malodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), which decision was referred to in both *Austin* and *Weber*, have been taken into consideration in this jurisdiction in determining the presence of a marriage-like relationship. These factors include the following: shared shelter, sexual and personal behaviour, domestic services, social and societal interactions and attitudes and conduct concerning children: *Souraya v. Kinch*, 2012 BCSC 1252; *Richardson Estate (Re)*, 2014 BCSC 2162; *Connor Estate*, 2017 BCSC 978; *A.J.E. v. T.B.W.* 2017 BCSC 1657; and *Dey v. Blackett*, 2018 BCSC 244.
- [29] In the family law case, *H.S.S. v. S.H.D.*, 2016 BCSC 1300, Justice Dardi also considered additional factors, which were not specifically listed in *Malodowich*, in determining whether a couple lived together as spouses. These include how the parties conducted their financial affairs, including any financial planning they undertook as a couple and how they filed their tax returns and estate planning.

Discussion and Analysis

- [30] Counsel for Eric Jones spent a significant amount of time in closing submissions on the question whether use of the words "lived" and "cohabited" in s. 1 of the Act should be interpreted to require that Tracey Davidson and Larry Jones actually resided together during a two-year period prior to Larry Jones' death.
- [31] In this respect Eric Jones submits, in consideration of principles of statutory interpretation, that the legislature must have intended that lived and cohabited mean different things. He submits that the term cohabited requires the parties to have resided together in one place, on a permanent basis, for a two-year period prior to Larry Jones' death.
- [32] For this reason, Eric Jones submits that on the evidence, because Tracey Davidson and Larry Jones did not reside together in one place for two years prior to March 18, 2014, she does not fall within the definition of common law spouse - and therefore an evaluation of whether their relationship was marriage-like is not required.
- [33] I accept that the legislature must have intended that the words lived and cohabited have separate meanings. I interpret the word lived as meaning carrying out the activities of daily life.
- [34] Cohabitation has been defined to mean a mutual intention to continue a relationship which is only ended when one party regards the relationship to be at an end and demonstrates that this particular state of mind is a settled one: *Gosbjorn v. Hadley*, 2008 BCSC 219 at para. 137, referring to *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 [*Hodge*].

- [35] As stated by Justice Binnie in Hodge "[c]ohabitation" in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof."
- [36] I note that there is nothing in the Act or in the authorities which suggests that cohabitation can only mean living in the same place on a permanent basis.
- [37] In my view in the context of the Act, cohabitation requires a mutual intention to be together as more than just roommates. Cohabitation must involve an intention to share responsibilities - although one party can provide more support than another. In this respect there is an overlap between cohabitation and being in a marriage-like relationship. I note that this overlap was eliminated in the successor to the Act, the Wills, Estate and Succession Act, S.B.C. 2009, c. 13, s. 2(1), where the word cohabited was removed from the definition of spouse.
- [38] I do not consider that a determination of whether two people lived and cohabited together should be made in isolation from consideration of whether they did so in the context of a marriage-like relationship. As the authorities make clear a holistic approach is required.
- [39] I will now consider the evidence adduced at trial, make necessary findings of fact, and apply those facts to the factors generally considered in divining a marriage-like relationship.

Intention of Tracey Davidson and Larry Jones:

- [40] In this case it is not possible to easily determine the point in time when Larry Jones intended that his relationship with Tracey Davidson would be of a lengthy, indeterminate duration. There is no express evidence in this respect. There is some evidence on which the intention of Larry Jones may be inferred.
- [41] One example is Larry Jones' employer sponsored insurance coverage and healthcare benefits coverage. Tracey Davidson called Sarah Ryan as a witness. Ms. Ryan worked with Larry Jones at Community Futures and was responsible for signing staff up for healthcare and other benefits. Ms. Ryan testified that on October 1, 2013 Larry Jones signed documents changing his health insurance coverage with Desjardins Insurance to "family" and designated Tracey and Grace Davidson as his dependents. On one of these forms, September 1, 2012 was shown as the "cohabitation effective date".
- [42] In my view the evidence regarding Larry Jones' healthcare and insurance coverage provides support for an inference that Larry Jones did not consider that he was in a marriage like relationship with Tracey Davidson until at the earliest September 1, 2012.
- [43] With respect to the intention of Tracey Davidson, she testified that in the summer of 2011 she and Larry Jones discussed her plan to complete a degree in human resource management at Capilano University, starting in September 2011, and then her and Grace moving to Terrace at the end of 2013 after they had finished school. According to Tracey

