
CANADA / JUDGMENT

Li v. Rao

2018 BCSC 142

COURT

Supreme Court of British Columbia

DECIDED

30 January 2018

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2018 BCSC 142 Li v. Rao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Rao,

2018 BCSC 142

Date: 20180130

Docket: E170206

Registry: Vancouver

Between:

Peipei Li

Claimant

And

Lu Hua Rao

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

In Chambers

Counsel for the Claimant:

Lorne N. MacLean QC

E. Xiong, Articled Student

Counsel for the Respondent:

Jeffrey A. Rose QC

Emma C. Vallance

Place and Date of Hearing:

Vancouver, B.C.

January 8, 2018

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2018

Introduction

- [1] On April 10, 2016, the claimant, Ms. Li, and respondent, Mr. Rao, went through a ceremony of marriage in Las Vegas, Nevada, pursuant to the laws of that jurisdiction (the "Marriage").
- [2] On January 24, 2017, Ms. Li filed a notice of family claim, seeking orders for divorce, spousal support, and division of property. On April 11, 2017, Mr. Rao filed a response and a counterclaim.
- [3] On November 15, 2017, Mr. Rao filed the application that is currently at issue. He seeks the following orders:
1. a declaration that the Marriage is a nullity and void ab initio;
 2. the claims of Ms. Li for a division of property under Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], and for spousal support under Part 7 of the FLA and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) be struck out under Rule 11-2(1)(b) of the Supreme Court Family Rules [Rules];
 3. an extension of time to file an F8 Financial Statement until the within application is determined under Rules 21-2(2) and 22-1(2); and
 4. costs.
- [4] On November 30, 2017, Ms. Li responded to the application and consented to an order that the Marriage is a nullity and void ab initio, but only on the terms that she is still a "spouse" under the FLA for the purposes of property division, pension division, and spousal support. She opposes the other orders and seeks an order of special costs against Mr. Rao.

Facts

- [5] Mr. Rao is a businessman, was born in 1965 in China and continues to reside there. In China, he has a wife, who is not Ms. Li, and two sons.
- [6] Ms. Li was born in 1985 in China and currently resides in Vancouver.
- [7] Ms. Li and Mr. Rao first met in August 2015, while Mr. Rao was on a trip to Vancouver. During Mr. Rao's stay, the two went on several dates and began communicating on WeChat, a Chinese social media app.
- [8] Ms. Li deposes that shortly after meeting, Mr. Rao told her that he had fallen in love with her and that he would buy her a house in Vancouver with the view that she would be "his woman", they have a baby, and start a life together. She states that she inquired as to his marital status, and that he said he was separated from his wife and soon to be divorced.
- [9] In mid-September 2015, Mr. Rao returned to Vancouver and visited Ms. Li. They travelled together to Seattle for two days. While in Seattle, Mr. Rao bought Ms. Li a 1.28 carat diamond engagement ring, at a cost of approximately \$34,400 US. During the trip, the parties began an intimate relationship.
- [10] Ms. Li deposes that she and Mr. Rao discussed starting a business together and that Mr. Rao raised the idea of a real estate investment company. On September 30, 2015, Ms. Li incorporated a BC company that would eventually be called LPP Properties Inc. ("LPP"). On November 9, 2015, Mr. Rao signed a document agreeing to transfer \$20,000,000 to the company in exchange for 50% of its shares. This is supported by a document submitted into evidence by Ms. Li titled "Subscription for Shares".
- [11] In January 2016, Mr. Rao transferred \$2,200,000 to the company's account at RBC. In February 2016, he transferred another \$6,400,000 to the account.
- [12] On or about April 8, 2016, Mr. Rao visited Ms. Li in Vancouver. Ms. Li deposes that Mr. Rao asked her to marry him as soon as possible. She deposes that Mr. Rao told her that he would purchase a home for her within a year and that he had divorced his wife. Mr. Rao, however, deposes that he twice told Ms. Li that he was married in China and not willing to divorce his wife.
- [13] The two then travelled to Las Vegas and stayed from April 9-12, 2016. During their stay, Mr. Rao and Ms. Li had a marriage ceremony performed under the laws of the State of Nevada. A document titled "Affidavit of Application for Marriage License", signed by both parties on April 9, 2016, lists Mr. Rao's marital status as divorced as of 08/01/2015.
- [14] In or about May 2016, Mr. Rao transferred to LPP \$9,905,000.
- [15] In May and June 2016, Ms. Li visited Mr. Rao in China, and over a few weeks they visited Shenzhen, Wuhan, and Hong Kong.

