
CANADA / JUDGMENT

Nathu v. Miller

2009 BCSC 1155

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Supreme Court of British Columbia

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2009 BCSC 1155 Nathu v. Miller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nathu v. Miller,

2009 BCSC 1155

Date: 20090825

Docket: 08-2047

Registry: Victoria

Between:

Gulzarina Sulemane Nathu

Plaintiff

And:

Murray Glendon Miller

Defendant

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Counsel for the Plaintiff:

W. Murphy-Dyson

Counsel for the Defendant:

L.P. Gagnon

Place and Date of Trial:

Victoria, B.C.

June 15-19, 2009 and

June 26, 2009

Place and Date of Judgment:

Victoria, B.C.

August 25, 2009

- [1] The plaintiff, Ms. Nathu, and the defendant, Mr. Miller, began a long-term relationship in 1993 but never married. Together, they purchased a house and property on Cecil Blogg Drive, Victoria, British Columbia. Title to that property is registered equally in their joint names. Applying the principles governing unjust enrichment, Ms. Nathu claims, as a remedy, a declaration that Mr. Miller holds his half interest in the house and property in trust for her.
- [2] Ms. Nathu also seeks spousal support, although Mr. Miller makes a compelling argument that this claim is out of time having regard to the definition of spouse in the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). The FRA limits the definition to persons living in a marriage-like relationship for at least two years but only if a spouse applies for spousal support within one year after they ceased to live together. The couple stopped living together in May 2005, but Ms. Nathu did not commence her action until May 2008.
- [3] There is no factual dispute as to when the parties stopped living together, but there is a dispute as to whether their marriage-like relationship continued thereafter. Ms. Nathu maintains that the marriage-like relationship continued until December 2007. Mr. Miller disagrees. The question is complicated by the fact that the parties frequently lived apart during earlier times when they both agree the marriage-like relationship continued but, as I set out later in my reasons, the separation that occurred in May 2005 was qualitatively different than all the previous ones.
- [4] Ms. Nathu is now age 47; she was born and grew up in Mozambique, where she received a limited formal education. Ms. Nathu came to Canada in 1984 with two sons and a new partner. She and her partner had a third son in Canada, but the relationship with the father did not last.
- [5] In 1988, Ms. Nathu moved to Victoria with her three sons. Ms. Nathu received some child support from the father of her youngest child, but raised the boys in a single parent household. In addition to the inherent challenges of single parenthood and limited education, Ms. Nathu faced a language barrier.

- [6] Ms. Nathu spoke only French and Portuguese when she arrived in Victoria and had to learn English. In spite of the challenges, Ms. Nathu supported herself and her family by working as a house cleaner and providing care for the elderly. Eventually, in 1991, she secured full-time employment at a local hotel, first as a room attendant and then, from 1993 on, as a seamstress. In 1993, Ms. Nathu earned about \$25,000. Ms. Nathu worked very hard and has continued to do so throughout her life.
- [7] Currently, Ms. Nathu earns about \$41,000 annually. The bulk of her income is employment income from the hotel totalling about \$36,500. The balance is made up of other income, including some rental income relating to a basement suite in the Cecil Blogg Drive property.
- [8] Ms. Nathu met Mr. Miller around the time that she secured employment in 1993. Mr. Miller, now age 46, was, and still is, an architect. He has a Masters degree in architecture as well as a Masters of Environmental Design Studies. Mr. Miller is a well educated, driven workaholic whose career has been his first priority in life. In 1993, Mr. Miller worked for a firm of architects in Victoria and earned about \$30,000 per year.
- [9] When Mr. Miller is employed, he is able to earn much more than Ms. Nathu. He now works for an architecture firm in England. In 2008, he earned the equivalent of almost \$100,000. This year, he expects to make less, but will still earn considerably more than Ms. Nathu.
- [10] Mr. Miller and Ms. Nathu formed a relationship not long after meeting. They began looking for a house big enough for them and Ms. Nathu's three sons. At the time, Ms. Nathu was living in new subsidized rental housing and Mr. Miller rented a small apartment.
- [11] In August 1993, the parties purchased the home on Cecil Blogg Drive for \$202,500, and moved in together. They registered title in their joint names, as tenants in common, and financed the purchase, in part, by taking out a \$184,500 first mortgage.
- [12] There were gaps in the evidence about the respective contributions of the parties to the additional funds needed to complete the house purchase: \$18,000 plus closing costs. According to Ms. Nathu, she provided \$5,000 that she had saved and also borrowed a further \$5,000 that she later repaid. According to Mr. Miller, he withdrew \$20,000 from his Registered Retirement Savings Plan ("RRSP"). Neither provided documents to corroborate their evidence or to confirm the final total owing. The parties also incurred other costs not directly related to the purchase at or near the time of moving. I am satisfied that Ms. Nathu contributed \$10,000 towards the purchase and other costs associated with the house and that Mr. Miller contributed \$20,000.
- [13] Both parties recognized, at the time, that Mr. Miller would likely earn more than Ms. Nathu, and, as well, he had fewer dependents. Unlike Ms. Nathu, Mr. Miller only had one son who lived with Mr. Miller's previous wife. Generally, although the parties did not record the arrangement in writing, the expectation was that Mr. Miller would pay two-thirds of the mortgage and other property-related expenses and Ms. Nathu would pay one-third. Their initial contributions were consistent with this arrangement. Over time, and as she could

