
CANADA / JUDGMENT

Kirkwood v. MacMillan

2008 BCSC 91

COURT

Supreme Court of British Columbia

DECIDED

23 January 2008

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2008 BCSC 91err1 Kirkwood v. MacMillan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kirkwood v. MacMillan,

2008 BCSC 91

Date: 20080123

Docket: S98547

Registry: New Westminster

Between:

Kenneth Robert Kirkwood

Plaintiff

And

Bonnie MacMillan

Defendant

Before: The Honourable Mr. Justice Bernard

Reasons for Judgment

Counsel for the Plaintiff:

J. Schwarz

Counsel for the Defendant:

E. Macaulay

Date and Place of Trial/Hearing:

November 30, 2007

New Westminster, B.C.

A. Background

- [1] Donald Kirkwood died intestate on October 24, 2005. He neither married nor had children, and his parents are deceased. The plaintiff Kenneth Kirkwood is Donald's only sibling. He claims to be the sole heir to Donald Kirkwood's estate. The defendant Bonnie MacMillan says that she was in a marriage-like relationship with Donald Kirkwood for the two-and-one-half years preceding his death and that therefore, she is Donald Kirkwood's common law spouse and sole heir.
- [2] Ms MacMillan's claim is by way of counterclaim in an action commenced by Kenneth Kirkwood to: (a) cancel a caveat filed by Ms. MacMillan; (b) obtain a grant of Letters of Administration; and (c) declare him sole heir and entitled to the residue of his brother's estate.
- [3] It is common ground that Bonnie MacMillan and Donald Kirkwood were in a romantic relationship for several years, and that throughout this relationship they maintained separate residences and independent finances.

B. Issues

- [4] The sole substantive matter in issue is whether Ms. MacMillan has proved that her relationship with the deceased was that of common law spouse as it is defined by the Estate Administration Act, R.S.B.C. 1996, c. 122. The sole procedural issue is whether this matter is suitable for resolution by summary trial. The defendant says that it is not.

C. Evidentiary Synopsis

- [5] The primary evidence in support of Ms. MacMillan's claim comes from Ms. MacMillan who states, inter alia, that she and Mr. Kirkwood had an exclusive romantic/sexual relationship for at least five years prior to his death; that throughout their relationship they maintained completely separate residences but spent many nights together; that they had no plans to cohabit (in June 2005 the deceased was looking for a new residence for him alone); that she and the deceased often shared food and drink, watched videos together, and had sexual relations at the deceased's home; that she and the deceased kept their finances separate, but the deceased would help her by doing car and home repairs, and she would help him by occasionally purchasing antiques or other items from him (e.g., in 2004 Ms. MacMillan bought the deceased's car and dining suite from him); that the deceased acknowledged special occasions with cards and gifts for Ms. MacMillan and, at times, for members of her family; that the deceased was included in Ms. MacMillan's family holiday dinners; that the deceased referred to Ms. MacMillan as his wife; and that shortly before the deceased's

untimely death in a house fire, he told Ms. MacMillan and others that he had left his entire estate to her.

- [6] Answers from Ms. McMillan's Examination for Discovery were tendered as evidence at the trial. In her answers, Ms. MacMillan speaks about her home, her property and her family, as clearly distinct from that of the deceased. She said that she knew nothing about the deceased's finances and he knew nothing of hers.
- [7] Ms MacMillan tendered affidavits from several persons acquainted with her and/or the deceased. The gist of their collective evidence is that in the latter years of the couple's relationship it appeared to be exclusive, and in conversations with others the deceased referred to Ms. MacMillan as his wife. A similar number of affidavits tendered by the plaintiff suggest that the deceased and Ms. MacMillan had a casual/dating relationship and that the deceased did not regard or refer to Ms. MacMillan as his wife.
- [8] The plaintiff did not see his brother often in the last few years of his life; he says that the deceased's excessive consumption of alcohol made maintaining a relationship difficult. He met Ms. MacMillan in 1997 and saw her once in 2004 when he dropped by his brother's home. He never regarded Ms. MacMillan as his brother's common law spouse and does not believe that his brother did so.
- [9] Mr. Bueler, a long-time friend of the deceased, and a person who maintained frequent contact with the deceased close to the time of his death, described the relationship between the deceased and Ms. MacMillan as social/dating. Others who knew the deceased say that he was a very independent man who lived an unusual lifestyle.