- [16] In August 2016, Mr. Rao and Ms. Li spent two days in San Francisco, and two or three days together in Vancouver and Victoria. During the stay in Vancouver, the parties opened a joint family bank account at RBC and viewed several residential properties with listing prices between \$9,680,000 and \$22,580,000. Mr. Rao returned to China.
- [17] In September and October 2016, Mr. Rao borrowed a total of \$16,000,000 from LPP. Ms. Li deposes that he asked her to put the amount into their joint account to buy a house for herself and a house for her parents, and to use the balance to buy investment properties. Ms. Li has submitted into evidence a promissory note dated September 1, 2016, signed by Mr. Rao, for \$10,000,000 with a direction to pay the funds into the joint account; and a promissory note dated October 18, 2016, signed by Mr. Rao, for \$6,000,000 with a direction to pay the funds into Ms. Li's personal account.
- [18] In mid-September 2016, Ms. Li closed on the purchase of a residential property. This required making a \$1,000,000 deposit.
- [19] Around the same time, Ms. Li requested from Mr. Rao documentation including his divorce certificate from China, so that she could include him as her spouse in her immigration application for Canadian Permanent Residency. Ms. Li deposes that during these discussions, Mr. Rao refused to give her a divorce certificate and stated that he did not wish to immigrate to Canada.
- [20] Mr. Rao deposes that in September and October of 2016, he asked Ms. Li to return the money he had transferred to her company, but she did not. On or about November 23, 2016, Mr. Rao asked RBC to freeze the funds in Ms. Li's personal account, their joint account, and LPP's account. Mr. Rao also deposes that in late November, Ms. Li asked him to buy her a \$15,500,000 property, but he refused.
- [21] On December 5, 2016, Mr. Rao commenced a civil action in this Court against LPP and Ms. Li for the return of \$17,650,000.
- [22] On January 24, 2017, Ms. Li filed a notice of family claim, which initiated these family law proceedings. She seeks orders for divorce, division of property, and spousal support.
- [23] On November 15, 2017, Mr. Rao filed the application that is currently at issue.

Respondent's Position

- [24] Mr. Rao submits that I should strike Ms. Li's pleadings under the FLA and the Divorce Act. He submits that the Marriage of April 10, 2017 is void ab initio, and as a result, the parties were never "spouses" within the meanings of the FLA or Divorce Act, and therefore her claims are bound to fail.
- [25] In addition, Mr. Rao submits that he should not be obligated to file an F8 Financial Statement until this application is determined, as it would be an expensive, impractical, and enormous undertaking given the complexity of his finances.

Claimant's Position

- [26] Ms. Li agrees that the Marriage is void ab initio, however, she contends that this does not prevent her from seeking spousal support and a division of property under the FLA. She submits that despite the Marriage being void ab initio, she is still a "spouse" under the FLA and therefore may seek entitlement under Part 5 (Property Division) and Part 7 (Child and Spousal Support).
- [27] Furthermore, Ms. Li submits that there is no reason why Mr. Rao's financial disclosure should be delayed. She seeks an order that within seven days of these reasons being pronounced Mr. Rao file and serve his F8 Financial Statement.

Issues

- [28] As Mr. Rao was already married at the time of the Marriage, and the parties do not dispute that the Marriage is void ab initio, I declare it as such.
- [29] The remaining issues raised by the pleadings, facts, and submissions are as follows:
1. Does the fact that a marriage is void ab initio prevent a party from being entitled to property division and spousal support under the FLA?
 2. Should the claims be struck?
 3. Should Mr. Rao be granted an extension for his Form 8 disclosure?
 4. Costs.

Discussion

1. Void ab initio marriages and entitlement under the FLA
- [30] Counsel were unable to provide any cases in which this issue has been decided as the FLA is a relatively recent enactment, having replaced the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] in 2011. As a result, I have organized my analysis in the following fashion: first, I will review the previous scheme for property division and support entitlement under the FRA and the relevant case law; second, I will review the relevant provisions of the FLA; third, I will compare the two acts, interpret the FLA, and determine the issue in question.
- a. Property division and support entitlement under the FRA
- [31] Property division is addressed at s. 56 (Part 5) of the FRA, which provides that each "spouse" is entitled to an interest in the family assets upon a breakup. There are four circumstances that trigger a spouse's entitlement, including an order declaring the marriage null and void:

Equality of entitlement to family assets on marriage breakup

56(1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void respecting the marriage is first made.

