
CANADA / JUDGMENT

L.E. v. D.J.

2011 BCSC 671

COURT

Supreme Court of British Columbia

DECIDED

25 May 2011

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2011 BCSC 671 L.E. v. D.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.E. v. D.J.,

2011 BCSC 671

Date: 20110525

Docket: S88410

Registry: Kelowna

Between:

L.E.

Plaintiff

And

D.J., E.M.F., M.R.F., and R.C.F.

Defendants

Before: The Honourable Madam Justice Russell

Corrected Judgment: The text of the judgment was corrected at paras. 225 and 227 on June 17, 2011.

Reasons for Judgment

Counsel for Plaintiff:

S.T. Rule

The Defendant, D.J.

appearing in person with the assistance of A. Powell, Esq.

Place and Date of Trial:

Kelowna, B.C.

February 21-25, 2011

Place and Date of Judgment:

Kelowna, B.C.

May 25, 2011

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Overview

- [1] L.E. alleges that she lived in a marriage-like relationship with the deceased, B.F., for a period of more than two years immediately before B.F.'s death. She sues for a declaration accordingly. L.E. also brings application to be appointed as Administrator of B.F.'s estate.
- [2] B.F. died without a will on February 13, 2010. If L.E. proves she lived with B.F. in a marriage-like relationship for more than two years immediately before his death, she meets the definition of spouse in s. 1 of the Estate Administration Act, R.S.B.C. 1996, c. 122 [Act].
- [3] If L.E. was B.F.'s spouse, she will receive \$65,000, 1/3 of the residue of the estate, the household furnishings and a life estate in the spousal home as a result of part 10 of the Act.
- [4] The net value of the estate is estimated at \$87,000 since the home belonging to B.F. is under foreclosure with the order absolute obtained in January 2011.
- [5] Although the evidence was not entirely clear, I understand the primary asset at issue in this case is B.F.'s RCMP survivor's pension which would go to L.E. as spouse.
- [6] The Act also sets out the criteria to determine who should be granted Letters of Administration for the Estate. Both L.E. and D.J. seek to be named Administrator. Sections 6, 7 and 13 of the Act confer broad discretion on the Court to name the Administrator.
- [7] R.F., the adult son of the deceased, has consented to the appointment of L.E. as Administrator of his father's estate. He participated in this action solely to give evidence as to the reason for giving his consent.

Background

A. The Plaintiff, L.E.

- [8] L.E., born on October 22, 1988, is currently a student at Okanagan College where she is upgrading her education in hopes of completing a medical office assistant course. She earns money by working part-time in metal recycling and house-sitting. She receives income assistance and has, on occasion, supplemented her income by charging for the delivery of sexual services.
- [9] She has occupied the house which belonged to B.F. since his death without contribution to the mortgage payment.
- [10] L.E. met B.F. in 2005 when she was 16 years old. He was 53 years old.
- [11] She met B.F. on an Internet site for alternative relationships. She was interested in finding partners for kinky sexual experiences, in her words. They met in person in July 2005 just before she entered grade 12.
- [12] Once back at school, she spent her study blocks and spares with him. He would pick her up and take her to Kelowna or she would drive down to meet him. Initially, she lied about her age; however, she had to explain why her availability was restricted to times when she did not have classes and presumably, she would have been forced to reveal her age.
- [13] L.E. visited B.F. often and began to stay over at his house by November 2005. After she graduated from high school, she would stay at B.F.'s house during the week and go home to Vernon on weekends when his two daughters stayed with him.
- [14] From the beginning, the focus of the relationship between L.E. and B.F. was sexual and it remained so throughout their time together. B.F. was bisexual and had L.E. participate in threesomes with men he found on the Internet.
- [15] L.E. had sex with partners she found on the Internet while B.F. was at work. She shared the details with him. She says he approved of these encounters and gave her tips on how to enhance them. She did not consider that having sexual encounters outside their relationship amounted to infidelity because B.F. took pleasure from her description of them.
- [16] L.E. says she moved in with B.F. in the summer of 2006.
- [17] L.E. assisted B.F. in renovating the suite in his duplex. She painted walls and ceilings, installed mouldings, a tub surround and sink, and trimmed doors. The project took four months. B.F. was employed at the time and while he was at work, L.E. would work on the suite. B.F. would help after work and they would work together on weekends.
- [18] L.E. testifies she was not paid for this work. However, according to his affidavit evidence in child support proceedings with his ex-wife, D.J., L.E. did not pay rent.
- [19] By August 2006, before her 18th birthday, L.E. states she had moved her clothes and a number of her possessions to the home of B.F. although she left furniture at her mother's home along with some clothes, art supplies and books.

- [20] L.E. described the domestic arrangements at the home of B.F.: He would do the cooking for his daughters and himself, cook dinners and brunch for them on weekends and make a roast dinner on Sundays. She cooked for herself during the day. She bought her own food since she was allergic to many of the foods eaten by B.F. and his daughters. If the deceased bought food items for her, she would pay him. She would also be reimbursed for expenses incurred for B.F.
- [21] L.E. says she cleaned the house, did most of the laundry although B.F. washed his daughters' school uniforms, and she organized the two girls' art supplies, the DVDs and the mail. She organized the garage and did some gardening. B.F. mowed the lawn.
- [22] She assisted the deceased with his grooming.
- [23] B.F. was a keen member of the local Rotary Club and often took his daughters to Rotary events and Friday meetings. He did not take L.E. to any such events.
- [24] L.E. states that B.F. was not open about their relationship. He was apprehensive that if their relationship became common knowledge, he would find himself a subject of gossip about the age difference between them. So his fellow Rotarians and his friends at work were not to know about them. However, she says he told his close friends about her. On occasions when he did have to introduce her, she said he would simply introduce her by her first name, without further explanation.
- [25] L.E. agrees that she left her address on her BC Driver's License as the address of her mother's house and indicated on her income tax return that she lived at her mother's address and was single. Her student records from Okanagan College also show her mother's address. She explains she had done this at the request of B.F. because he was concerned his ex-wife would inquire into her income for child support purposes. According to L.E., he did not want there to be any way to connect her with him.
- [26] On occasion, she did use B.F.'s address for such innocuous things as her cat's vaccination certificate, obtained in 2008.
- [27] The two daughters of B.F., M.F. and E.F., were at the home of B.F. every day after school and overnight on weekends. L.E. did not have much to do with them but did give them small gifts at Christmas, and occasionally picked them up from school or their mother's house. She did not have a mothering relationship with them. B.F. did not demonstrate affection to L.E. in front of his daughters or in front of others.
- [28] When the girls stayed on weekends, she would sleep in their bunk beds or on the couch. They would sleep in his room. When they did not stay overnight, she would sleep with him in his bedroom. She also said he found them frustrating on occasion and would take his frustration out on her. She decided it would be better if she left for weekends to give him "alone time" with them. She would return to her mother's home in Vernon. B.F. and L.E. took some trips together with the girls. They went to Nakusp Hot Springs in May, went to Vancouver to see the sister of B.F., and took a day trip to see a friend of B.F. in Washington

state. They went to Whistler and to Armstrong to the Interior Provincial Exhibition. At all times, L.E. paid her share of the expenses.

- [29] L.E. and B.F. did not sleep together when they travelled with the girls. Neither did they discuss their relationship with the girls.
- [30] They bought each other some gifts during their time together. She bought B.F. a bike rack for his car, some clothes and some DVDs. He gave her a trip to Nakusp Hot Springs for one night as a high school graduation present and gave her a sewing machine, some clothes and some DVDs. In addition, as a birthday present, he contributed to the cost of a trip on which she accompanied him.
- [31] L.E. took several trips with B.F. to his business conferences but paid her own way. He also took trips with others although there is no evidence that the others who accompanied him were more than friends.
- [32] In December 2007, L.E. went to Hungary for a planned trip of six months to visit her grandparents.
- [33] Before leaving, she asked B.F. to be her boyfriend, but he made clear their relationship was not evolving. She was hurt and angry and thought it a good time to travel since he was only interested in his child support battle. While she was away, she left the things she had brought to B.F.'s house.
- [34] L.E. and B.F. spoke on the phone several times while she was away and used instant messaging. One of their instant messaging sessions was presented as an exhibit. In it, he seemed to say he was trying to include her in his life in a more meaningful way. As well, he included his elder daughter in one of the sessions and she said she would be happy if the two of them became closer. In the daughter's oral evidence she explains this comment as relating to a lessening of tension in the household.
- [35] The instant messaging session on February 23, 2008 was preceded by a lengthy email from B.F. In it, he set out his readiness to be committed to L.E. provided she would accept his definition of commitment. He appears to make his readiness to commit to her as a husband conditional upon her willingness to accept his rules and his dominance in her life.