Davidson, she and Larry Jones discussed starting a consulting business together in Terrace, after he retired from Community Futures. In my view this testimony does not establish that Tracey Davidson and Larry Jones were living together in a marriage like relationship but rather, in 2011 had discussed plans to do so.

- [44] In any case, I treat the evidence of Tracey Davidson with caution. During the trial it was apparent that Tracey Davidson intentionally misstated the length and nature of her relationship with Larry Jones on several occasions before and after Larry Jones' death to suit her purposes. This has negatively impacted my assessment of her credibility.
- [45] The evidence of the intentions of Larry Jones and Tracey Davidson regarding the seriousness of their relationship is unclear. It is therefore necessary to consider the objective evidence of their lifestyle and interactions adduced at trial.

Objective Factors

Shelter:

- [46] There is no suggestion in the evidence that Tracey Davidson and Larry Jones lived with each other on a full-time basis until April 2013. Their relationship started with short visits and progressed over time until after Tracey made the decision to quit school and Tracey and Grace moved to Terrace.
- [47] Tracey Davidson testified that Larry Jones visited her in North Vancouver on only a few occasions in 2010 when he was in Vancouver for work. They would, for example, meet for coffee at Lonsdale Quay. They attended a Johnny Winters concert at the Centennial Theatre in North Vancouver on September 16, 2010.
- [48] Tracey Davidson does not recall when she next saw Larry Jones but believes that it was in early 2011.
- [49] During her direct examination Tracey Davidson testified that she saw Larry Jones in North Vancouver two or three times during the summer of 2011 and a further two or three times in the fall of 2011. According to Tracey Davidson, during his trips to Vancouver during this period [and perhaps into early 2012] he would stay with her approximately 50% of the time and at a hotel for the balance.
- [50] Larry Jones did not spend Christmas of 2011 with Tracey and Grace Davidson but spent Christmas alone in Terrace. Tracey and Grace spent Christmas with friends in North Vancouver. In December 2011 Larry Jones purchased an expensive Wii Kinect video game console for Grace as a Christmas gift.
- [51] The next visit occurred in February 2012 when Tracey Davidson travelled to Prince Rupert with Grace. Grace stayed with Tracey's ex sister-in-law in Prince Rupert and Tracey and Larry spent their first romantic weekend together alone at the Crest Hotel. The group later travelled by car to Terrace and Tracey and Grace stayed at Larry's home in Terrace for approximately two weeks. During this visit Larry Jones purchased a new headboard and

footboard for his master bedroom and installed a new mattress which he had purchased earlier that month.