afford it, Ms. Nathu was expected to increase her contribution to one-half.

- [14] The parties also took out a joint line of credit to cover other expenses related to the house which they later each contributed to paying off. Finally, they set up an account that they each made deposits to for the purpose of funding the mortgage payments. The parties anticipated that, over time, as Ms. Nathu's parenting obligations diminished, she would contribute more and eventually contribute an equal share to the mortgage account with Mr. Miller.
- [15] Although Mr. Miller paid a disproportionate share of house-related expenses in the early years, Ms. Nathu purchased most of the food for the family. She testified that she did almost all of the housework, prepared most of the meals, and did the gardening. She continued to work hard, including taking on extra jobs in addition to her full-time employment, was very frugal and continued throughout the relationship to contribute to the joint mortgage and house accounts. The overall plan, according to Ms. Nathu, was to pay for the home and all related expenses as quickly as possible so that the couple could free up money to travel.
- [16] According to Mr. Miller, during his evidence in chief, throughout the relationship he contributed two-thirds of the overall mortgage, property taxes and house-related maintenance, repair and renovation costs. Counsel for Ms. Nathu successfully challenged this evidence on cross-examination. While I accept that Mr. Miller paid about two-thirds at the beginning, this changed as a result of his periodic unemployment and Ms. Nathu's growing contributions that eventually, for a period, exceeded fifty percent of the mortgage costs and house expenses.
- [17] Although Mr. Miller's earning potential was considerably higher than that of Ms. Nathu, he was periodically unemployed and also accepted employment opportunities away from Victoria that resulted in increased costs of living. I set out some of the details below.
- [18] In October 1994, Mr. Miller was laid off and remained unemployed until late spring 1995. He undertook some private work during this period, but it was not very profitable. His savings were depleted.
- [19] In about mid-1995, Mr. Miller took a contract position with the City of Victoria that extended until late 1996 or early 1997. This was followed by another period of unemployment. Mr. Miller testified in chief that he was unemployed for about six months, but it must have been significantly longer as his next employment was in Edmonton, Alberta, commencing in June 1998. While Mr. Miller worked in Edmonton, he had to rent and maintain an apartment and also had additional traveling expenses.
- [20] In about February 2000, Mr. Miller took a position in Phoenix, Arizona, and moved there. He did not return to Victoria as frequently as he had while living in Edmonton. Once again, while in Arizona, Mr. Miller had additional housing and living expenses.