- [36] This emailed document is found at Exhibit 1 tab 17. I will quote from relevant sections:

. . Here it is, hopefully in some order. This is important.

For some time, you have wanted to be part of something, a relationship. It has intrigued you, you found it necessary to actually leave me a note one day, asking me to be your "boyfriend".

A "boyfriend" is a fairly lightweight description of a partner of someone wanting a relationship, but I guess compared to the absence of having one, or never having had one, it is significant.

The question is [L.E.], are you prepared to commit?

...

We have muddled and evolved in our relationship. There have been extenuating factors that have caused me to limit my "commitment" to you. I have pushed you away, I have not expressed my true feelings to you; partially due to fear and not wanting to repeat my historical pattern. I have reached a place where I am prepared to tell you that I love you, I am in love with you and I am prepared to commit to you, your growth, your life and be your husband (if not in the legal sense, in the lifestyle sense). Before you tell me you are prepared to commit to me, as my wife, I want you to understand the depth of what is required.

...

I absolutely understand the commitment and I am prepared to make the commitment.

I understand this is what you want, but I need to know that you know the rules and accept them to Commit! A failure to accept any rule is a failure to accept all and is a statement of rejection of the rules. You will not be dismissed but you will be relegated to bitch status in the pack.

I disclosed, in a very drawn out manner, your love, your support and your history of supporting me in difficult times with [E.F. and M.F]. I have disclosed your love and the nature of your love for me to them. They were not surprised.

I have disclosed to them my love and the nature of my love for you, a matrimonial, husband and wife love. They understand and are supportive and were not surprised.

They now see us as husband and wife. They understand we are lovers and partners in a spousal way.

They also miss you very much and are happy to be a family with you as my wife. They still see you as a big sister, relating to their day to day stuff, and are pleased we have formed this bond.

That is just a sign of my commitment. All you have read is my further commitment.

I await your response, your commitment, your bond; for life.

With unconditional love;

[B.F.]

(writer's emphasis)

[37] During the course of their instant messaging session later that day, L.E. indicated she was prepared to accept the conditions set down by B.F.

[38] Instead of L.E. staying in Hungary for the intended duration of six months, B.F. arranged her return ticket after three months, in March 2008. When L.E. returned to Canada, B.F. picked her up at the airport and they spent a few days together before she visited her mother.

- [39] Over the next few months, L.E. testifies she continued to help around the house, occasionally picked up the two daughters from school and took them to dance lessons.
- [40] L.E. was intermittently employed and her tax returns show little income. However, I am aware she occasionally worked for cash and sold Cialis to customers on occasion. Therefore, her reported income may not accurately reflect her actual income. However, she certainly was not earning substantial amounts whether declared or not and it appears B.F. would occasionally help her out with gas money, particularly after she returned to school in September 2009.
- [41] L.E. and B.F. maintained accounts of who paid for what. If L.E. bought something for the house, she informed B.F. he owed her money and he would do the same. Both were listed as payees on each other's bank account so that they could make transfers when necessary.
- [42] L.E. decided to return to school after consulting B.F. She needed to find secure employment and she did not have post-secondary education. B.F. approved of her decision because she could contribute more to the household with a better job. His employment income was in decline while his child support obligations continued.
- [43] During the time she was at school, she stayed with her mother in Vernon because it was closer to Okanagan College. She would return to Kelowna about every second weekend and whenever she could. Some of her clothes, DVDs and books remained at the home of B.F.
- [44] By Christmas 2009, B.F. had serious financial issues. L.E. persuaded him to go to Vernon for Christmas dinner since her mother would pay for the food.
- [45] While at L.E.'s mother's home, the cat bit B.F. The bite became infected and he was hospitalized for three days and had surgery. L.E. stayed with him and then prepared him for discharge by washing and dressing him. Once home, she changed the dressing on his wound twice a day.
- [46] On the day B.F. died, L.E. had stayed overnight and with B.F., had taken the girls to the mall to shop. On their return, she left the house to go snowboarding at Silver Star near Vernon.
- [47] While on the mountain, she received a call from D.J. calling from the cell phone belonging to B.F., saying that B.F. had suffered a heart attack. She tried to call back but the phone was busy. She tried again and then received a message from E.F. saying that her father was dead. L.E. called again and confirmed the message and then left for the house.
- [48] Among D.J., E.F. and M.F., there were four calls made to L.E.'s cell immediately following the death of B.F.
- [49] On arrival at the Kelowna house, L.E. hugged the two daughters and then went to the bedroom to say goodbye to the deceased. She remained with the body until the coroner arrived.

[50] In consultation with two sisters of the deceased, neither of whom gave evidence, L.E. made funeral arrangements and helped to compose the deceased's obituary.

[51] In the obituary, she is referred to as the deceased's partner. In the funeral card prepared by his sister, C., she is not mentioned. In the announcement of B.F.'s death made by his employer, her name does not appear.

Cross-examination of L.E.

[52] At the outset of her relationship with B.F., L.E. was 16 years old. She had lied about her age to access the website on which she wanted to locate partners for alternative sexual experiences. She lied to B.F. as well about her age, telling him she was 18.

[53] L.E. admitted that she had sworn a false affidavit in her efforts to obtain the RCMP survivor's pension as the common-law wife of the deceased. In that affidavit (Exhibit 3) she swore that she and B.F. had had an exclusive sexual and romantic relationship from August 2006 to his death.

[54] She agreed that this was not true. She also stated that she lied from time-to-time about aspects of her life with B.F.

[55] L.E. also agreed that she had initially lied to her lawyer about the unconventional sexual relationship she had had with B.F. and their involvement with other people.

[56] Any credit card lenders were given her Vernon address as were any employers for whom she worked. She continued to bank in Vernon throughout her relationship with B.F.

[57] The federal and provincial governments had her address as her mother's home in Vernon. She indicated on her income tax returns for 2006-2009 that she was single and lived at her mother's Vernon address.

[58] There were no bank accounts or credit card accounts shared with B.F.

[59] L.E. was not named on B.F.'s benefit plan and he kept his ex-wife, D.J., and his daughters on that plan.

[60] His daughters were the beneficiaries of his life insurance.

[61] B.F. introduced L.E. to his family and friends as his nanny, friend, roommate, or assistant and often did not introduce her at all. For example, L.E. did not meet the son of B.F. who was estranged from him until after his death. She did meet some of his relatives, including his aunt and uncle in Oliver, in October 2009.

[62] L.E. acknowledged the importance to B.F. of his membership in the Rotary Club. However, she agreed he did not take her to any of its events although he did take his daughters and occasionally another female friend known as J. She agreed he was not comfortable with the idea that their relationship would become known in that community.