- [52] Tracey Davidson next visited Larry Jones in Terrace on her own, for four or five days around spring-break of 2012 and Larry visited her in North Vancouver, perhaps around Easter.
- [53] During cross-examination Tracey Davidson was taken to Larry Jones' credit card statements for late 2011 and early 2012. These statements only show charges incurred in the lower mainland during three trips made by him in October 2011 and January and April 2012. Tracey Davidson agreed that it appears that he only visited her in North Vancouver three times during this period.
- [54] In July 2012 Larry Jones drove from Terrace to North Vancouver and Tracey and Grace Davidson returned with him to Terrace to spend the summer. They took some clothes, camp dishes and some of Grace's stuffed toys with them. In August 2012 Tracey and Grace returned to North Vancouver and returned to school in September.
- [55] Tracey Davidson testified that for various reasons including the difficulty of the program and financial stresses she decided that she could not continue with her studies at Capilano University and by December 2012 had decided to withdraw. During Christmas of 2012 Larry Jones and his step-father Joe Such ("Grandpa Joe") stayed with Tracey Davidson at her rented home in North Vancouver. According to Tracey Davidson at this point she and Larry decided they did not want to wait any longer to be together and that she would finish her degree through distance learning at Thomson Rivers University.
- [56] Tracey Davidson testified that they hired movers to move her and Grace's possessions from North Vancouver to Terrace in February 2013. The moving costs were paid by Larry Jones and the bank draft used to pay the movers is dated April 23, 2013. Tracey and Grace Davidson moved out of their North Vancouver home arriving in Terrace on or about April 30, 2013.
- [57] During the late spring and summer of 2013 Tracey and Grace Davidson commenced life in Terrace. Grace was admitted into elementary school in Terrace on May 6, 2013 and Larry Davidson was recorded as her stepfather on the school registration form. They made small trips in the region including fishing in Prince Rupert with Tracey's parents. During the summer of 2013 Grace Davidson began playing in a local softball league. In the fall of 2013 Tracey Davidson continued to study, now in an on-line program through Thompson Rivers University and started volunteering at job fairs in Terrace. She testified that she continued to have discussions with Larry Jones around this time to establish a consulting business.
- [58] During her cross-examination Tracey Davidson denied that the time she and Grace spent in Terrace in the summer of 2012 was only a "summer holiday". It was her evidence, in essence, that the movement of some clothes, camping dishes and some of her daughter's stuffed toys constituted a partial move of their possessions. She denied that she only moved to Terrace in April 2013.

Sexual Relationship and Personal Behaviour:

- [59] Tracey Davidson testified that around early 2011 she and Larry Jones started to develop romantic feelings for each other. She testified that at that time Larry Jones indicated that he did not have time for a relationship.
- [60] During her examination for discovery Tracey Davidson did not recall when she was first intimate with Larry Jones. During her direct examination at trial she testified that this occurred sometime in early 2011. During her cross-examination, when taken to her discovery evidence she testified that her discovery evidence, that she did not know when they first became intimate, was correct.
- [61] During her direct examination Tracey Davidson was taken to her telephone records which show only one call to Terrace in July 2011, one in August 2011 and between four and eight calls per month from October 2011 to January 2012. The telephone records show an increase in the frequency of calls from these levels starting in February and into March 2012.
- [62] Larry Jones' ex colleague Larry Guenter provided evidence regarding Larry Jones use of his company cell phone for texting. Mr. Guenter testified during cross-examination that Larry Jones texted Tracey Davidson only occasionally in the last few months of 2011 and that the frequency of his texts to her increased significantly starting in February 2012.
- [63] During cross-examination Tracey Davidson agreed that Larry Jones' telephone records showed that in 2011 he made only a few calls to her in the months of January, August, October, November and December and that the number of calls began to increase between January and March 2012.
- [64] Tracey Davidson testified that during their relationship Larry Jones purchased gifts for her including a Pandora bracelet, gift cards for a lingerie store in Terrace and other places and flowers. It is unclear whether these purchases were made before or after Tracey Davidson moved to Terrace in April 2013.

Services:

- [65] Tracey Davidson testified that she cared for Larry Jones during the last months of his life. Other than this period, there was very little evidence at trial with respect to services performed for each other including preparation of meals, washing clothes, shopping or household maintenance during the two-year period prior to Larry Jones' death.

Social/Societal:

- [66] There is some evidence that starting in February 2012 Tracey Davidson and Larry Jones began to socialize together with friends and members of their respective families.
- [67] As set out above this started when Tracey and Grace Davidson visited Prince Rupert and Terrace in February 2012 and Tracey was introduced to Larry Jones' colleagues at Community Futures.