[Emphasis added.]

[32] Spousal support obligations are addressed at s. 89 (Part 7) of the FRA:

Obligation to support spouse

89(1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
 - (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
 - (c) custodial obligations respecting a child;
 - (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
 - (e) economic circumstances.
- (2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

[33] The term "spouse" is defined at s. 1(1):

"spouse" means a person who

- (a) is married to another person,
- (b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,
- (c) applies for an order under this Act within 2 years of the making of an order
 - (i) for dissolution of the person's marriage,
 - (ii) for judicial separation, or
 - (iii) declaring the person's marriage to be null and void,

[Emphasis added.]

- [34] In *G.C.H. v. H.E.H.*, 2008 BCSC 1127 [G.C.H.], the court decided the issue of whether a party to a marriage that is subsequently declared void ab initio is entitled to property division and spousal support under the FRA. A simplified account of the case is as follows.
- [35] The plaintiff and defendant went through a ceremony of marriage on October 12, 1991, when unknown to the defendant, the plaintiff was still married to her first husband. By March 1993, the defendant had learned of this fact, but he decided to remain with the plaintiff anyway.
- [36] On or about April 18, 2004, the parties separated. The plaintiff sought a declaration of nullity or, alternatively, a divorce, joint custody, guardianship, and access to their child, spousal support, and a division of family assets. The defendant too sought a declaration of nullity, but took the position that as a result, the plaintiff was not a "spouse" under the FRA and therefore not entitled to claim spousal support or a division of assets.
- [37] Mr. Justice Joyce declared the marriage void ab initio but held that the plaintiff was entitled to spousal support and a division of property. In making this determination, His Lordship rejected the defendant's submission that a distinction can be drawn between a void and voidable marriage with respect to substantive family law rights under the FRA:
- [31] The plaintiff submits she comes within the definition of "spouse" under subparagraph (c) (iii). The defendant submits that a distinction should be made between void and voidable marriages in determining whether a person meets the definition of spouse under that provision. He submits that in the case of a marriage that is void ab initio, as in this case, there never was a marriage and there is no need for a declaration to that effect in order to change the parties' relationship. On this basis, he submits that the plaintiff never was a spouse and that only a spouse can claim relief under Part 5.
- [32] The defendant is correct in submitting that in the case of a marriage that is void ab initio, strictly speaking, there is no need to obtain a declaration of nullity. In *Meunier v. Meunier*, [1997] B.C.J. No. 1156 (Q.L.)(S.C.), McEwan J. stated at para. 19:

An action for a declaration of nullity on the basis that the marriage was void at initio by reason of the defendant's prior and subsisting marriage is not, strictly speaking, a matter requiring a ruling by the court. In such circumstances there never was a marriage to invalidate. If such facts are established there is really no lis, as such, between the parties. The person bringing the action is simply seeking to have an existing state of affairs recognized and affirmed by a tribunal with the authority to do so.

- [38] the defendant submits that by including an order "declaring the person's marriage to be null and void" with orders for dissolution of marriage and judicial separation in paragraph (c), the Legislature intended that it encompass only those orders that fundamentally change the relationship of the parties. As a declaration of nullity in the case where there never was a marriage (a marriage that is void ab initio) does not change the status of the parties, it does not come within the definition.

- [39] I do not accept that submission for two reasons. First, I am not satisfied that the Legislature intended to deny the benefit of the property division provisions to persons who went through a ceremony of marriage and lived together thereafter as though they were married without taking steps at the first opportunity to denounce the marriage and go their separate ways.
- [40] Furthermore, and perhaps more importantly, the authorities on which the plaintiff relies and which are binding on me are clearly against the defendant's position that a distinction can be drawn between void and voidable marriages in connection with the right to seek support and property division.
- [41] First, in *Abraham v. Abraham* (1981), 127 D.L.R. (3d) 745, 31 B.C.L.R. 299 (S.C.), in the context of an application to amend pleadings, Wetmore, L.J.S.C. held that Part 3 of the Act applied to both void and voidable marriages.
- [42] In [sic] *Gwynn v. Forsythe* (1982), 40 B.C.L.R. 358, 31 R.F.L. (2d) 188 (S.C.) was an action in which the plaintiff sought a declaration that a marriage was void ab initio and variation of a marriage agreement. MacDonald L.J.S.C. dealt with the preliminary issue of whether Part 3 of the Act applied to a void marriage at para. 18:

In considering s. 51, a preliminary question is whether Part 3 of that Act applies to void marriages. That question arises because Part 3 is expressly excluded from application to common-law marriages. Since this marriage is a nullity, it was void ab initio and never existed as a legal relationship. That argument was resolved in connection with maintenance in *Gwyn v. Mellen* (1978), 7 B.C.L.R. 241 where it was held that maintenance could be ordered from one of the parties of a marriage which was void ab initio. The same question was considered in the context of Part 3 in *Abraham v. Abraham* (1981), 31 B.C.L.R. 299 where, on a preliminary application, the Court held that Part 3 of the Act may be applicable to a marriage which had been declared to be null and void. I find that it is so applicable. S. 1 of the Act defines "spouse" as a person whose marriage has been declared null and void. S. 43 in Part 3 of the Act provides that each "spouse" is entitled to an interest in each family asset when an order declaring the marriage null and void is first made. I agree with the Gwyn and Abraham cases which refuse to distinguish between a void and a voidable marriage under those provisions.

- [43] On appeal (45 R.F.L. (2d) 188) one of the issues was whether the plaintiff was entitled to bring proceedings under Part 3 before a declaration of nullity had been made. The court held, per Hutcheon J.A. that the proceedings under Part 3 of the Act were properly initiated by the plaintiff at the same time as the proceedings for a declaration of nullity under the Divorce and Matrimonial Causes Act, R.S.B.C. 1960 c. 118.
- [44] I am satisfied, therefore, that the plaintiff is entitled to claim relief under Part 5 of the Act.
- [38] Joyce J. also held that the plaintiff was entitled to spousal support under Part 7 of the FRA, at paras. 75-79.

- [39] Similar issues were put to the court in *Sarmiento v. Villarico*, 2014 BCSC 455 [Sarmiento]. In that case, the claimant and respondent went through a ceremony of marriage on July 20, 2001. The respondent, however, was still married to her first husband at the time.
- [40] On January 1, 2009, the parties separated. The respondent sought a declaration of nullity and a division of family assets under the FRA. The claimant sought spousal support under the FRA; the respondent opposed that claim.
- [41] Mr. Justice Voith declared the marriage void ab initio. His Lordship then determined that the property division sections of the FRA were available to parties who were in a bigamous marriage that was subsequently declared void ab initio:

ii) What Flows from the Fact that the Parties were not Married?

- [40] Property division under the FRA is only available to "spouses" as defined in section 1(1) of the Act: *Suckau v. Suckau*, 2002 BCCA 300. Accordingly, the reapportionment provisions in Part 5 of the FRA do not pertain to persons who lived in a common-law relationship prior to their separation (*Gould v. Sandau*, 2005 BCCA 190 at para. 2). Instead, the division of property interests of unmarried persons in domestic relationships were normally determined under constructive trust principles (*Kerr v. Baranow*, 2011 SCC 10).
- [41] In this instance, because the parties were never properly married and because their marriage was void ab initio, counsel for Ms. Villarico argued that the FRA reapportionment regime did not pertain and that constructive trust principles were relevant. During the hearing I agreed with this. On reflection and closer examination I do not, however, believe that this is so.

[42] Section 56(1) of the FRA provides:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void respecting the marriage is first made.
- [Emphasis added.]

- [43] In other words, section 56(1)(d) expressly makes the property regime in Part 5 of the FRA, which is premised on an equal division of assets (s. 56(2)), available to parties who were in a bigamous marriage that was subsequently declared to be void ab initio; see *Yang v. Yang*, 2003 BCCA 473 and *Backer v. Backer*, 2005 BCSC 195 at para. 42.