- [63] While maintaining that her relationship with B.F. was cemented from August 2006 and that they were like a married couple, L.E. acknowledged that she had registered on another Internet dating site in May 2008 because she was "lonely for a man".
- [64] In the sexual relationship between L.E. and B.F., B.F. was dominant and L.E. was submissive. From the many and detailed diaries she maintained, it appears that L.E. not only endured but seemed to enjoy the abuse which accompanied the power dynamic between them.
- [65] In her evidence, she explained that having sex with another in front of B.F. aroused him just as her description of sex with others in his absence gave him pleasure. She claimed that while she was not sexually exclusive with B.F., she was romantically exclusive with him.
- [66] L.E. claimed that B.F. was sexually exclusive with her from August 2006, when she moved in with him until his death on February 13, 2010. However, L.E. stated that B.F. was looking for a sexual partner while she was away in Hungary. She offered as explanation that having sex with other partners was like using sex toys and did not affect the relationship between them. She said B.F. wanted sex with outsiders to be part of their relationship.
- [67] She states the paid sexual transactions were proposed by B.F. but she set up the appointments.
- [68] B.F. was sufficiently reticent about his relationship with L.E. that he did not demonstrate affection to her in front of others, including his daughters.
- [69] There was very little relationship between L.E. and the daughters of B.F. L.E. admitted to being jealous of the attention B.F. gave to his daughters and their continuing importance in his life to what she appeared to feel was her detriment.
- [70] When the daughters were over at the home of B.F., she would crochet, use her computer or watch television. She often found the daughters' behaviour frustrating but mostly had little interaction with them.
- [71] L.E. and B.F. did not have much conversation about the future except in the email excerpted above. On one occasion, in Las Vegas, she suggested buying a recreational vehicle for travel. She says B.F. endorsed her suggestion.

B. L. V.

- [72] L.V. was a neighbour and friend of B.F.. She knew B.F. from church and from school functions he would attend with his girls that she attended with her grandchildren.
- [73] She gave evidence that B.F. would visit her with his daughters so they could use her swimming pool.
- [74] She met L.E. in 2006 when L.E. accompanied B.F. and his daughters to visit L.V.

- [75] She describes her relationship with B.F. as close but she did not know the extent of his unconventional sexual lifestyle.
- [76] When she met L.E., L.V. asked B.F. if she was his girlfriend. He reluctantly admitted that she was. He also told L.V. L.E.'s age. The age difference and youth of L.E. concerned her.
- [77] Although B.F. discussed sex frequently with L.V., he did not disclose that he was bisexual. He did not say he was exclusively dating L.E., but admitted it was a sexual relationship.
- [78] L.V. states L.E. and B.F. were affectionate while at her house, but not when the two daughters were present. Since she only met them in the company of the girls, they did not touch each other in her presence.
- [79] She recalled being at B.F.'s home for dinner with a group which included L.E.'s mother. While there, she noticed what she assumed were possessions belonging to L.E., but she could not recall whether the articles were still in the house at the time of B.F.'s death. Among the articles she noted was an easel. She thought it belonged to L.E. but in cross-examination, she agreed it could have belonged to one of the girls.
- [80] She was aware that L.E. was going to school in Vernon after September 2009. B.F. told her L.E. was visiting him when she could. He was in favour of her improving her education so she could contribute more to the household finances.
- [81] In 2009, L.V. began raising her grandchildren and hardly saw B.F. The two daughters came over to swim twice but without B.F. L.V. was very fond of the girls and was happy to see them but they did not discuss the relationship of B.F. with L.E.
- [82] She and B.F. saw each other sporadically. When she saw him after Christmas 2009, he showed her the infected cat bite.
- [83] She thought L.E.'s cat was in the home of B.F. in 2009 but by then L.E. had returned to her mother's house to stay while she attended school and had taken her cat with her.

C. R. E.

- [84] R.E. is the mother of L.E.
- [85] She was very upset when L.E. began to date B.F. She learned of the relationship from reading L.E.'s diary. L.E. was out with B.F. that night and R.E. called L.E. on her cell phone and asked to speak to her male companion. At that time L.E. was in grade 12.
- [86] When she spoke to B.F., they arranged to meet in a coffee shop. She had a civilized conversation with B.F. but was sufficiently disquieted by the age difference that she consulted the RCMP about the legality of a 16-year old having a sexual relationship with a 53-year old.
- [87] She also consulted the counselling service at L.E.'s high school. Neither the consultation with the RCMP nor with the school assisted her.

- [88] At the outset of the relationship, B.F. told R.E. that it would not last. However, some time later, he told her he thought of L.E. as his partner. But she agreed he never said to her that he was committed to her daughter for the long-term or at all.
- [89] She is frank to say that she wished her daughter could have become involved with someone her own age but eventually, she accepted the relationship between L.E. and B.F.
- [90] R.E. says L.E. moved many of her few possessions to B.F.'s home after an approximate year and a half of dating. L.E. left some of things at her mother's house but only for storage.
- [91] L.E. helped with some of the renovations at her mother's house to earn the cost of her trip to Hungary at Christmas 2007.
- [92] L.E., B.F. and R.E. took some holidays together. R.E. paid her own way and contributed to expenses. This ended in 2008 when B.F. began to lose commission income and could no longer afford the cost of holidays.
- [93] R.E. hosted L.E. and B.F. for Christmas dinner in 2008, and L.E., B.F., and his two daughters in 2009.
- [94] On February 9, 2008 R.E. sent an angry email (marked as Exhibit 15) to L.E. in which she tried to provoke her into making a decision about her life. She asked her daughter if she wanted to remain the "nanny" in B.F.'s life forever. She explained she said this because her daughter had told her B.F. occasionally introduced her as his nanny. She was concerned L.E. could no longer manage the situation.
- [95] The email was sent while L.E. was still in Hungary and relates to L.E.'s earlier than planned return to Canada. Its tone reveals that R.E. was not quite as at ease with the relationship as she professed.
- [96] R.E. at no time introduced B.F. to anyone as the partner, or common-law husband of L.E.
- [97] Throughout the period 2005 to the death of B.F., R.E. both lent and gave her daughter money, fed her meals, accommodated her at her home, and looked after her cats because L.E. had no confidence that B.F. would feed them if L.E. were not there. When asked if L.E.'s cats were with her in 2009, she could not remember but said that if L.E. was staying with her, the cats were also there.
- [98] R.E. said that L.E. was "on her tax papers" but she did not know if she claimed her as a full-time student since her taxes were prepared by a tax service.

D. D.V.N.

- [99] D.V.N. considered himself one of the few people with whom B.F. was candid about his relationship with L.E.

- [100] He testified that L.E. told him about his relationship with L.E. in 2007. D.V.N. swore a statutory declaration supporting L.E.'s application to receive the RCMP survivor's benefit in which he stated B.F. had introduced L.E. as his "spouse" in October 2007 at a dinner party at his house attended by two elderly neighbours.
- [101] At the trial, he stated he now recalled that B.F. introduced her as his "better-half", a surprising new recollection almost four years after the event.
- [102] D.V.N. was also prepared to speculate that the aunt and uncle of B.F. accepted B.F. and L.E. as a common-law couple although he did not say whether they discussed this.
- [103] Interestingly, L.E. did not give evidence of the dinner party at which D.V.N. stated she was introduced as B.F.'s spouse or better half. It is also surprising that this public revelation of her status was allegedly made by B.F. at a time when she had asked B.F. for an assurance about their relationship and he had refused to give her any such assurance. He would not even consent to being called her "boyfriend".
- [104] If the party occurred in October 2007 L.E. would have been 18 or 19 years of age.
- [105] In cross-examination, D.V.N. would not agree that his initial recollection regarding the use of the term "spouse" at his October 2007 party was incorrect. He states that was what he recalled when he swore the affidavit but he later changed his mind respecting that recollection.
- [106] He also states that from 2007 to 2009, he did not see much of B.F. Despite this evidence, he felt they had a "pretty close" friendship. He did not mention having any telephone conversations with B.F. as one would expect with good friends.
- [107] D.V.N. referred to the girls (B.F.'s daughters) adoring L.E. and being "all over her". This is contrary to other evidence in the case including that of L.E. and of the two daughters.
- [108] While well-intentioned, I did not find D.V.N. to be a particularly reliable witness.

E. M.V.V.

- [109] M.V.V. was a neighbour of B.F. living across the street from the house on Stockton Avenue.
- [110] M.V.V. helped B.F. with his yard until L.E. started to work in the garden in August 2006.
- [111] B.F. introduced her as [L.E.] without identifying her status.
- [112] The window in her kitchen is well-positioned to look into B.F.'s living room so she was able to observe the two of them in the house. She did not enter B.F.'s house.
- [113] M.V.V. only saw the two daughters at B.F.'s house on weekends although they were with their father most days after school and were picked up by their mother at his home.
- [114] She assumed L.E. and B.F. were living common-law (her words) although she did not have any conversation with B.F. about his relationship with L.E.