- [68] Starting in the summer of 2012 Tracey Davidson had some limited contact with members of Larry Jones' family and further contact with his work colleagues. This included the period when Grandpa Joe travelled from the U.S. to stay at Larry's home in Terrace over a three-week period during the summer. Also during the summer of 2012, Tracey Davidson attended at a barbecue hosted by Larry Jones' work colleague, Wayne Bennett. In addition, Larry hosted a 50th birthday party for Tracey at his Terrace Home which was attended by friends, including her ex sister-in-law Gail Shaw. Finally, Larry Jones and Grandpa Joe spent Christmas of 2012 at Tracey Davidson's home in North Vancouver, for three weeks and ten days respectively.
- [69] The evidence of Tracey Davidson's friend Sarah Ryan was that she first met Tracey Davidson in the spring of 2012 when Larry Jones brought her into the office to meet his work colleagues. During cross-examination she testified that she was told that Tracey Davidson was a good friend of Larry's and that she was in Terrace visiting.
- [70] During her cross-examination Tracey Davidson did not recall how Larry Jones introduced her during her visit to the Community Futures offices in February 2012.
- [71] Sarah Ryan met Tracey again in the summer of 2012 at a barbecue hosted by Wade Bennet, the General Manager of Community Futures. In total she met Tracey Davidson two or three times prior to Larry Jones changing his healthcare and insurance beneficiary information in October 2013. At some point Sarah Ryan became aware that Tracey Davidson had moved to Terrace but she was not sure when.
- [72] The evidence of Ken Guenter, Larry Jones' friend and his manager at Community Futures, was that in or about July 2011 staff including Larry Jones were provided with cell phones. He testified that during a conversation with Larry Jones in early December 2011 they discussed overages for text messages on Larry's company cell phone bill, starting in October 2011. According to Mr. Guenter, Larry Jones told him that he had a girlfriend in North Vancouver, Tracey, who had a young daughter and that he was financially supporting them. I note that Ken Guenter's evidence regarding the timing of financial support is inconsistent with the documentary evidence which shows that Larry Jones first transferred \$1,500 to Tracey Davidson on December 9, 2011 and nothing further until February the following year.
- [73] Mr. Guenter met Tracey Davidson and Grace for the first time in the summer of 2012 at the barbecue hosted by his and Larry Jones' colleague, Wade Bennett. During his direct examination Mr. Guenter testified, although his recollection was not clear, that Larry Jones did not introduce Tracey as his wife but referred to her as his "live in lady". He also testified on direct examination that Grace referred to Larry using his first name. During his cross-examination Mr. Guenter agreed that he could not really recall how Larry Jones referred to Tracey Davidson but stated that he didn't think that it was in his nature to describe her as a wife.

- [74] Tracey Davidson also called Larry Jones' ex-colleague and manager Wade Bennet as a witness. Mr. Bennet testified that he first met Tracey Davidson when she visited Terrace in February 2012 and later at the company barbecue he hosted at his home in July 2012. In direct examination he testified that he saw Grace playing in the local softball league in the summer of 2012. In cross-examination, when it was pointed out that Tracey and Grace Davidson did not arrive in Terrace until July 2012, he agreed that he may have seen Grace playing in the local softball league starting in the summer of 2013.
- [75] Tracey Davidson called her friend Barbara Bond as a witness at trial. Ms. Bond did not become friends with Tracey Davidson until sometime in 2013 or 2014 when they took a restorative justice program together in Terrace. Ms. Bond testified that at a dinner at Larry Jones' house in early 2014 he referred to Tracey Davidson as his wife. Given the timing of Ms. Bond's discussion with Larry Jones, just a few months before his death, I do not consider this evidence to be overly helpful.
- [76] Tracey Davidson called her ex sister-in-law and friend Gail Shaw as a witness at trial. Ms. Shaw testified that she first heard Tracey Davidson speak about Larry Jones in the middle or end of August 2011. She first met Larry Jones when he visited Prince Rupert with Tracey and Grace in February 2012. According to Ms. Shaw it was some time after the visit to Prince Rupert and Terrace in February 2012 that Tracey Davidson told her that her relationship with Larry Jones was progressing and that she was considering moving to Terrace.
- [77] Tracey Davidson called her ex-landlord Joanna Kostanski as a witness. Ms. Kostanski did not provide any relevant evidence other than confirming that she recalled seeing Larry Jones at her home five or six times, perhaps in the late summer of 2011, before Tracey Davidson moved out.
- [78] Tracey Davidson also called an old friend of Larry Jones', Johnny Pequin as a witness. Mr. Pequin testified that he saw Larry Jones socially once or twice a week during the year when he was in Canada between March and October (he spent the balance of the year in Thailand). He recalls Larry Jones telling him, sometime during the summer of 2011, that he was in a relationship.
- [79] Tracey Davidson called Gordon Shaben, another old friend of Larry Jones' and now a good friend of her, as a witness. Mr. Shaben testified that he began to suspect that Larry Jones had a girlfriend in the fall or early winter of 2011. He testified that he first met Tracey Davidson at the Terrace farmers' market in June or July 2012.