[44] In this case Mr. Sarmiento's original claim for division of property under the FRA remains valid despite the annulment of the party's marriage, as s. 252 of the FLA, which states that claims initiated under the FRA should be continued under the FRA, pertains. In practical terms this means that by operation of s. 56(1)(d) Mr. Sarmiento's interest in the Apartment crystallized when the marriage was declared null and void (or will crystallize when such a declaration is made), and that he is, subject to reapportionment, entitled to an undivided half interest in the Apartment under section 56(2) of the FRA. In light of these conclusions, legal principles related to unjust enrichment and constructive trust are irrelevant to Mr. Sarmiento's claim.

[42] The reasons in G.C.H. and Sarmiento support that under the FRA, a declaration that a marriage was void ab initio does not prevent a party from claiming spousal support or a division of family property.

b. Scheme of the FLA

[43] Property division is addressed at s. 81 of the FLA, which provides that each "spouse" is entitled to a half interest in the "family property" upon spousal separation:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[44] Spousal support obligations are addressed at s. 160:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

[45] The term "spouse" is defined at s. 3, which states that:

Spouses and relationships between spouses

3 (1) A person is a spouse for the purposes of this Act if the person

- (a) is married to another person, or
- (b) has lived with another person in a marriage-like relationship, and
- (i) has done so for a continuous period of at least 2 years, or

(ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.

(2) A spouse includes a former spouse.

(3) A relationship between spouses begins on the earlier of the following:

(a) the date on which they began to live together in a marriage-like relationship;

(b) the date of their marriage.

(4) For the purposes of this Act,

(a) spouses may be separated despite continuing to live in the same residence, and

(b) the court may consider, as evidence of separation,

(i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

(ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

c. Discussion and comparison between the FRA & FLA

[46] The respondent submits that the cases decided under the FRA have no application to the FLA, as the wording of the FLA creates a different legislative scheme.

[47] The respondent highlights that under the FRA, the definition of "spouse" explicitly included a person who applied for an order of a null and void marriage, and that this wording has not been imported into the FLA. In addition, the respondent highlights that the FRA explicitly stated that a spouse's entitlement to family assets arose when an order declaring the marriage null and void was first made: see s. 56 (referred to as s. 43 in *Gwynn v. Forsythe* (1982), 40 B.C.L.R. 358, cited in *G.C.H.*). This wording has also not been imported into the FLA.

[48] The claimant submits that although these wordings are absent from the FLA's definition of spouse at s. 3 and property division section at s. 81, the wording in s. 198(2) of the FLA gives that Act the same effect as the FRA. Section 198 states, in part, that:

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,

(a) in the case of spouses who were married, the date

(i) a judgment granting a divorce of the spouses is made, or

- (ii) an order is made declaring the marriage of the spouses to be a nullity, or
- (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

[Emphasis added.]

- [49] Before giving my interpretation of the FLA, I must first outline the principles of statutory interpretation informing my analysis.
- [50] The overarching approach to statutory interpretation is the oft-cited "modern approach", which provides that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]": Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at 41.
- [51] In interpreting the statute I may consider the legislative history, Parliamentary debates, and similar materials as long as they are relevant, reliable, and not assigned undue weight: *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 17.
- [52] As mentioned, counsel for the claimant submits that s. 3 and s. 198 of the FLA must be read together in order to determine the inclusive definition of a "spouse". He submits that because 'dates of separation' are included in the substantive definition of "spouse" in s. 3(4), the limitation period in s. 198 is fundamentally linked to s. 3: see generally *Meservy v. Field*, 2013 BCSC 2378 at paras. 56-57.
- [53] Section 198 of the FLA was discussed in British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 4th Sess, Vol. 28, No. 8 (23 November 2011) at 1838, where L. Krog asked:

With respect to the limitation periods referred to in this section, this, as I read it is no substantive change except for the provision respecting the grounds, if you've discovered that there are grounds for making the application that ought to have been reasonably discovered no later than two years after that. Is that correct?

- [54] In response, Hon. S. Bond stated in part that:

In fact, it carries over a number of subsection (1) from the Family Relations Act, as well as subsection 16(1).

- [55] I infer that Hon. S. Bond's mention of "a number of subsection (1)" is a reference to the FRA's time-limit subsections that were included in a number of that Act's provisions: see s. 1(1) in the definition of "spouse", s. 56(1) for property entitlement, s. 68(2) for variation of marriage settlements, s. 93(1) for support and maintenance, and s. 127(1) for responsibility of debts of former spouses. These subsections included the "null and void" wording.