- [21] In late December 2000, Mr. Miller moved to Vancouver, British Columbia, and took a position there. Once again, he incurred the additional costs associated with an apartment but, on this occasion, was able to return to Victoria regularly on weekends. By June 2001, Mr. Miller was unemployed again and moved home to Victoria. He did not find employment again until late 2001.
- [22] At the end of 2001, Mr. Miller moved to Toronto to take up new employment commencing January 2002. Once again, he had additional housing costs. Mr. Miller stayed in Toronto until March 2003. His visits to Victoria were infrequent during this period. In late November 2002, while Mr. Miller was still working in Toronto, he went to New Zealand to check out an employment opportunity there. Ms. Nathu joined him on part of that trip.
- [23] Eventually, in March 2003, Mr. Miller moved to New Zealand to take up the new employment opportunity available there. He worked there until his visa expired in early 2006. Mr. Miller has since moved, in June 2006, first to London and then Manchester, England, where he now resides and works.
- [24] The lengthy periods of unemployment significantly reduced Mr. Miller's income in those years. When unemployed, he earned much less from contract work for private clients. In addition, once Mr. Miller left Victoria to work in other places, he incurred significant additional living expenses. All of this impacted on his ability to contribute to the Victoria home on the same basis as the parties originally planned.
- [25] For example, while Mr. Miller was living in Edmonton, he reduced his contribution to the mortgage account by about \$200 to \$300 per month. Ms. Nathu's eldest son made up that contribution. Throughout this period, Ms. Nathu continued to pay as much as she could afford towards the mortgage and other home-related expenses. I find that the parties were making roughly equal mortgage contributions as a result. Ms. Nathu's son stopped making contributions when he returned to school full-time in 1999.
- [26] Unfortunately, the banking records available for the joint mortgage and house accounts are limited to August 2001 forward. A comparison of those accounts to Ms. Nathu's personal account records for the same period permits confirmation of her contributions to the joint accounts since August 2001.
- [27] By a process of elimination, Mr. Miller likely made the balance of the deposits to the joint accounts. Mr. Miller's personal bank records for the same period are not in evidence. The available records do not, however, support Mr. Miller's testimony that he contributed about two-thirds of all costs throughout.
- [28] In September 2001, bi-weekly mortgage payments were \$763.20. On average, Ms. Nathu contributed \$500 every two weeks, but Mr. Miller only contributed \$300 every two weeks. This lasted through to July 2002. The records indicate that the parties made roughly equal contributions thereafter through early October 2003. Starting in mid-October, the bank record shows a single monthly deposit to pay the mortgage.

- [29] The origin of the single monthly deposits commencing in October 2003 cannot be linked back to Ms. Nathu's personal account. By that point, she had moved to New Zealand to join Mr. Miller. The parties rented out the Victoria home and the rent was sufficient to cover the mortgage and related expenses.
- [30] While the record is incomplete, it is sufficient to conclude that by the fall of 2001, at the latest, Ms. Nathu was contributing a half share of the mortgage payments. Absent records, it is not possible to exactly determine her earlier contribution to the mortgage account.
- [31] The banking record for joint home expenses does not reveal a similar pattern of regular transfers from Ms. Nathu's personal account. The traceable deposits are mostly in small amounts, such as \$50, until after Ms. Nathu returned to Victoria from New Zealand. The remaining deposits in the same period are typically in amounts that exceed those of Ms. Nathu and likely originated with Mr. Miller.
- [32] After Ms. Nathu began living in the Cecil Blogg Drive property following her return from New Zealand, she made additional deposits over the course of a year of about \$750. The account record and email exchanges between the parties demonstrate that Mr. Miller continued to deposit more to the account than did Ms. Nathu. In addition, Mr. Miller sometimes paid taxes and insurance directly. It is likely that he contributed \$5,000 to \$10,000 during this period.
- [33] In addition to her deposits to the account, Ms. Nathu testified that she collapsed an RRSP of about \$5,000 to pay for the construction of a downstairs rental suite and for other home-related expenses. Mr. Miller refused to contribute anything to the cost of the suite as he believed it was illegal. The suite now generates gross annual rental income of about \$8,000. All rents are deposited to the mortgage account.
- [34] On the whole of the evidence before me, I conclude that Ms. Nathu paid about one-third of the mortgage expense to start with and gradually built her contribution in that regard up to half of the expense by no later than mid-2001. On the evidence it is not possible to exactly calculate her financial contribution to other expenses related to the house and property, but I am not persuaded that it exceeds that of Mr. Miller.
- [35] The reverse is likely so for Mr. Miller. His contributions probably exceed half of the other expenses relating to the Cecil Blogg Drive property.
- [36] Due to Mr. Miller's lengthy absences from Victoria, Ms. Nathu has likely contributed overall more labour to maintaining and improving the house and property. While Mr. Miller contributed significantly when he was in the house, even when on weekend visits, Ms. Nathu's labour contribution exceeds his.
- [37] I will return later to Ms. Nathu's contention that she is entitled to a remedy based on unjust enrichment. First, I will set out my findings respecting the parties' relationship and, in particular, when did the parties cease to live in a marriage-like relationship.