Economic Support:

- [80] Tracey Davidson testified and the documents confirm that Larry Jones provided some financial support to her starting in December 2011 when he transferred \$1,500 to her bank account. He transferred further amounts, between \$500 and \$2,000, in the months of February, June, November and December 2012 and in March and April 2013.

- [81] Tracey Davidson testified that Larry Jones would leave between \$500 and \$1,000 in cash when he visited and would on occasion purchase gifts of clothing or wine. The evidence establishes that Larry Jones visited once in October 2011 and then again in January 2012 and therefore would only have had the opportunity to leave cash or gifts on two occasions prior to March 2012.
- [82] In addition to leaving gifts and cash, Larry Jones sent supermarket gift cards, valued between \$100 to \$200, in February, March, May and December 2012 and then in March 2013.
- [83] Tracey Davidson testified that in early 2013 Larry Jones purchased a used Kia vehicle for her for \$4,995, with the intention that she would learn how to drive when she moved to Terrace.
- [84] Tracey Davidson testified that at all times she maintained a separate bank account from Larry Jones as well as separate credit cards.
- [85] There is no evidence that Larry Jones and Tracey Davidson discussed financial and estate planning, including putting her name on title to Larry Jones' Terrace home.

Children

- [86] Larry Jones and Tracey Davidson did not have children together.
- [87] With respect to how Larry Jones referred to Grace, Tracey Davidson testified that in the summer of 2012 he requested that Grace start calling him "dad" and that she started doing so. I note that this conflicts with the evidence of Ken Guenter who testified that Grace referred to Larry using his first name.

Other Factors

- [88] Larry Jones and Tracey Davidson's tax returns did not show a change in their marital status in either 2011 and 2012.
- [89] During her cross-examination Tracey Davidson was taken to her income tax return for the years 2011, 2012 and 2013. Those returns record her marital status at the end of 2011 and at the end of 2012 as "divorced" and her 2013 return shows her marital status at the end of 2013 as "common law". Tracey Davidson testified during cross-examination that the recording of her marital status as "divorced" (and not common law) on her 2012 return was a "mistake" but acknowledged that she was required to record her personal information truthfully on her returns.
- [90] In personal tax returns which Tracey Davidson had prepared and filed for Larry Jones in her capacity as administratrix for the years 2011, 2012 and 2013 Larry Jones' marital status was shown as, respectively, single, single and common law.

- [91] Tracey Davidson testified that she discussed filing her tax return with Larry Jones in 2013 and he suggested that she not file a return as his common law spouse so that she could continue to claim the child tax credit - which she said was at that time her only source of income. What is noteworthy is that this discussion took place in 2013 - which does not support an inference that they considered themselves to be a common law couple the previous year.