[56] Section 198 is also interpreted in a document titled Family Law Act Section Notes, developed by the Ministry of Justice to support the transition from the FRA to the FLA. It compares the definitions of "spouse" between the two Acts and then states the following:

Rationale:

The time limits related to being a spouse have been moved from the definition section to section 198 [Time limits] of the Family Law Act. The definition directs readers to the interpretation section - section 3 [Spouses and spousal relationships] - for additional details.

Substantive change: Extends the definition of spouse to include common-law couples for the purposes of property and pension division and common-law couples who have lived together for less than two years, if they have a child together, for other purposes under the Family Law Act.

[Emphasis added.]

[57] Based on these records and the overall construction of the FLA, I am persuaded that the Legislature intended to replace the "null and void" wording, which was previously included in the definition of "spouse", with the "nullity" wording in s. 198(2) of the FLA. As a result, I find that the definition of "spouse" in s. 3 must be read together with s. 198 in order to determine the inclusive definition of the term.

[58] The claimant also points out that when comparing the property entitlement provisions in s. 56 of the FRA and s. 81 of the FLA, the only significant difference is that s. 56 of the FRA specifically lists the circumstances on which entitlement arises - at the date of either a separation agreement, a declaratory judgment, an order for dissolution of marriage or separation, or when an order declaring the marriage null and void respecting the marriage is first made. Section 81, on the other hand, simply states that entitlement arises "on separation".

[59] As a result, I am persuaded that the Legislature intended to replace the FRA subsections relating to the timing of property division (at s. 56(1)) and spousal support (at s. 93(1)) with s. 198(2) of the FLA.

[60] Upon reading s. 3 and s. 198 of the FLA together, in the context of property division under Part 5 and spousal support under Part 7, I am persuaded that the FLA maintains rights previously available under the FRA in situations involving marriages that are void ab initio.

[61] As an aside, I should note that the claimant relies on additional principles of statutory interpretation noted by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th Ed. (2014). Specifically, the claimant submits that it is presumed that the Legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects, noting that "[e]xplicit statutory language is required to divest persons of rights they otherwise enjoy": *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 at para. 43 [Crystalline]; and that it is presumed that the legislature does not intend to change existing law or to depart from existing principles or practices: *Parry Sound v. Ontario*, 2003 SCC 42 at para. 39 [Parry

Sound].

- [62] In my view, these principles are of little assistance in deciding the current case. The issue before me is the change in rights after a statute has been repealed and replaced. This is different than the issue of whether a statute may or may not conflict with a person's rights held under the common law or a general system of law, as was alluded to in *Crystalline* at paras. 32-44, and *Parry Sound* at para. 39. I have a difficult time in this case presuming that the Legislature did not intend to interfere with rights previously available under the FRA in light of the fact that it enacted an entirely new piece of legislation. Therefore I have carried no such presumption in my analysis. Nevertheless, the point is of little consequence given my earlier findings.
- [63] The respondent also submits that s. 198 is merely a limitation section and that it does not grant an entitlement to property division. I, however, cannot ignore the legislative transcript, the related material, and the overall scheme of the FLA, which all support my earlier determination.
- [64] Counsel for the respondent raises a further point, in which he distinguishes marriages that are void ab initio from those that are merely voidable. He submits that the legislature intended for s. 198 to apply only to voidable marriages. He cites P.M. Bromley, *Family Law*, 4th Ed. (London: Butterworths, 1971) at p. 58 for the following explanation on the distinction between void and voidable marriages:

As in the case of any other type of contract, a marriage may be void or voidable. A void marriage is strictly speaking a contradiction in terms, for it is no marriage at all; to speak of a void marriage is merely a compendious way of saying that, although the parties have gone through a ceremony of marriage, they have never acquired the status of husband and wife owing to the presence of some impediment. In brief, a void marriage, on the other hand, is at its inception a valid subsisting marriage; in this case the effect of the impediment is to empower one (or, occasionally either) of the spouses to take steps to have it turned into a void marriage. But whilst, in the case of other contracts, a voidable contract may usually be avoided by a simple repudiation by one party, a voidable marriage may only be set aside by a court of competent jurisdiction. Once this has been done, the decree for some purposes has a retrospective effect, so that the parties are deemed in law never to have been married at all. The distinction has been thus judicially explained by Lord Greene, M.R.:

"A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be treated so by both parties without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction."