- [115] She testified that L.E. and B.F. were always together and that he never went out at night without her although she agreed she did not see him every day nor did she see everyone who entered or left his house.
- [116] After B.F.'s death, M.V.V. offered advice to L.E. about her "right" to half the house and to continue to occupy it, since in her opinion, L.E. had earned such a share by living with B.F. for four years. M.V.V. had been a common-law spouse herself.
- [117] She says she saw L.E. at B.F.'s home maybe two or three times a week during the last few months before his death. This overstates the frequency she could have seen L.E. at the house during this period because L.E. was at school in Vernon and as much as nine days could pass without her being at the house.
- [118] M.V.V. impressed me as a very partisan witness, anxious to preserve what she saw as L.E.'s rights.

F. J.M.

- [119] J.M., a long time real estate agent in Kelowna, became acquainted with B.F. through the sale of his first house in which he lived with D.J. He also sold B.F. the spousal home after he and D.J. divorced and was a member of the same Rotary Club as B.F.
- [120] In 2009 J.M. sought B.F.'s assistance regarding issues he had with the Rotary Club chapter of which he was president. His term in office was July 1, 2008 to June 30, 2009.
- [121] He met often with B.F. to discuss issues with him, relying on his experience as an RCMP officer. Hey says his problems in Rotary began in May 2009 and he met with B.F. over the summer and fall of 2009. His meetings with B.F. preceded the 7:00 a.m. Friday Rotary meetings. He would meet with B.F. either very early in the morning at B.F.'s home or in the late afternoon preceding the Friday morning meeting.
- [122] Many of these meetings would have taken place after September 2009 when L.E. was living mostly in Vernon. As well, on only one occasion during the time he sought advice about Rotary did he go into B.F.'s bedroom and this would have been in approximately May 2009.
- [123] J.M. encountered the girls at the house but did not see L.E. there at any time. He had no knowledge of her at all until after B.F.'s death and the issues surrounding his estate arose. He was very surprised to learn of L.E.'s claim since he had not met her at the house and B.F. had never mentioned her. In his words, her claim to be B.F.'s spouse "seemed impossible".
- [124] J.M. considered himself a friend of B.F. Every Christmas he would drop by B.F.'s house with a gingerbread house for his daughters. He and B.F. would have a drink together on those occasions. However, he was not aware of the bitter quarrel over child support between B.F. and D.J.
- [125] J.M. had witnessed B.F. bringing his girls to Rotary Club events almost monthly for several years. He had also met other female friends B.F. brought to Rotary Club.

[126] J.M. agreed that he would have found the substantial age difference between B.F. and L.E. to be outside his parameters.

G. R.F.

[127] R.F. is a named defendant and is B.F.'s only son.

[128] R.F. was estranged from his father at the time of his death and had not spoken to him for five years after his divorce from D.J. because of his father's alternative sexual lifestyle and postings on the Internet.

[129] R.F. consents to the appointment of L.E. as Administrator because he believes this is what his father would have wanted.

[130] He has no way of knowing this other than to have discussed the topic with L.E. and to have accepted the comments of other family members who were not called to give evidence.

[131] Counsel for L.E. put the questions to R.F. regarding his father's wishes in the context of a reputation of a common-law relationship and based that reputation on what B.F. allegedly told his sister about his relationship with L.E.

[132] I do not doubt R.F.'s veracity but B.F.'s sister was not called as a witness and I am not satisfied this third-party hearsay evidence meets the criteria necessary to be admitted.

[133] As well, R.F. agrees D.J. told him he would share liability in costs if L.E. was successful in her lawsuit against him and the other parties.

[134] In my view, that fact could well have influenced R.F.'s decision to grant letters of administration to L.E.

[135] I cannot give R.F.'s evidence any weight.

H. J.S.

[136] J.S. became acquainted with B.F. through the Rotary Club. He met B.F. six or seven years before his death.

[137] The two of them eventually became friends partly because J.S. has a daughter close in age to B.F.'s girls and the three girls enjoyed each others' company.

[138] The topics discussed on social occasions included technology, finances, travel and their daughters. B.F. confided that he was involved with an wealthy, older woman who wanted him to travel with her and he was conflicted about their relationship. J.S. found the topic unpleasant. He recalled it as a macho conversation which he did not appreciate and he made this clear. This conversation likely occurred some four or five years ago. Since that single occasion, B.F. had not discussed any other relationships he had with women.

[139] J.S. had never heard of L.E. and was surprised to hear of her claim to be B.F.'s spouse.

[140] I took J.S. to be a casual social acquaintance of B.F.

I. F.F.

[141] F.F. is the aunt of the deceased.

[142] She recalls meeting L.E. several times in the company of B.F. She also met two other women who were friends of B.F. whom he brought to her house in Oliver during the last year of his life.

[143] As F.F. put it, she was polite and welcoming to whomever B.F. brought to her home.

[144] As she recalls, B.F. did not explain L.E.'s status. He introduced her as "[L.E.]" without further explanation.

[145] He did not show affection or particular attention to any woman he brought over. He talked with the family but tended to ignore his companion. F.F. recalls feeling sorry for L.E. and attempting to make conversation with her.

[146] On the last occasion F.F. met L.E. in B.F.'s company, she asked her if she was working. L.E. told her she was living with her mother in Vernon and going to school.

[147] About two weeks before B.F.'s death, he brought his daughters with him when he visited.

[148] F.F. does not remember any occasion on which B.F. brought his daughters and L.E. to her home.

J. O.J.

[149] O.J. was a business acquaintance of B.F.'s, a friend and a member of the same Rotary Club branch. She met him in 2006 at a Rotary event and they became friends. They would go hiking, attend Rotary meetings, and have dinner at her house. O.J. was affectionate with B.F. and he returned the affection. She also had a relationship with his daughters where she gave them gifts at Christmas and they gave her gifts as well. However, she had no intimate relationship with B.F.

[150] When she met L.E. the first time in 2006, B.F. introduced her as his roommate. When O.J. asked about her, B.F. made it clear he did not want to answer any questions about her. On another occasion, he stated she was working on his suite for him. O.J. did not ask any more questions about L.E..

[151] B.F. and L.E. did some renovation work on two houses O.J. owns. She paid them for their work.

[152] O.J. went on two business trips with B.F. They went to Las Vegas and Orlando, and L.E. was aware she accompanied him.

[153] O.J. attended Thanksgiving dinner at B.F.'s home in 2009. She recalls that L.E. arrived late and was coming from her mother's home in Vernon.

K. Constable Kenning

- [154] Constable Kenning of the RCMP went to B.F.'s home on February 13, 2010 after receiving a call to assist with a patient in cardiac arrest. Upon arrival, the ambulance paramedics told him the resident was deceased.
- [155] M.F. and E.F. were there. Constable Kenning called the coroner since the cause of death had to be investigated. He searched the house as part of his investigation, including the bedrooms and bathrooms. He noted the presence of a breathing apparatus for sleep apnea. He also noted that B.F. was very obese.
- [156] In the ensuite bathroom he saw nothing odd. There were male products, a toothbrush, other basic items. There were no cosmetics. In the common bathroom there were girls' products but nothing out of the ordinary.
- [157] The bedroom drawers and closets were full of male clothing. In boxes next to the drawers there were some exotic costumes and sex toys.
- [158] L.E. arrived after an hour or so and identified herself as B.F.'s girlfriend of five years. She told the officer that B.F. was bisexual. She described their sexual activities that day and their use of Dust-off to achieve asphyxiation. She told the investigating officer that she had left the house to go skiing at 4:00 p.m.
- [159] L.E. provided Constable Kenning with her Vernon contact information.
- [160] Constable Kenning's search of the house was not to locate women's clothing, although he saw none, but to look for items related to the cause of death. He was made aware L.E. and B.F. had used a dangerous sex aid earlier that day. As well, he saw needle marks in B.F.'s arm.
- [161] He noted that L.E. went in to say good-bye to B.F. She was emotional.
- L. M.J.
- [162] M.J. has been the coroner for the Kelowna area for eight years.
- [163] She arrived at the house at 8:00 p.m. She spoke to L.E. and to Constable Kenning on her arrival.
- [164] L.E. told the coroner that she and B.F. had been sexual partners for five to six years and that they were friends.
- [165] The coroner was there to try to establish a cause of death for B.F. She asked L.E. about their activities that day and was told L.E. had come over that day to have sex and they had had three hours of sex before L.E. left to go skiing.
- [166] When the coroner asked L.E. for her contact information, L.E. told M.J. she lived at her mother's home in Vernon and gave her the phone number there.