Findings of Fact and Conclusion on Common Law Status

- [92] I find that Larry Jones and Tracey Davidson started dating casually in or around the summer of 2010 and that their relationship progressed through 2011 and 2012.
- [93] I find that Larry Jones and Tracey Davidson visited each other every few months, mainly in North Vancouver and occasionally in Terrace, between January 2011 and the summer of 2012, but that they did not spend a significant period of time together until the summer of 2012 when Tracey and Grace Davidson travelled to Terrace. I do not accept Tracey Davidson's evidence that she had partially moved to Terrace during the summer of 2012. In my view the movement of some clothes, camp dishes and children's toys does not constitute moving.
- [94] I find that Larry Jones and Tracey Davidson communicated by phone and text on a sporadic basis throughout 2011 and that the frequency of their communication began to increase significantly between December 2011 and February 2012 and afterwards.
- [95] I find that Larry Jones and Tracey Davidson commenced an intimate relationship some time in early 2011.
- [96] I find that Larry Jones provided some financial support to Tracey Davidson starting in December 2011 but that these payments were sporadic. Only two bank transfers were made between December 2011 and February 2012 and one \$100 gift card was provided in February and March 2012. In addition, I note that there was an almost five-month gap in direct transfers to Tracey Davidson's bank account between early February and late June 2012.
- [97] I find that Tracey Davidson and Larry Jones did not live with each other until April 2013 when Tracey Davidson made the decision to cease her studies at Capilano University and move with Grace from North Vancouver to Terrace.
- [98] I find that, starting in February 2012, to the world at large Tracey Davidson and Larry Jones had become "boyfriend and girlfriend" but were not acting as a committed couple at that time. I find that they did not comport themselves in this manner until after April 2013 when the following events occurred:
- a) In May 2013 when Grace Davidson registered for school in Terrace and Larry Jones was listed as her stepfather on her registration documents;

- b) In October 2013 when Larry Jones revised his Desjardin's health and life insurance coverages at work to include Tracey as his common law spouse and Tracey and Grace as his dependants; and
- c) In or about early 2014 when Tracey Davidson recorded her marital status on her 2013 income tax return as "common law".

[99] In summary, I find on a balance of probabilities that Tracey Davidson and Larry Jones were not in a marriage like relationship until April 30, 2013. On this basis I find that Tracey Davidson has not met her burden to prove that she lived and cohabited with Larry Jones in a marriage-like relationship for a period of at least two years prior to his death on March 18, 2014. She therefore did not fall within the definition of common law spouse set out at s. 1 of the Act at the time of his death.

Should Eric Jones be Granted Letters of Administration and the Entirety of Larry Jones' Estate?

[100] Given that Tracey Davidson was not Larry Jones' common law spouse at the time of his death, the Letters of Administration should not have been granted to her on July 25, 2014. The evidence establishes that Eric Jones is Larry Jones' next of kin and is therefore entitled to be granted administration of his estate pursuant to s. 6 of the Act.

[101] The evidence at trial establishes that Eric Jones is the only lineal descendant of Larry Jones. Pursuant to s. 84 of the Act, as the only lineal descendant he is entitled to the entirety of Larry Jones' estate on the basis of intestacy.

Should Tracey Davidson be Required to Pay Occupational Rent?

[102] Based on a claim of unjust enrichment, Eric Jones seeks an order that Tracey Davidson pay occupational rent for the use of Larry Jones' Terrace home for the period from three to six months after Larry Jones' death to the date of trial and ongoing rent until she vacates the property, subject to an allowance for mortgage payments and insurance costs.

[103] Eric Jones called Steve Cullis as an expert witness at trial. Mr. Cullis was qualified to provide opinion evidence on the fair market rental of Larry Jones' home between 2014 and the present. In Mr. Cullis' opinion fair market rental for the home varied between \$1,400 and \$1,700 during this period as a result of uncertainty concerning various industrial developments in the Terrace region.

[104] As stated by Justice Humphries in *Dacyshyn v. Semeniuk*, 2007 BCSC 71 "claims [for occupational rent] by a person who has never lived in [a] subject property are rare": *Dacyshyn*, at para. 16, referring to *Re Kostiuik*, 2002 BCCA 410 at paras. 42-43. What is more typical is a claim in a family law context for occupational rent by an individual who once resided in a property but is subsequently denied access.