D. Findings and Analysis

- [10] To make out her counterclaim, the onus falls to Ms. MacMillan to prove, on a balance of probabilities, that she was the common law spouse of the deceased (see *Janus v. Lachocki*, 2001 BCSC 1702).
- [11] The applicable provision of the Estate Administration Act outlines two alternative definitions:

"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 have lived and co-habited 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.
- [12] It is the latter definition upon which the defendant relies.

- [13] At the summary trial there was objection to much of the evidence tendered by both parties. Indeed, it was the basis for the defendant's position that this matter was unsuitable for resolution by summary trial. The plaintiff's position is that the matter in issue may be resolved without resort to the alleged hearsay evidence of friends, acquaintances, and neighbours. The plaintiff says that the defendant relies upon the hearsay to corroborate her evidence, but that her own evidence does not establish the basis for finding that she was the common law spouse of the deceased.
- [14] I agree with the plaintiff's assertion that one need go no further than the testimony of Ms. MacMillan to resolve this matter. In Ms. MacMillan's own evidence, she establishes the absence of fundamentally important aspects of a common law marriage. She states that throughout their relationship, she and the deceased owned and maintained distinctly separate residences, she in a condominium and he in a house, each separated by several miles. She acknowledges that there was no co-mingling of finances, and no shared debts, expenses, or assets. She speaks of her family, her home, and her assets to the clear exclusion of the deceased. Although she claims that the deceased sometimes referred to her as his wife, there is no evidence that she ever referred to him as her husband.
- [15] In my view, the fact that the defendant and the deceased never co-habited is fatal to the defendant's claim. In this regard, the defendant relies upon *Somodi v. Szabados*, 2007 BCSC 857, a case in which Cullen J. found a marriage-like relationship between two persons who lived as landlord and tenant under the same roof of a house divided into suites. Even if this decision could be construed as a broadening of the meaning of "co-habiting," I would distinguish it from the instant case. Ms. MacMillan and the deceased owned and maintained distinctly separate residences. Ms. MacMillan never shared the same roof as Donald Kirkwood, except as his guest.
- [16] Even if I were wrong, and the absence of co-habitation was not fatal to finding that the defendant was a common law spouse, I would conclude, nonetheless, that the dearth of other important indicia of a common law marriage would preclude such a finding.
- [17] The instant case bears striking similarities to *Davey Estate v. Gruyaert*, 2005 WL 4579002 (B.C.S.C.) in which Wedge J. made the following apposite remarks:
- [30] I do not doubt that Ms. Gruyaert and Ricky were a couple, in the sense that they were sexually and emotionally intimate, possibly to the exclusion of all others, although the evidence with respect to that was not entirely clear. Nor do I doubt that Ms. Gruyaert spent the majority of her time at Ricky's house in the year or so prior to his death. But the question I must answer is whether the two coexisted in a marriage-like relationship for two years before the death of Ricky. With respect to that issue, I have considered the decisions of *Janus v. Lachocki Estate*, *Gostlin v. Kergin*, and *Takacs v. Gallo*. I have also considered *Hayden v. Barrass*.