- [38] In spite of Mr. Miller's various moves, the parties' relationship continued and flourished. The parties were in daily or near daily telephone contact when apart and often travelled to be together or for trips. I have no doubt that Mr. Miller was very welcome whenever he returned to Victoria and their personal relationship carried on as it had before. It is apparent from the evidence that they conducted themselves as though they were married. They had a marriage-like relationship even though they only lived together periodically. The parties last lived together in New Zealand.
- [39] Before Mr. Miller moved to New Zealand, he gave Ms. Nathu an engagement ring. In October 2003, she moved to New Zealand and the parties lived together there until Ms. Nathu returned to Victoria in May 2005. They never married. Nor have the parties lived together or even spent any time together since her return.
- [40] Ms. Nathu was unhappy in New Zealand. Mr. Miller was extremely busy, worked very long hours and also spent long hours studying to advance his career prospects. Ms. Nathu had not expected to work in New Zealand and was considering going to school. Instead, according to her, Mr. Miller wanted her to find work. She eventually found work, but it was not satisfying. In the meantime, according to her, she did 95 percent of the cooking and cleaning in their apartment.
- [41] The personal relationship between the parties suffered as a result of these factors. Again, according to Ms. Nathu, Mr. Miller stopped speaking to her. In spite of that, Ms. Nathu testified that the parties went through similar patches in the past so she did not consider the relationship at an end. Nonetheless, she decided to return to Victoria when her visa ended. Ms. Nathu testified that, although Mr. Miller was no longer responding to her, she told him before leaving that she would wait for him, as long as necessary, to make a decision to come home.
- [42] Much of Mr. Miller's evidence was unnecessarily self-serving. For example, in an effort to downplay the seriousness of the relationship, he described his marriage proposal as an indication of his sincerity. According to him, if Ms. Nathu came to New Zealand, it would be a "good test" to see if the relationship would work. He acknowledged that he was fully immersed in his work and studies when Ms. Nathu arrived in New Zealand but denied being aware of her unhappiness until it became a "recurring issue".
- [43] According to Mr. Miller, Ms. Nathu decided to work in New Zealand rather than taking the year off. He denied telling her that she had to work. In chief, in response to Ms. Nathu's evidence that he was unavailable to spend time with her, he suggested that Ms. Nathu had to work too many weekends and that he encouraged her to take classes rather than work.