- [105] As was stated in Dacyshyn, caution in awarding occupational rent is apt where the person claiming occupational rent attains their interest through a gift (in this case through the laws of intestacy), never lived in the premises, paid some expenses for a short time and other than that has never contributed to maintaining the integrity of the property or sought to enter it, let alone live in it: Dacyshyn, at para. 32.
- [106] Eric Jones lives in San Francisco and there is no indication that he ever expressed a desire to reside in Larry Jones' Terrace home. Although evidence at trial indicates that funds from Larry Jones' estate were used to pay for costs of maintaining the property Eric Jones did not contribute towards such costs. In addition, there is no evidence that he ever made a demand that Tracey Davidson vacate the premises.
- [107] Although Tracey Davidson has arguably been enriched as a result of her ability to reside in Larry Jones' Terrace home since his death on a rent free basis, the evidence at trial suggests that there been some benefit to the estate through the preservation of the home as an estate asset.
- [108] I do not consider that the claim for occupational rent is made out in the circumstances of this case. I do find, given my decision that Larry Jones' home should be transferred to Eric Jones, that Tracey Davidson should be required to vacate the property within a reasonable period of time after judgement, which reasonable period I set at three clear months. Should she fail to vacate the property by that time, relying on the lower end of the range of fair market rents determined by Steve Cullis, rent in the amount of \$1,400 per month will be payable.

Is Eric Jones Entitled to Damages for Fraudulent, Negligent or Innocent Misrepresentation?

- [109] Although Eric Jones' pleadings include a claim, in the alternative, for fraudulent, negligent or innocent representation and he repeated a request for an order granting damages for misrepresentation in his written closing submissions, this element of his claim was not argued during closing submissions. Despite this I will address this portion of his claim.
- [110] The law governing fraudulent misrepresentation was summarized in *Van Beek v. Dodd*, 2010 BCSC 1639, providing that in order to succeed in a claim for fraudulent misrepresentation the following must be established:
1. the defendant made a representation of fact to the plaintiff(s);
 2. the representation was false in fact;
 3. the defendant knew that the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
 4. the defendant intended for the plaintiffs to act on the representation; and
 5. the plaintiffs were induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.

- [111] I find as a fact, that when Tracey Davidson called Eric Jones in March 2014 she told him that she had lived with Larry Jones for three years, which was a false representation that she knew to be false when she made it. This finding is supported by the admissions of Tracey Davidson at trial that in March 2014 she falsely swore on a Statutory Declaration of Common Law Union that she had lived with Larry Jones since September 2010.
- [112] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 9, the Court of Appeal stated that proof of fraud requires clear and convincing evidence of the elements of civil fraud, including the mental element.
- [113] I am not satisfied that the evidence in this case clearly establishes the mental element, being that Tracey Davidson intended Eric Jones to act on the March 2014 representation, or in this case to fail to conduct his own inquiries into the status of her relationship with Larry Jones.
- [114] In addition, I am not satisfied that Eric Jones relied upon Tracey Davidson's March 2014 representations to his detriment. In my view Eric Jones simply took Tracey Davidson's representations at face value and did nothing further in respect of the estate of Larry Jones. I am not satisfied that there is evidence that he turned his mind to the question of whether Tracey Davidson was Larry Jones' common law spouse at the relevant time and for the relevant period.
- [115] In the circumstances, I do not find that the claim for damages arising from misrepresentation has been made out.

Are Eric Jones' Claims Statute Barred or Should They be Dismissed Through Application of the Doctrine of Laches?

- [116] The defendants plead the provisions of the Limitations Act, S.B.C. 2012, c. 13 and submit that the Eric Jones is statute barred from pursuing his claim.
- [117] The relevant sections of the Limitation Act, are as follows:
- 6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
- (2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.
- 8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;

(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

12

(2) A fraud or trust claim is discovered when the beneficiary becomes fully aware

(a) that injury, loss or damage had occurred,

(b) that the injury, loss or damage was caused by or contributed to by the

(i) fraud,

(ii) fraudulent breach of trust,

(iii) conversion, or

(iv) other act or omission

on which the claim is based,

(c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and

(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

(3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

[Emphasis added.]

[118] The Defendants submit that Eric Jones received notice of Tracey Davidson's intention to apply for the Letters of Administration by way of the letter from counsel dated March 31, 2014 and therefore, on the basis that his claim was discoverable at that time, the limitation period runs from that date. I disagree with this position.