- [31] In today's society, partners in a committed relationship are often quite independent in ways that were not typical of couples 20 or 30 years ago. However, as I read the case law, there are numerous factors that can be taken into account in determining whether a relationship was "marriage-like," particularly where the subjective intentions of the parties are not clear. The case law emphasizes that while we now have a more modern view of the institution of marriage, along with that view comes the appreciation that not all couples who live together wish to enter into a marriage-like relationship.
- [32] In the circumstances of this case, I must look at the objective factors. These parties did not share legal rights to their living accommodation, nor did they share any bank accounts or have access to each other's bank statements. There was no financial intermingling at all. Ms. Gruyaert had no access to, or knowledge of, Ricky's financial affairs. There was no blending of incomes. The two kept their belongings entirely separate. They had separate vehicles. Ms. Gruyaert did not contribute any money to the upkeep or ongoing expenses of Ricky's house. Ms. Gruyaert not only kept her paycheque to herself but also her benefit plans, though it would have cost her nothing to enrol Ricky in her medical plans. She maintained a separate mailing address and maintained a residence with her parents until very shortly before Ricky's death. None of these objective factors point to a marriage-like relationship. Finally, as I have noted, Ricky had virtually no relationship with Travis. While I am sure Ricky saw Travis from time to time and interacted with him, he did not conduct himself as one who was involved in a marriage-like relationship with Travis's mother.
- [35] As noted by Parrett J. in *Harris v. Willie Estate*, the court should be very slow to impose on parties commitments which, by their conduct, they have clearly not intended to make. On Ms. Gruyaert's evidence alone, I conclude that absent from the relationship was any element of economic independence, a sharing of and commitment to a common principal residence, and a general recognition that they were a family unit.
- [36] Mr. [sic] Gruyaert's claim under the Estate Administration Act is therefore dismissed.
- [citations omitted]
- [18] In this case, as in *Davey Estate v. Gruyaert*, there is an absence of economic dependence, of a sharing and a commitment to a common principal residence, and of a general recognition that the defendant and the deceased were part of a family unit. I agree with the comment of Parrett J. in *Harris v. Wille Estate*, 2001 BCSC 143, where he said at ¶63: "the court should be very slow to impose on parties commitments which by their conduct they have clearly not made." The conduct of the deceased and Ms. MacMillan is entirely inconsistent with the existence of a common law relationship. To find that Ms. MacMillan was the common law spouse of Donald Kirkwood would impose upon this couple the sort of relationship which the parties, by their conduct, individually and collectively, clearly did not intend to have. A committed relationship, per se, is not enough.

- [19] In regard to the procedural issue, I am satisfied that this matter is eminently suitable for resolution by summary trial. In light of the onus on the defendant and the defendant's own evidence, no credibility issues are raised. There is no need to resort to the alleged hearsay evidence which troubled the defendant and founded her opposition to resolution by summary trial.

E. Disposition

- [20] The defendant's counterclaim is dismissed. The plaintiff's claim is allowed. The caveat filed December 6, 2005; November 17, 2006; and May 15, 2007 are cancelled. Letters of Administration are granted to the plaintiff. It is hereby declared that the plaintiff is the sole heir of the deceased and entitled to the residue of the estate.
- [21] The plaintiff is the successful party and he is entitled to his costs on scale B. I am not persuaded that the defendant's claim reasonably warranted these proceedings and that, therefore, it is the estate which ought to bear the costs.

"The Honourable Mr. Justice Bernard"

February 1, 2008 - Revised Judgment

Corrigendum to the Reasons for Judgment issued advising that paragraph 20 on page 8, which reads as follows should be cancelled and replaced with the new paragraph 20 stated below:

E. Disposition

- [20] The defendant's counterclaim is dismissed. The plaintiff's claim is allowed. The caveat filed December 2, 2005 is cancelled. Letters of Administration are granted to the plaintiff. It is hereby declared that the plaintiff is the sole heir of the deceased and entitled to the residue of the estate.

E. Disposition

- [20] The defendant's counterclaim is dismissed. The plaintiff's claim is allowed. The caveats filed December 6, 2005; November 17, 2006; and May 15, 2007 are cancelled. Letters of Administration are granted to the plaintiff. It is hereby declared that the plaintiff is the sole heir of the deceased and entitled to the residue of the estate.

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