- [44] In cross-examination, Mr. Miller refused to concede that Ms. Nathu decided to return to Victoria and wait for him. According to him, they only discussed how hard he was working and how, to adopt his words, they might "narrow the gap", presumably between their expectations. It also became apparent that his evidence concerning Ms. Nathu working weekends was entirely inaccurate. On balance, I find Ms. Nathu's description of events in New Zealand more reliable than Mr. Miller's and accept her version.
- [45] With the assistance of an agency, the parties leased out the Victoria home for a year while they were in New Zealand. The rents were sufficient to cover most of the costs associated with the house. Mr. Miller testified that he personally paid any balance owing and that his contribution was as much as \$300 per month. Ms. Nathu testified that she gave money directly to Mr. Miller to be applied towards the expenses.
- [46] After Ms. Nathu returned to Victoria, she decided to move back into the house when the lease ended. This decision was controversial and became the subject of considerable email correspondence between the parties. The correspondence demonstrates that they reached accommodations respecting the house and related finances, but not about their relationship.
- [47] As to the nature of their relationship, Ms. Nathu's own statements are a strong indication that, shortly after her return to Victoria, she considered it ended. While each of the following extracts needs to be read in the overall context of larger messages and exchanges, they nonetheless illustrate that Ms. Nathu acknowledged that the relationship was over:
1. June 9, 2005: Thanks for sending my CV and will hear from me if I have great news, so it will be awhile, I am even going to erase your email address from my list so I am not tempted. Good life, good luck and a great journey to you.
 2. August 8, 2005: Don't waste time calling me again. I don't want to hear from you unless it is about the house.
 3. December 26, 2005: Please let me know how we are going to proceed with the mortgage and you can be reassured you won't be getting any more calls or emails from me unless it is about this house, as I am going to erase all the contact #s, so I am not tempted.
 4. September 10, 2006: But in spite of all I don't hate you, I hoped you would give us a chance, which you seem not interested. So be it, we shall move on.
 5. January 27, 2008: Murray, I would really like to know what you would like to do, please respond to my email before I start the procedures with a lawyer. I have an appointment this week and would love to know.

6. January 29, 2008: you being this person who has treated me like I was nothing more than a person to be used for your needs, maintain the house, take care of other matters as you order! And not a recognition of none of it. A person who is cold and calculating, angry at me without knowing the reason. A person who was not man enough to tell me in my face the relationship was over, but yes, told his family and they have known for 2 years.
7. February 5, 2008: So here it goes, I have been asking you to end things in an amicable way, from the beginning, I told you I would have a hard time holding the fort, but you decided to ignore it and me, naïve, thinking you were taking time to sort things out and maybe make peace and restart our life again I went ahead and facilitated things,

At trial, Ms. Nathu maintained that she did not consider the relationship at an end when she returned to Victoria from New Zealand and that she continued thereafter to expect Mr. Miller to return as well. She conceded that he was angry at her, but expected him to get over it, come home and participate in counselling with her. According to her, this expectation extended until 2007.

- [48] By December 2007, Ms. Nathu had learned from Mr. Miller's mother that her son had moved to England from New Zealand. Ms. Nathu telephoned him. After discussing ongoing financial problems, according to Ms. Nathu, in chief, she asked when he was coming home. Mr. Miller told her the relationship was over. Ms. Nathu testified that she was shocked, angry and upset; she had been in "total denial" to that point.
- [49] In cross-examination, Ms. Nathu explained her email of August 8, 2005, as an attempt to trigger Mr. Miller to make a choice about ending the relationship or resolving it. She testified that she wrote her December 26, 2005 email when she was recovering from painful injuries suffered in a car accident and did not intend to signal the end of the relationship. Instead, she wanted to provoke a response. Similarly, the email of September 10, 2006, was only intended to provoke a response, not to convey that the relationship was over.
- [50] According to Ms. Nathu, the telephone conversation in December 2007 was the only occasion on which Mr. Miller said the relationship was over. Even then, according to her, she demanded that he return to resolve the situation face to face, but was ignored.
- [51] I accept that Mr. Miller practiced avoidance techniques when it came to personal discussions. He appears uncomfortable with oral communication even when testifying. His description of his marriage proposal was, at best, clinical. I am, however, satisfied that he would have permitted the relationship to continue, albeit on his terms, even after Ms. Nathu returned to Victoria. The relationship on Mr. Miller's terms, however, appeared, by that point, to be more of an arrangement for household services than anything else.