- [167] The coroner noted nothing in the house which would indicate an adult female lived there. The only items of adult female clothing she saw were the costumes in the box by the closet. There were no women's coats and no women's cosmetics in the bathroom.
- [168] In the course of her investigation of the cause of death she searched the entire house. She was primarily searching for drugs and alcohol but found no illicit drugs which could have caused B.F.'s death. She noted the cans of Dust-off and surmised that substance probably played a role in his death.
- [169] In cross-examination, the coroner agreed she was not primarily searching for women's clothing. However, she recalled specifically noting the absence of women's clothing in the house.
- M. E.F. and M.F.
- [170] E.F. and M.F. are the daughters of B.F. and D.J. E.F. is 14 and M.F. is 12 years old.
- [171] E.F. and M.F. spent a lot of time with B.F. D.J. worked full-time and at the time of B.F.'s death, she would pick them up at his house after school unless they were at dance lessons.
- [172] They spent Friday night, Saturday and Sunday with their father, returning home to their mother at 8:00 p.m. Sunday evening.
- [173] M.F. recalls meeting L.E. in 2007 although she does not remember the specific circumstances of their meeting. Both girls knew L.E. but said they had no relationship with her because she was very quiet and withdrawn. If she were at the house when they were, she would be watching television or crocheting by herself. E.F. states that L.E. had very little involvement in their lives. Her father did not talk much about her and did not tell the girls she should be considered part of the family. However, E.F. recalls the February 23, 2008 electronic conversation in which her father told her the four of them would be more like family after L.E. returned. She felt happy about it because there had been a lot of tension in the house before L.E. went to Hungary. She felt if things improved she could talk to L.E. and be more open.
- [174] M.F.'s recollection of her schedule with her father mirrored that of her sister. She mentioned as well that she spent every other Christmas with her father. Of those Christmases, she did not think L.E. had been present every time. They say L.E. was not there most times they stayed overnight with their father. Occasionally when she did stay, she slept in their bunks or on the couch.
- [175] B.F. was actively involved with his daughters and occasionally L.E. would join them. In the house, they would paint with easels and art supplies he bought for them. They spent more time doing outdoor activities.

- [176] They went to Rotary once a month for Friday morning meetings staying over Thursday night to accommodate their attendance, and went to the Christmas banquet. Both M.F. and E.F. fondly recall going to Rotary with their father. They had many friends among the adults there and felt as if they were with family. They were part of this central activity in B.F.'s life. They did volunteer work with their father through Rotary.
- [177] The girls cleaned B.F.'s house but sometimes L.E. would clean. L.E. and B.F. did the yard work. L.E. made a small garden in the back yard but after she finished it, no one took care of it again. L.E. did not cook for them. B.F. did the cooking for the girls. Because L.E. had allergies, she made her own meals.
- [178] While they were with their father, they played soccer and baseball, went to the park, went skiing, hiking, swimming, watched videos and went out for dinner. They enjoyed their time with B.F. and liked staying with him. M.F. says L.E. did not do activities with the girls at home nor on trips they took together. Their father took them shopping, did crafts with them. On Saturday nights, he would rent a movie and the three of them would watch it together. Occasionally, L.E. would join them.
- [179] From the point of view of the girls, L.E. made no effort to have a relationship with them. L.E. would not talk much with the girls so they did not have a strong connection with her. M.F. says L.E. did not talk much with her father either, and would sit and work by herself.
- [180] When they rode together in the car, B.F. would play 20 Questions with them but L.E. would either remain silent or sleep. On one occasion only, as a result of the girls begging her repeatedly, she played soccer with them. She did pick them up from school once or twice when B.F. was late from work.
- [181] L.E. did show M.F. how to draw eyes. When she finished her drawing with the embellished eyes, her father posted it on the refrigerator. It was signed "to [L.E.] love [M.F.]". M.F. recalled making the drawing at Exhibit 1 tab 6, but did not think she had signed it since the way it was written was not the way she now writes.
- [182] From their observation, their father would ask L.E. to repay him the expenses he incurred for her both at home and on trips. The girls recall several trips with L.E. but were clear in their recollection that their father asked her to pay her way. M.F. says L.E. bought her own groceries or her father would buy for her and "make her pay him back". In M.F.'s recollection, L.E. did not pay any bills for the household. Her father did not discuss his bills except to complain about them.
- [183] Both E.F. and M.F. deny that L.E. was their father's girlfriend. She was not at the house all the times they were there and after she decided to go to school in Vernon, she was at the house even less.
- [184] M.F. agrees it would have bothered the girls if her father had a girlfriend because he had never told them that. However, both girls thought that B.F.'s friend C. was more like a girlfriend to their father. They had a relationship with her and considered her like an aunt.

C. picked them up from school on several occasions, took them for dinner or to the park, sometimes with their father. M.F. says their father did not say anyone was his girlfriend but he introduced C. as such at a dinner party which occurred after the girls had met L.E. But M.F. agrees C. did not live with her father. To the best of the girls' recollection, C. still featured in their father's life up to his death. Unfortunately, C. could not be located and did not give evidence. E.F. agrees she told her father never to get married again.

- [185] M.F. remembers O.J. as a friend of her father's. He was helping O.J. with her tenants.
- [186] E.F. recalled D.V.N. visiting occasionally on holidays although he did not visit at B.F.'s home on New Year's. She also remembered going to Oliver with D.V.N., her father and L.E.. It was E.F.'s recollection that she rode in her father's car and he drove. The girls met L.E.'s mother a few times at her house, but she was not at their father's home at New Year's which was their father's annual party.
- [187] M.F. felt that L.E. did not live with her father. When asked, L.E. told others she lived in Vernon with her mother.
- [188] L.E. did stay over some nights when the girls were there. This happened more often over the last couple of years until L.E. decided to go to school in Vernon. She said she had a place to live in when going to school in Vernon, but none in Kelowna. After she went back to school, L.E. stayed over perhaps once or twice a week but she was not at the house every night the girls stayed over.
- [189] E.F. says L.E. had some of her things at the house - shoes, some clothes, but after her return to her mother's house, she took her things with her. Of the three saddles that were in the house, two belonged to E.F. and M.F. and one to the deceased. L.E. took her saddle to Vernon with her when she returned to school in September 2009. M.F. agreed L.E. had a few clothes and shoes at the house but said when she left to go to school in Vernon about two years ago, she took her belongings to her mother's house. In any event, L.E. did not have many things at B.F.'s house.
- [190] M.F. recalls a trip to the U.S. when American border guards delayed their crossing and questioned her father about the nature of his relationship with L.E. Their father kept responding that she was "just a friend".
- [191] On the day of their father's death, the two girls were at the mall. Their father walked around with them and they bought two dresses before going to his house. He put some ribs on and asked them to wake him when they were cooked.
- [192] When he could not be awakened, E.F. got the tenant to come in. She called her mother and then 911. She started to make phone calls to L.E. and to B.F.'s family.
- [193] When she and L.E. connected, she told her of B.F.'s death. When L.E. arrived at the house, she hugged the girls. It was the first time she had ever initiated physical contact with them and they felt uncomfortable.

[194] E.F. says she called L.E. to let her know of her father's death, but this was not because L.E. was someone special. She believed she had called L.E. a couple of times and was surprised to learn there were five calls to L.E. after her father's death. M.F. thought she should call L.E. because they were calling all of his friends and were using her father's cell phone for that purpose.

N. D.J.

[195] D.J. is the mother of E.F. and M.F. She was married to B.F. from 1994 to 2004.