[65] The respondent's main thrust is that because a void ab initio marriage is never actually a marriage at all, it is incapable of having legal consequences. It follows from this that if the claimant and respondent were never actually married, they were also never actually "spouses", and therefore they cannot rely on s. 198, which states that "[a] spouse may start a proceeding". The respondent submits that as a result, the legislature must have intended that s. 198 applies only to voidable marriages.

[66] In response, the claimant cites the Family Law Sourcebook for British Columbia (Vancouver: Continuing Legal Education Society of British Columbia) "Nullity of Marriage" at Part IV, s. 1.11, which notes that a declaration of nullity may be obtained in two situations:

1. void marriages, which are null and void ab initio; and
2. voidable marriages, which are valid until a court of competent jurisdiction grants a declaration of nullity (although such a declaration has the effect of invalidating the marriage from the beginning).

The distinction between a void and voidable marriage is less important in matrimonial proceedings in British Columbia than it once was, as the Family Law Act and Family Relations Act make no distinction between the two, and Part 5 of the Family Law Act applies to both married and unmarried spouses.

[67] First, I note that s. 198(2)(a)(ii) only speaks in terms of a marriage "nullity". The provision does not distinguish between nullities obtained from a void marriage and nullities obtained from a voidable marriage. The only Part of the FLA that distinguishes between void and voidable marriages is Part 3, which deals with "Parentage".

[68] Section 21 is the only provision in Part 3 that distinguishes between void marriages and voidable marriages. It is a deeming provision that provides, in subsection (1), that a void marriage is deemed to have been in effect when the parties lived together. Subsection (2), however, provides that voidable marriages will be deemed to have been in effect until the date of a nullity declaration, with no requirement that the parties lived together:

Void and voidable marriages

21 (1) For the purposes of this Part, if

- (a) 2 persons go through a form of marriage to each other, with at least one of them doing so in good faith,
- (b) the 2 persons live together during the marriage, and
- (c) the marriage is void,

the 2 persons are deemed to have been married during the period they were living together, and the marriage is deemed to have ended when the persons stopped living together.

(2) For the purposes of this Part, if a voidable marriage is declared a nullity, the persons who went through the form of marriage are deemed to be married until the date of the declaratory order of nullity.

[69] The legislative discussion surrounding s. 21 is at British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 4th Sess, Vol. 28, No. 5 (21 November 2011) at 1618:

L. Krog: This is the section that talks about void and voidable marriages. This--how shall I say?--a somewhat more pedestrian topic, I take it, and not as complex as the definitions section. As I understand it, essentially, even if you've been tricked, if you go through the marriage ceremony and believe your marriage is valid for other purposes of this act--for instance, property division--then you would have legal rights to claim, obviously, although it doesn't really matter anymore because common law provides. But essentially what we're saying is that if you live together and you thought you were married, you get the benefit of being married for that period of time that you lived together, even though, in fact, the marriage was voidable or void.

Hon. S. Bond: I think the best way to describe this is: while you may want to argue about whether or not you're a spouse and whether or not your marriage is void, this applies in the parenting section. There is no voiding your legal responsibility as a parent.

[70] What is clear from the wording of s. 21, its legislative discussion, and the absence of equivalent provisions in other Parts of the FLA, is that the distinction between void and voidable marriages, in the sense provided, is limited to Part 3 and does not extend to Part 5 or Part 7 of the FLA.

[71] Unlike in Part 3, I see no indication that the Legislature intended to distinguish between void marriages and voidable marriages in the rest of the Act. I find it reasonable to infer that had the Legislature intended to distinguish them in other Parts, it would have done so by including relevant wording as it did in s. 21.

[72] For example, I note that property entitlement under Part 5 is specifically triggered "on separation": s. 81(2). The concept of "separation" is incorporated in the definition of "spouse" at s. 3 of the FLA. As can be seen below, separation is not necessarily contingent on cohabitation:

(3) A relationship between spouses begins on the earlier of the following:

- (a) the date on which they began to live together in a marriage-like relationship;
- (b) the date of their marriage.