- [52] Mr. Miller testified that their issues were not so great that they could not talk about them. He acknowledged that Ms. Nathu was unhappy before she left New Zealand and that the relationship was tense. According to him, he did not want to prolong it. Mr. Miller left me with the impression that he was relatively indifferent to Ms. Nathu's unhappiness as long as it did not interfere with his own priorities.
- [53] My review of the content of Mr. Miller's emails does not reveal any attempt by him to persuade Ms. Nathu to change her mind. Throughout, he primarily focused on the financial arrangements for the house. He also objected to the personal and often emotive tone of Ms. Nathu's emails.
- [54] According to Mr. Miller, it was clear from Ms. Nathu's June 9, 2005 email that their relationship was at an end and he stopped taking personal telephone calls from her at work after receiving the email. He described Ms. Nathu continuing to insist that he return to Victoria to tell her face to face that the relationship was over, but he had no intention of traveling to Victoria for that purpose.
- [55] By June 2006, when Mr. Miller relocated to England, he had ceased all telephone contact with Ms. Nathu. He never informed her of his further career change, the move or his new addresses. According to Mr. Miller, Ms. Nathu placed the December 2007 telephone call after getting his number from someone else. Ms. Nathu was very emotional and asked if he was coming home for Christmas to which he responded, "Of course not". After he reminded Ms. Nathu of her numerous statements that there was nothing left in the relationship, she insisted that he come to Victoria and tell her face to face.
- [56] While both sides were apparently willing to continue their personal relationship for some time after Ms. Nathu returned to Victoria in May 2005, it is obvious that they took no steps to further address the underlying issues that caused Ms. Nathu to leave New Zealand. Mr. Miller was not prepared to change and Ms. Nathu was slow to realize that left them without a future together. In spite of her denials at trial, I find that she realized it by June 2005, as partially evidenced by the chain of emails set out above. In fact, the parties never lived together again or even spent any time together after Ms. Nathu returned to Victoria.
- [57] I conclude that the separation that occurred when Ms. Nathu returned to Victoria was qualitatively different than all the earlier separations that occurred when Mr. Miller moved for employment or career purposes. Previously, both parties intended to and did keep up regular contact. They spent as much time together as possible, including on holidays. They always intended to resume living together when feasible to do so. None of those elements were present after Ms. Nathu moved back to Victoria from New Zealand. In fact, most of the continuing contact related to the house and financial issues.

- [58] The economic relationship between the parties, as it related to the house and Ms. Nathu's personal financial difficulties, continued after her return to Victoria. Ms. Nathu's previously secure employment at the hotel was not available to her when she returned. She eventually regained employment at the hotel in October 2005, but without the advantage of her previous seniority. Her earnings were limited for a time as a result.
- [59] Ms. Nathu moved back into the house after the tenants vacated in 2005 but, at first, was unable to pay her half share of the mortgage and other house-related expenses. She rented out rooms on the main floor of the house and, eventually, in 2006, cashed in RRSP monies to fund a partial rental suite in the basement. Once finished, the suite generated rent of \$650 per month and later, \$700 per month. Since 2008, the rents have been applied against the mortgage payments.
- [60] In addition, Ms. Nathu spent most of her non-working time looking after the house and working in the yard and garden. Much of the email traffic between the parties focused on the extent to which Mr. Miller was willing or able to assist in covering the shortfalls that Ms. Nathu experienced when there was insufficient rent to cover expenses. As set out earlier, Mr. Miller was opposed to building the basement suite as he considered it illegal but otherwise assisted in meeting the shortfalls that occurred.
- [61] I summarize my findings respecting the Cecil Blogg Drive house and property as follows. The house has been further improved as a result of Ms. Nathu's recent efforts, just as it was improved by the previous efforts of both parties when Mr. Miller was in Victoria. Overall, Ms. Nathu has lived in the house more than Mr. Miller over the years and I find that she has contributed a disproportionate share of the labour necessary to maintain the house and property.
- [62] Each also contributed financially over the years, although in differing proportions from time to time. I conclude that Mr. Miller has contributed more than half, but not significantly more.
- [63] The current assessed value of the property is \$446,000. As at June 1, 2009, the market value of the property was appraised at \$400,000. The remaining balance on the original mortgage is about \$9,000. The parties' equity appears to be at least \$390,000 and will be divided equally in the event that the parties sell the property.
- [64] I turn next to the legal issues starting with the claim for spousal support. The definition of spouse in s. 1 of the FRA is expressly limited. The applicable part reads:
- "spouse" means a person who
- (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

Ms. Nathu's application for spousal support is under Part 7 of the FRA and is, accordingly, subject to the conditions set out in the definition. Unfortunately, Ms. Nathu did not file her claim for spousal support until May 13, 2008.