[196] She described B.F. as an enthusiastic and committed father to his two daughters.

[197] When they were married, they used joint bank accounts and credit cards. Although the house they lived in was in his name, as was the mortgage on it, they had a joint line of credit secured against the house. He had purchased the house from his second wife before he and D.J. began living together.

[198] D.J. took care of the family books and prepared B.F.'s business accounts for audit.

[199] Although B.F. was 19 years older than D.J., they mixed socially as a couple and both entertained and were entertained as a couple.

[200] D.J. described B.F. as committed to commitment. She was his third wife. She said he was not afraid to commit but found it hard to break off.

[201] While she and B.F. were married, they did not engage in searching for other sexual partners. D.J. stated that B.F. was possessive of her and it was her feeling that neither of them would have looked elsewhere for a partner.

[202] After their divorce, B.F. revelled in his single status and would go on dating rampages. After he met L.E., his daughters mentioned a "girl" staying at his house and sleeping in their bunks.

[203] D.J. saw C. at the door when she picked her daughters up. C. appeared to enjoy the girls and was friendly to D.J. As she and B.F. were in a battle over a review of his child support payments at the time, she did not go into his house. However, it was her understanding that C. stayed over. B.F. had introduced her to C.

[204] D.J. was never introduced to L.E. and did not meet her until after B.F.'s death.

[205] In October 2006, B.F. described L.E. as a roommate in an affidavit prepared for a chambers application on child support. In paragraph 8 of that affidavit he describes L.E. as an "acquaintance" who helped with the renovation of the suite in his house. In his appearance before the Chambers Master, he also described L.E. as a roommate.

- [206] From 2006 to 2009, D.J. was at the spousal home almost daily to pick her daughters up. More recently, she was in the house to get the girls' dance bags. She noticed pictures of B.F. with the children around the house. She did not see women's clothing or belongings and the house did not look like a woman lived there. On one occasion she saw a cat which she knew could not belong to B.F. because he disliked cats.
- [207] At no time did B.F. indicate to D.J. that L.E. had any particular role in his life. They did communicate by email and D.J. objected strenuously when L.E. picked the girls up from school because she did not know L.E. and felt that a stranger had been allowed to take the girls.
- [208] When B.F. wanted to take the girls to Disneyland, he proposed that L.E. look after them for two days while he went to his conference. D.J. would not agree because she knew nothing about her. When she questioned B.F. about taking a holiday with L.E. when he was unable to pay child support, he responded that they had no financial attachment and she paid her own way.
- [209] In 2006, in an email to B.F., D.J. noted that for a 54-year old to be living with an 18-year old was confusing to her daughters since their ability to discern their own personal space with their father was compromised.
- [210] D.J. described B.F. and L.E. as being involved on one other occasion when she spoke to a friend of hers, W.G.

Issues

1. Is L.E. a spouse pursuant to s. 1 of the Estate Administration Act?
2. If so, how does that affect the deceased's estate?

The Law

- [211] One of the difficulties in analyzing this particular relationship is its very particularity. The intensely sexual focus of the relationship and the unconventionality of the sexual conduct of B.F. and L.E. takes the relationship beyond many of the measures by which society assesses the commitment of the parties.
- [212] Necessarily, the guidance afforded by case law is general, since relationships are as variable as the people who enter into them.
- [213] However, it is important to consider the jurisprudence and to use the principles set out in the cases to assist in analyzing this relationship.
- [214] As well, because the analysis is very much fact-driven, I have taken pains to set out the evidence offered in the case.
- [215] The applicable provision in the definitions set out in s. 1 of the Act reads as follows:

"common law spouse" means either

- (a) . . .
- (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;

[216] As B.F.'s spouse, L.E. would be entitled to take on intestacy as provided in Part 10 of the Act. The relevant sections provide as follows:

Intestate leaving spouse and issue

85 (1) In this section, "net value" means the value of an estate wherever located, both in and out of British Columbia, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

- (2) This section applies if an intestate dies leaving a spouse and issue.
- (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.

. . .

Spousal home and household furnishings to spouse

96 (1) In this section and section 97:

. . .

"household furnishings" means chattels usually associated with the enjoyment by the spouses of the spousal home;

"spousal home" means

. . .

- (2) Despite section 95, and in addition to any other provision in this Part, but subject to section 98, in an intestacy,

- (a) except where it would otherwise go under this Part to a surviving spouse, the spousal home devolves to and becomes vested in those persons by law beneficially entitled to it and, subject to the liability of the land comprising the spousal home for foreclosure or the payments of debts, those persons must hold the spousal home in trust for an estate for the life of the surviving spouse, or so long as the surviving spouse wishes to retain the estate for life, and
- (b) the household furnishings go to the surviving spouse.

[217] The parties are substantially in agreement on the principles of law which prevail in determining whether L.E. and B.F. were living in a marriage-like relationship for the two-year period immediately prior to his death.

[218] A recent statement of the law from Dardi J. in *J.J.G. v. K.M.A.*, 2009 BCSC 1056, poses the analytical approach which should be taken by a trial judge in determining whether persons are living together as spouses:

[37] . . . the court must examine the relationship as a whole and consider all the various objective criteria referred to in the authorities. The presence or absence of one particular factor will not be determinative. The court must recognize that each relationship is unique and, in applying a flexible approach within the context of a particular relationship, make a determination as to whether the parties intended to and were living in a marriage-like relationship.

[219] Dardi J. applied the decision of the Court of Appeal in *Austin v. Goertz*, 2007 BCCA 586. In *Austin*, Frankel J.A. in the context of arguments that financial dependence and capacity to marry must be present for a marriage-like relationship, held that neither characteristic must be present for such a relationship to be found. He stated at paragraph 58:

It is understandable 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. . . .

[220] In *Austin*, Frankel J.A. also quoted from a decision of the Supreme Court of Canada: *M. v. H.*, [1999] 2 S.C.R. 3. This case concerned the definition of "spouse" in the Family Law Act, R.S.O. 1990, c. F.3 in which certain rights were conferred on a man or woman not married to one another but who lived together in a "conjugal relationship". "Conjugal" means marriage-like and thus the wording is similar in meaning to the definition of "spouse" with which I am concerned in this case.

[221] Mr. Justice Cory, at paragraph 59 of *M. v. H.*, stated as follows:

Molodowich v. Pentinen (1980), 17 R.F. L. (2d) 376 (Ont. Dist. Ct.) sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in

varying degrees and not all are necessary for the relationship to be found to be conjugal. . . . In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[222] The Court of Appeal in Austin found the trial judge took the proper "holistic" view of the disputed relationship to find the parties were in a committed marriage-like relationship.

[223] The necessity for such a broad view is clear -- the vast diversity of spousal relationships in today's society makes defining a "marriage-like relationship" elusive.

[224] To accomplish the necessary analysis of the relationship in this case, I will begin by looking at the relationship as a whole and by taking the various objective criteria in the case law and measuring them against the evidence concerning this unique relationship. However, I accept that it is rare that these objective criteria tell the whole story of any relationship since there is no checklist of factors which will allow an easy determination of the question.

[225] Some of those objective criteria are taken from *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.) per Lambert J.A. The case concerns the plaintiff's claim for support and maintenance under the Family Relations Act which at the time defined spouse as including:

. . . a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

[226] Lambert J.A., for the court, wrote as follows:

. . . 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 property? 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.

[227] In *Mazur v. Berg*, 2009 BCSC 1770, Adair J., in considering an application under the Wills Variation Act, R.S.B.C. 1996, c. 490, by a putative spouse, looked at the following considerations in finding that the plaintiff and the deceased testator had cohabited in a marriage-like relationship (at paras. 68-74):

- The testator took the plaintiff to meet his best friend and they visited him together;
- Although they maintained separate properties, they stayed together in one or the other as it suited them;

- Friends and acquaintances knew that if they could not reach the testator at his house, he could be reached at the plaintiff's house;
- Their mail was delivered to the couple at each address as directed from time to time;
- The plaintiff's young son had a bedroom at the testator's house;
- The plaintiff supplied the lumber for the testator's deck and firewood for both residences;
- The testator provided financial support for the plaintiff and paid for groceries, some of her son's dental costs and a new hot water heater;
- They celebrated holidays and special events together;
- They vacationed together;
- They worked together on their properties and a rental property belonging to the testator;
- They were perceived by the community on Hornby Island to be spouses;
- The plaintiff accompanied the testator to his lawyer and to his doctors' appointments where the testator relied on her extensively;
- They were physically demonstrative in front of others;
- The plaintiff looked after and cared for the testator for the lengthy period of time during his terminal illness leading to his death.