(4) For the purposes of this Act,

- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,

- (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
- (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

- [73] The record before me does not explicitly address why, with respect to Parentage under Part 3, a void marriage requires a period of cohabitation for it to be deemed to have been in effect; whereas this is not required for property division or spousal support under Parts 5 and 7. However, upon a review of the materials, I find it reasonable to infer that this difference likely stems from the nature of a family unit with children, the presumption of paternity, and the unique circumstances in which a man will be presumed to be the biological father of a child pursuant to s. 26: see also British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 4th Sess, Vol. 28, No. 5 (21 November 2011) at 1625.
- [74] Based on the context of the FLA as a whole, considering its scheme and object, and the intention of the Legislature, I am satisfied that a marriage which is void ab initio does not prevent a party from claiming entitlements pursuant to Part 5 and Part 7 of this Act. This is especially supported by my conclusion that s. 3 and s. 198 are to be read together, that the Legislature intended to carry forward the "null and void" wordings from the entitlement provisions provision of the FRA, and that the FLA makes no distinction between void and voidable marriages in s. 198, Part 5, or Part 7.
- [75] As a result, I find it appropriate to follow the previously decided cases, and therefore the claimant is not prevented from seeking a division of property under Parts 5 of the FLA and spousal support under Part 7 of the FLA.
- [76] This finding only relates to the right of the claimant to make a claim for spousal support and property division; it does not in anyway impact on whether there is any merit in these claims in the context of the facts of this unique case. That will be a matter to be dealt with as part of the hearing on the merits of the claims.

Production of the Respondent's F8 Financial Statement

- [77] Mr. Rao is required to file and serve a F8 Financial Statement. He has not done so to date on the basis that his application to strike the claims for spousal support and property division should be heard first.
- [78] Since these claims continue Mr. Rao must file and serve his F8 Financial Statement and the only issue is within what time limit.
- [79] Counsel for the claimant submits that seven days from the decision of this application is ample time in light of the fact that this action is over 11 months old and the available resources Mr. Rao has to assist him in this process.

- [80] Given that Mr. Rao resides in China, that he deposes the preparation of a Form 8 Financial Statement will be an enormous undertaking as a result of the complexity of his finances, the nature of the attachments, and the translations that will be required, I am of the view that 21 days is a more reasonable time period.

Costs

- [81] Counsel for the claimant submits that this is an application that merits an award of special costs to the claimant on the basis that there was no reasonable possibility that the application would have succeeded and it was doomed to fail.
- [82] A further basis is that the respondent has used this application to delay the family proceedings and to avoid making disclosure of his net worth.
- [83] Special costs are intended to punish reprehensible conduct in the course of litigation. Reprehensible conduct includes scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 132-134.
- [84] The claimant contends that the courts have already rejected arguments that are comparable to those the respondent brings, and therefore the respondent's claim had little or no chance of success.
- [85] In consideration of this argument, I first note that in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 23, Lambert J.A. stated that:
- the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons for Madam Justice McLachlin, for the majority in the Supreme Court of Canada on the question of costs, in *Young v. Young* at p. 28. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.
- [86] Secondly, I note that the previous cases were decided specifically with respect to the FRA. Counsel for neither party was able to provide any case in which the issue had been decided under the FLA. The differences between the two Acts and the intricate submissions of both counsel make it clear to me that the key issue before the Court was novel.
- [87] In *Buschau v. Rogers Communications Inc.*, 2004 BCCA 369 at para. 7 (cost ruling aff'd, 2006 SCC 28 at para. 58), the Court of Appeal held that:

We agree with the submission of the appellant that it "was entitled to raise and did raise serious and novel questions of law concerning the termination of a modern pension trust" and that "[t]his cannot constitute reprehensible conduct".

[88] It is only appropriate in the circumstances that I follow the Court of Appeal's reasoning from Buschau that the respondent was entitled to raise the issue and therefore it was not reprehensible conduct.

[89] In respect to the delay in the production of the Form 8 Financial Statement, it was not unreasonable to seek to have this application heard first since if successful it would have eliminated the need to serve a Form 8.

[90] Therefore the claim for special costs is denied.

Summary of Orders Made

[91] I make the following orders:

- a. the application of the respondent is dismissed;
- b. the respondent will file and serve his Form 8 financial statement within 21 days of the pronouncement of these reasons;
- c. the claimant is entitled to her costs of this application.

"The Honourable Madam Justice Forth"

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