[65] In *Gostlin v. Kergin*, [1986] 5 W.W.R. 1, 3 B.C.L.R. (2d) 264 (C.A.), the court addressed the meaning of the term "who live together as husband and wife" that then appeared in the definition of spouse in the FRA. The court found that the purpose of the Act is to impose the same obligations on an unmarried couple as are voluntarily undertaken by a married couple (p. 267). The court went on to state that the question is whether the parties felt committed to life-long financial and moral support of the other, even in the event of life-long disability. I list below objective factors that might assist in providing an answer to such a question, as set out in the reasons at p. 267-268:

1. 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?
2. Did they share the legal rights to their living accommodation?
3. Did they share their property?
4. Did they share their finances and their bank accounts?
5. Did they share their vacations?
6. In short, did they share their lives?
7. 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?

While the language of commitment might differ today, the essence is that the couple must intend long-term mutual support, including financial support. I have no hesitation in finding that such mutual intention existed until Ms. Nathu left New Zealand. I am unable to find any expressions of such mutual subjective intent or sufficient objective indicators of that intent after that point.

[66] It follows from my findings of fact that the marriage-like relationship in this case ended when Ms. Nathu returned to Victoria from New Zealand. I accept that Ms. Nathu had a continuing hope for some time thereafter that Mr. Miller would return to Victoria so that they could resume their relationship, but I am satisfied that Mr. Miller never intended to do so. I am further satisfied that, by June 2005, Ms. Nathu also considered the relationship ended.

[67] Ms. Nathu's hope thereafter was insufficient to extend the period of the marriage-like relationship. Nor did it extend the period within which she was required to file her claim for spousal support. The following extracts from *W.A.S. v. D.W.T.*, 2003 BCSC 865, 40 R.F.L. (5th) 389, at paras. 25 and 26, assist:

25 Ms. S. argues that it was reasonable for her to assume that her relationship with Mr. T., which had survived several rough times in the past, would also survive the separation that commenced in December of 2000. I do not accept this argument. First, the December 2000 split was of a different character than the previous problems. Further, the Family Relations Act attempts to use fairly straightforward criterion to determine the time when members of a common-law couple cease to be spouses. That criterion uses the concept of ceasing to live together. It does not suggest that the mere possibility that a couple that has cohabited in the past might reconcile in the future means that the parties remain spouses. Rather, the elasticity of the concept of spouse is provided for in the one-year period after cohabitation ceases during which the common-law couple are still characterized as spouses.

26 Where the one-year period has expired, the mere fact that the parties could possibly reunite does not make them spouses. It simply means that they might in future become spouses again. As the parties did not reunite in this case, they ceased to be spouses for the purposes of Part VII of the Family Relations Act, on December 27th, 2001, one year after they ceased to cohabit.

In other decisions, the court has accepted that the words "ceased to live together" are modified by "in a marriage-like relationship": see, for examples, *D.L.M. v. R.E.G.*, 2004 BCSC 364, at para. 68, and *Eisener v. Baker*, 2007 BCSC 83, at para. 36. Although counsel did not refer to these decisions, they appeared to agree that the legislature intended the one year period to commence when the parties ceased living together in a marriage-like relationship. I have applied that test here.

[68] By not commencing her action until May 2008, I am satisfied that Ms. Nathu failed to apply for spousal support within one year of leaving Mr. Miller and the end of the marriage-like relationship. It follows, albeit regrettably, that I must dismiss her claim for spousal support. I say regrettably, as I would have awarded spousal support based on her ongoing financial needs and Mr. Miller's ability to pay if it were open to me to do so.