[228] In the trial decision of *Roach v. Dutra*, 2009 BCSC 229 and 2009 BCSC 693, aff'd at 2010 BCCA 264, in an application for spousal support by the plaintiff found to be a spouse for purposes of the Family Relations Act, R.S.B.C. 1996, c. 128 at paras. 91-94 the trial judge made note of:

... The evidence of their continuing emotional commitment to each other, their continuing mutual expectations of fidelity, their continuing presentation to friends and family as a couple, and their joint vacations all militate in favour of finding that the parties intended to continue their marriage-like relationship.

Between the fall of 2003 and September 2006, Mr. Dutra continued to provide economic support to Ms. Roach. He gave her cash from time to time and paid her telephone and hydro bills. . . Mr. Dutra permitted Ms. Roach to use his bank card to make purchases for herself, for her own children, for his children, and to purchase groceries and household items.

... Ms. Roach and Mr. Dutra provided care to each other's children. Mr. Dutra developed a close relationship with the plaintiff's daughter, and became a father figure to her. Mr. Dutra's children went camping with the plaintiff and her children.

. . . Mr. Dutra willingly provided financial support for Ms. Roach and she, with his consent, continued to be economically dependent upon him during the time they maintained separate residences. Their mutual expectations of fidelity continued after the acquisition of the Page Two property. They continued to share their lives . . .

Analysis

The Evidence

- [229] L.E. has good reason to exaggerate her evidence of the commitment between herself and B.F., and D.J. and her daughters have good reason to minimize it.
- [230] At the same time, L.E. has shown herself to be untruthful on occasion, more because she was uncomfortable with revealing the way in which she and the deceased lived than because she is inherently dishonest.
- [231] Her use of her mother's address on a continuing basis is a factor by which I can consider how she viewed her status with B.F. She may argue now that this was for simplicity and to keep D.J. away from any consideration of her income but I am satisfied D.J. was only interested in whether she was paying rent to B.F.
- [232] With the other witnesses, J.M. and J.S. presented the conventional views of the community with the likelihood that while they were friends with B.F.; he knew they would not understand his and L.E.'s involvement. But it is their evidence which provides the way in which the community would have perceived any relationship in which B.F. participated.
- [233] I find D.V.N. overstated his evidence, no doubt, out of a wish to help L.E. with her case.
- [234] The same is true of M.V.V.'s evidence.
- [235] F.F.'s evidence was fair and forthright but not particularly helpful since her treatment of L.E. did not differ from her treatment of any guest in her home and thus could neither confirm nor deny the kind of relationship which existed between B.F. and L.E.
- [236] The evidence of Constable Kenning and the coroner simply indicates what is not in controversy: L.E. took her things to her mother's place where she was living while she went to school. It is clear that at the time of B.F.'s death, she was not staying with him as she had before she returned to school in September 2009.
- [237] I will begin by analyzing some of the objective criteria to determine whether L.E. and B.F. lived and cohabited in a marriage-like relationship.

I. Shelter

- [238] From the time L.E. alleges she moved in with B.F. in the summer of 2006 to the time she moved back to her mother's home in September 2009, they spent the majority of their nights together in his home. She went on vacation to Hungary for two months in 2007-2008.

During this period 2006 to 2009, as noted earlier, L.E. also spent weekend time with her mother so that she could avoid being at the house at the same time as B.F.'s two daughters who spent weekends with him. When she did stay over, she slept on the couch or in their room.

- [239] L.E. had no property interest in B.F.'s house. There was no evidence that any discussion on this topic took place. From B.F.'s difficult marital history, it seems unlikely he would have offered any property right to L.E.
- [240] B.F.'s daughters were often at his house after school until their mother picked them up. They did not see her there at that time of day very often. However, on school days it was rare for them to spend the night at B.F.'s home so they would not have known if she were staying overnight.
- [241] I accept L.E.'s evidence that she spent most week nights with B.F. with the exception of his business trips, her vacation to Hungary, her return to her mother's house on weekends and in September 2009 for school.
- [242] It is clear that in the circumstances of the relationship between B.F. and L.E., she was living with her mother in Vernon and attending school from September 2009 until the B.F.'s death in January 2010. She visited L.E. and stayed over whenever she was able during this time.
- [243] However, I would not find against L.E. on this basis alone. Several cases have taken a practical view of interruptions in relationships for purposes of work or travel and have not taken those interruptions as sufficient in themselves to deny the existence of cohabitation: *Re Estate of Ernest Ray Vliet*, 2005 BCSC 724; and *Roach*.
- [244] I am satisfied that L.E. and B.F. did cohabit. But that is not the end of the analysis since I must consider whether they cohabited in a marriage-like relationship.

II. Sexual and Personal Behaviour

- [245] The focus of L.E. and B.F.'s time together seems to have been sexual. The purpose of L.E. contacting B.F. via the internet initially was to engage in a sexual relationship. Right up to his death, it appears their sexual contacts were frequent and intense. I note from the sexual nature of the transcription of the Skype exchange in February 2008 that their discussion of their connection as a couple centred on sexual arousal. Certainly there was not much affectionate exchange.
- [246] With respect to sexual exclusivity, it appears this was not a value shared by the parties. L.E. had relations with others, sometimes for money, sometimes just for pleasure and sometimes because she said B.F. wanted to observe.

- [247] L.E. claimed B.F. was exclusive with her from 2006 forward, an assertion I find unlikely since one of the first comments she made to the coroner attending at B.F.'s death, was that B.F. was bisexual. If he had not acted on this interest since 2006, it seems an odd statement to make. Given B.F.'s intense interest in sexual matters, I infer he was not faithful to L.E.
- [248] I note, too, that while she was in Hungary, she was aware he was looking for an additional relationship and she, too was "hungry for a man" and looking online to join a dating website in the period of 2008-2009 while still involved with B.F.
- [249] As for their attitudes to one another, L.V. said they were affectionate, yet she commented they were not demonstrative in front of the girls and she said she had not observed them in the absence of the girls. So I am not clear on what she based her comment that they were affectionate.
- [250] D.V.N. said L.E. showed affection to B.F. by touching his arm when he and his wife met them for drinks. No other witness said they were affectionate with each other.
- [251] However, I accept that L.E. cared deeply for B.F. and grieved his loss.
- [252] The observations of M.F. and E.F. were that L.E. and B.F. did not communicate much. When they were present, L.E. kept to herself and crocheted or watched television. In the car, she slept or was silent while they played games with B.F.. L.E. and B.F. exchanged emails on occasion and he would call her, particularly when she was staying at her mother's.
- [253] L.E. and B.F. exchanged a few gifts during their time together. They were not expensive or elaborate gifts nor did L.E. give evidence of any regularity to their gift-giving.
- [254] After B.F. became ill as a result of the cat bite he suffered in December 2009, L.E. visited him in hospital, prepared him for release and brought him home when he was discharged. Then she looked after his surgical wound by cleaning it and changing the dressing.
- [255] There is no evidence of B.F. assisting L.E. in illness but there is evidence that early in their relationship he told her not to count on him, that she was basically on her own.
- [256] Certainly, in the early part of their time together, from 2006 to 2008, their sexual and personal behaviour did not appear to be marriage-like.

III. Services to Each Other

- [257] L.E. occasionally picked the girls up after school when B.F. was delayed at work.
- [258] As for meals, B.F. cooked for himself and his daughters when they were present. L.E. made her own meals because her food preferences differed from B.F.'s as a result of allergies. They each paid for their own groceries and accounted to the other if they bought items for the other person.