[119] Eric Jones testified that in March 2014 he was contacted by Tracey Davidson who told him she had been living with Larry Jones for three years and was seeking appointment as administrator of his estate. Eric subsequently received a letter from estate counsel retained by Ms. Davidson dated March 31, 2014 which stated that Tracey Davidson was the surviving spouse and that Ms. Davidson was taking steps to apply for a grant of administration.

[120] Eric testified that in March 2014 he believed that Tracey Davidson was being truthful when she swore that she had lived with Larry Jones for three years. The evidence at trial establishes that he had no contact directly and only indirect contact through family with Larry Jones. Therefore, he would have had no basis on which to doubt what she had told him - that is that she was Larry Jones' common law spouse. He testified that in or around March 2014 he conducted some on-line research to investigate the powers of an administrator, learning it could take years to sort out an estate, but did nothing else. In my

view nothing else was required at this time.

- [121] Eric Jones testified that he did not hear from Tracey Davidson again until September 2017 when she called him to advise that Larry Jones' Terrace home had been appraised and that although he was entitled to twenty percent of its value she wanted him to waive his rights as she wished to purchase the home and couldn't afford to pay him his share. He then received a second letter from estate counsel on September 26, 2017 requesting that he, in effect, waive his right to his portion of Larry Jones' estate given the relative, higher value of a life estate in favour of Tracey Davidson compared with the net value of the estate. These requests apparently piqued Eric Jones' interest.
- [122] Eric Jones testified that after receiving the September 26, 2017 letter that he conducted an on-line search of Tracey Davidson's Facebook page and found responses from Tracey Davidson to postings from friends who had commented on photographs showing the view from Larry Jones' home. Those responses included comments from Tracey Davidson that she had moved to Larry Jones' home in around May 2013. He then retained legal counsel, who made requests for additional documents proving common law status. He filed his claim against the defendants on May 11, 2018.
- [123] In my view the earliest that Eric Jones knew or reasonably ought to have known that Tracey Davidson was not Larry Jones' common law spouse and therefore that he had a cause of action against her was some time after September 26, 2017. He commenced his claim approximately eight months later, which is well within the two-year limitation period. As a result, I find that Eric Jones' claims are not statute barred.
- [124] In addition, I do not find that the doctrine of laches applies in this case. For the reasons set out above, I do not consider that there was an unreasonable delay between the time that Eric Jones first learned that Tracey Davidson might not be Larry Jones' common law spouse and the commencement of his claim, that constitutes a waiver or acquiescence resulting in circumstances that make the prosecution of his claim unreasonable. see *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at pp. 239-240 and *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6 at paras. 77-78.

Conclusion

- [125] Although Eric Jones' pleadings include a claim for special costs his counsel confirmed during closing submissions that he was not advancing this claim.
- [126] For the reasons set out above I conclude that Eric Jones is entitled to the following relief:
- a) A declaration that Tracey Davidson was not the common law spouse of Larry Jones at the date of his death - March 18, 2014;
 - b) An order revoking the July 25, 2014 grant of Letters of Administration for the estate of Larry Jones to Tracey Davidson;

- c) An order granting Letters of Administration of the estate of Larry Jones to Eric Jones;
- d) An order that Tracey Davidson transfer the property located at 1769 Sleeping Beauty Lane in Terrace, B.C. to Eric Jones, free and clear of any encumbrances placed on the property after the date of Larry Jones' death;
- e) An order for an accounting and tracing of the assets and monies that formed or ought to have formed part of the estate of Larry Jones, judgment for said amount and an order transferring them to the estate of Larry Jones;
- f) An order that Tracey Davidson, in her capacity as administratrix of the estate of Larry Jones pass her accounts before a Registrar of the Supreme Court of British Columbia for the period from the date of Larry Jones' death to the date she is removed as administratrix;
- g) That subject to the parties coming to a different arrangement, that Tracey Davidson provide vacant possession of the property at 1769 Sleeping Beauty Lane in Terrace, B.C. to the estate of Larry Jones within three clear months of the date of this judgment; and
- h) Interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 and costs in favour of Eric Jones.

"Mayer J."

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