[69] I turn next to the unjust enrichment claim. Ms. Nathu claims that Mr. Miller has been unjustly enriched and seeks the imposition of a constructive trust against Mr. Miller's registered half interest in the Cecil Blogg Drive property. In her pleadings, Ms. Nathu advances this claim respecting other assets held solely in Mr. Miller's name as well. According to Mr. Miller's Property and Financial Statement, the other assets are as follows:

1.

Financial assets;

\$ 61,093

2.

Pensions and RRSPs

\$157,695

TOTAL

\$218,788

[70] The imposition of a constructive trust only occurs if Ms. Nathu establishes an unjust enrichment that gives rise to a need for restitution. At the conclusion of trial, she sought her remedy only in respect of Mr. Miller's half interest in the Cecil Blogg Drive property.

[71] In *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, the Supreme Court of Canada confirmed the potential application of the equitable doctrine of unjust enrichment giving rise to restitution by means of a constructive trust in common law relationships. As set out by the majority, an action for unjust enrichment arises when three elements are satisfied:

1. an enrichment;
2. a corresponding deprivation; and
3. the absence of a juristic reason for the enrichment (para. 3).

Once satisfied, the remedy of constructive trust arises if monetary damages are inadequate and where "there is a link between the contribution that founds the action and the property in which the constructive trust is claimed" (para. 3).

[72] There is no evidence that Ms. Nathu made any direct financial contribution towards Mr. Miller's acquisition of financial assets, including his pensions and RRSPs. Insofar as the Cecil Blogg Drive property is concerned, Ms. Nathu made direct contribution. Taking into account Ms. Nathu's greater labour contribution and close to equal financial contribution, I conclude that her overall contribution is about the same as that of Mr. Miller. She, of course, already has a registered one-half interest in the property.

[73] What then is the enrichment? According to counsel for Ms. Nathu, the household and domestic services that Ms. Nathu rendered enriched Mr. Miller. Implicitly, counsel contends that the provision of services freed up Mr. Miller to concentrate on advancing his career, the income from which enabled him to acquire assets registered in his name. There are a number of problems with this approach.

[74] First, Mr. Miller had already accumulated financial savings and RRSPs before meeting Ms. Nathu, some of which he used to pay for his share of the house. Second, the evidence does not disclose the full extent of those assets; Mr. Miller testified that he had tens of thousands in RRSPs at the time. Second, I am satisfied, on the evidence, that when Mr. Miller stayed in the house, he contributed labour to repairs, maintenance, yard work, some housekeeping and assisting with the care of Ms. Nathu's three sons. He also prepared and cooked meals some of the time. Third, when Mr. Miller lived and worked away from Victoria, Ms. Nathu did not ordinarily provide housekeeping services for him as she did in Victoria. Ms. Nathu did provide housekeeping services during the time that she lived with Mr. Miller in New Zealand.

- [75] I am unable, on the evidence, to find that Mr. Miller was enriched as alleged resulting in his acquisition of any of the assets described above. While Ms. Nathu was never obliged to provide household and domestic services to Mr. Miller, nor was he obliged to provide services to her. In the exchange that occurred, both benefited. Again, keeping in mind that Ms. Nathu already has a half interest in the Cecil Blogg Drive property, I am unable to discern any imbalance significant enough to infer that Ms. Nathu suffered a corresponding deprivation. Ultimately, there is no unjustness respecting property division that needs to be remedied.
- [76] As to the house, Ms. Nathu was able to enter the market when she did because Mr. Miller was able to pay more than half the related costs at the time. In spite of that, she received a registered one-half interest and now shares equally in the substantial equity that has accumulated since. Overall, her registered interest equals her overall financial investment and labour contribution.
- [77] In all the circumstances, the claims in unjust enrichment are not made out. Ms. Nathu's claims are, as a result, dismissed. In addition, Ms. Nathu's claim for spousal support is out of time and must be dismissed.
- [78] Unless there are special circumstances arising out of an Offer to Settle, Mr. Miller is entitled to recover his costs on Scale B.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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