[259] L.E. assisted with some housework and with gardening. Early on she assisted with the renovation of B.F.'s suite for which she did not receive payment.

[260] L.E. did some family laundry but B.F. did his daughters' school uniforms. It also appears he shopped for his daughters' needs when they were with him.

IV. Social Participation

[261] The amount of socializing in which L.E. and B.F. participated was limited. L.E. and B.F. had occasional and special occasion dinners with L.E. and went to Oliver where they had dinner at F.F.'s home. D.V.N. mentioned a dinner in 2007 to which B.F. brought L.E.. Of the New Year's gatherings at B.F.'s house, none of the guests who attended mentioned seeing L.E. present.

[262] B.F.'s main social outlet was through his membership in the Rotary club and it is incontrovertible that he concealed his relationship with L.E. from his friends there.

[263] His employer's announcement of B.F.'s death does not mention L.E. and from that I infer that B.F. kept his relationship with L.E. from his friends at work. Certainly there was no evidence to contradict this inference.

[264] R.E. tolerated L.E.'s relationship with B.F. but never introduced him to third parties as her daughter's boyfriend, or common-law husband.

[265] B.F. introduced L.E. as his roommate, his nanny, his assistant, and to L.V. as his girlfriend. With the exception of D.V.N.'s evidence that B.F. introduced L.E. as his "better-half" at a dinner in October 2007, there is no evidence which says that B.F. invited the community to see L.E. as his spouse. In fact, the opposite was true: he did his best to hide his relationship from all but a few people.

[266] In *Buell v. Unger*, 2011 BCSC 351, Grauer J. upheld the action of the children of the deceased for a declaration that the defendant Unger was not the common-law spouse of the intestate deceased and dismissed the defendant's application. He agreed they had lived together off and on for a time preceding the death of the intestate, but did not cohabit and did not live in a marriage-like relationship. He pointed to the lack of evidence that they ever referred to themselves as spouses or the equivalent. They did not reveal their relationship to his wife, from whom he was separated or his children or mother. As Grauer J. stated at paragraph 20:

... when it came to dealing with his children and his mother, Mr. Buell denied a committed ongoing relationship, and did so also to his physician on Saltspring Island. While it is understandable that Ms. Unger would seek to attribute this to discretion and secrecy, the fact remains that one must pay attention to how a man describes a relationship to those who are most important to him.

[267] The concealment of the relationship is a substantial indicator that the relationship was not marriage-like.

V. Vacations

[268] L.E. accompanied B.F. on several business trips. He would conduct his business matters and then extend the trip to vacation briefly with L.E. Each paid their own way but they spent this time together.

[269] This practice ended after 2008 when B.F. could no longer afford to take vacations.

[270] During the time that B.F. was taking vacations, sometimes he would be accompanied by his daughters and R.E. along with L.E.

[271] L.E. and her mother always paid their own way.

[272] In my view, this is not behaviour consistent with a marriage-like relationship.

VI. Financial Affairs

[273] Throughout their relationship, L.E. and B.F. kept their finances separate. L.E. did not earn much money so had little to share with B.F. B.F.'s finances were strained when his employment income began to decline and his child support payments continued. But the parties charged each other for purchases made for each other and seemed to keep a strict accounting.

[274] However, financial interdependence is not alone determinative and is just one factor to be considered (Austin).

[275] But in the context of this relationship, this kind of continued accounting between participants in a relationship which had carried on for a period of time is one factor which is not marriage-like.

[276] At no time during their relationship did the parties have any joint accounts although they were designated as "payees" on each other's accounts to simplify the transfer of repayments.

[277] B.F. did not put L.E. on his benefits plan but maintained his ex-wife and his daughters, nor did he make L.E. the beneficiary of his life insurance. He would likely have been entitled to add L.E. as a spouse, were he willing to make that declaration.

[278] L.E. and B.F. did not buy furniture or other personal property together.

[279] L.E.'s income tax returns were filed with her mother's Vernon address and her bank records also carried that address.

[280] On the whole, management of their financial affairs was separate and this factor does not support the existence of a marriage-like relationship.

VII. Other Factors

- [281] While I have found that the sexual relationship between B.F. and L.E. was somewhat exploitive and occasionally abusive, that finding cannot affect the question of whether a marriage-like relationship existed between them. As noted in *J.J.G. v. K.M.A.*, "[t]he essential inquiry is the existence of a marriage-like relationship; not the quality of that relationship" (at para. 71).
- [282] On the issues I have analyzed above, I find there was no marriage-like relationship between B.F. and L.E. up to February 23, 2008 due to the lack of community participation and knowledge, the lack of integration with his family, the lack of plans for the future and the lack of his willingness to even commit to be her boyfriend. They cohabited but in a relationship that was not marriage-like, no matter how deeply L.E. desired to have B.F.'s commitment.
- [283] On February 23, 2008, while L.E. was in Hungary, B.F. emailed her offering to commit if she would agree to his terms. She accepted those terms.
- [284] Prior to this email, there is evidence that L.E. asked B.F. to be her boyfriend and he responded that their relationship was not evolving. This email appears to be B.F.'s declaration of commitment. It also points to a desire to have a future together - as he states in his email, "a bond for life". Clearly, L.E. did not view their relationship as one of commitment prior to this date, otherwise she would not have asked B.F. to commit to her.
- [285] I have set out that email at paragraph 49 above but the salient provisions read as follows:
- I have disclosed to them [his daughters] my love and the nature of my love for you, a matrimonial, husband and wife love. They understand and are supportive and were not surprised.
- They now see us as husband and wife. They understand we are lovers and partners in a spousal way.
- They also miss you very much and are happy to be a family with you as my wife.
- [286] This email is evidence of B.F. which has not been filtered through other witnesses.
- [287] After this email was sent, in 2009 L.E.'s journal counters the earlier lack of sharing of resources between L.E. and B.F. when L.E. gave some money to B.F. that she had earned from the sale of Cialis and from her sexual services because he was short of cash.
- [288] As well, when L.E. returned to school, B.F. gave her some gas money as she was driving his Suburban and he was using her mother's small car.

- [289] I have also considered that one of the reasons for L.E. returning to school was to enable her to find some more remunerative employment so that she could contribute more to the household. This makes sense in light of B.F.'s declining income and it shows that L.E. and B.F. were looking to a future together. This plan shows a difference in long-term intention between the two of them.
- [290] The issue now is to determine the timing of that declaration and whether it is sufficient to meet the requirements of s. 1 of the Act.
- [291] The section requires that the parties have lived together in a marriage-like relationship for a period of at least two years immediately before the death of the other person.
- [292] The email which I find signifies the first day which the parties cohabited in a marriage-like relationship was sent February 23, 2008. B.F. died on February 13, 2010.
- [293] The section is very clear and puts emphasis on the time period required by stating that the marriage-like relationship must have endured for at least two years preceding the death of the other person. There is no discretion.
- [294] While a period of 10 days short of the required time appears to be minimal, the wording of the statute does not permit abridging the time required to meet the definition.
- [295] The definition creates a substantive and not a procedural right, is clear, and has no discretionary language.
- [296] The legislature has made a policy decision to limit the definition to limit to two years and, while it may be arbitrary, it is not open to the court to allow a claim that falls short. The court cannot change or relax this requirement.
- [297] I note as well that s. 25 of the Interpretation Act, R.S.B.C. 1996, c. 238 with respect to the calculation of time and age states as follows:
- (4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
- [298] Therefore, I must find that L.E. did not live and cohabit with B.F. for the required period of time preceding his death.

Conclusion

- [299] L.E.'s action is dismissed.
- [300] Mr. Rule, counsel for L.E., concedes that if I do not find L.E. meets the definition of spouse, she should not be appointed Administrator of his estate.
- [301] I appoint D.J. as Administrator of B.F.'s estate without bond.
- [302] Costs follow the event.

[303] I would like to acknowledge Mr. Rule's assistance throughout this trial. His observance of his obligation as an officer of the Court was clear and appreciated.

"L.D. Russell J."

The Honourable Madam Justice Loryl D. Russell

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