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CANADA / JUDGMENT

## Smith v. Cartwright

2018 BCSC 2074

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2074 Smith v. Cartwright

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Cartwright,

2018 BCSC 2074

Date: 20181126

Docket: E79957

Registry: Nanaimo

Between:

Kenneth Edward Smith

Claimant

And

Tracy Dell Cartwright

Respondent

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

The Claimant, appearing on his own behalf::

K. Smith

The Respondent, appearing on her own behalf:

T. Cartwright

**Place and Dates of Trial:**

Nanaimo, B.C.

October 10 & 11, 2018

November 1, 2018

**Place and Date of Judgment:**

Nanaimo, B.C.

November 26, 2018

**INTRODUCTION**

[1] Mr. Kenneth Smith submits that he is Tracy Cartwright's "spouse" as defined in s. 3 of the Family Law Act, S.B.C. 2011, c. 25 (the "Act") and claims entitlement to a division of property under Part 5 thereof. Ms. Cartwright moves for dismissal on the basis that the parties' relationship was never "marriage-like" and, in any event, it did not last for a continuous period of two years: see Act s. 3(1)(b)(i). Ms. Cartwright advances a counterclaim pursuant to R. 4-4(1)(f) of the Supreme Court Family Rules for unpaid rent. Other items of relief are referred to in the counterclaim but Ms. Cartwright abandoned them at trial.

**EVIDENCE**

- [2] The parties met in 2007 when a friend of Ms. Cartwright referred her to Mr. Smith in his capacity as an investment advisor. Mr. Smith understood that Ms. Cartwright had recently left a lengthy relationship. He testified that, as soon as he laid eyes on Ms. Cartwright, he said to himself "I like the looks of this girl, I'm going to ask her out." Thus began a casual dating relationship that lasted a couple of years.
- [3] The parties' relationship became more serious in August 2009, when, according to Mr. Smith, they agreed that they were "exclusive". Thereafter they spent more time together and became sexually intimate. Mr. Smith began the trial firmly and repeatedly saying that this was the beginning of their marriage-like relationship. Later on he corrected himself, probably because he was confronted with evidence that he could not plausibly deny or contradict, and his final position was that marriage-like status was first achieved in the spring of 2011.
- [4] It was around this time that the parties started do-it-yourself renovations to Ms. Cartwright's home on Poets Trail Drive in Nanaimo. Mr. Smith used to be a carpenter, apparently, and the evidence is clear that, working together, the parties built an addition to Ms. Cartwright's garage and an extension to the deck above it, and refurbished her kitchen, dining room, and home entertainment room. They also did a fair amount of landscaping and yard work. Their joint renovation efforts were confirmed by a neighbour, Terry McCann, an obviously objective and independent witness whose evidence was not challenged in cross-

examination. Ms. Cartwright paid for all the building materials and supplies without anything more than nominal contribution from Mr. Smith.

- [5] Mr. Smith told me that he did not ask or expect to be paid for any of this work. It was all part of the parties' joint plan for a long-term future together, and he was happy to do it because, as it were, he was feathering a nest for both of them. He said that during the renovation work, most of which was completed by spring 2012, he frequently stayed overnight at Ms. Cartwright's house, more often, at any rate, than he stayed at his own place in Lantzville. Ms. Cartwright disagreed. She maintained that Mr. Smith stayed at her place only on weekends, and this was confirmed in evidence by her daughter, who lived in the basement suite of her home throughout the renovations, and her sister, who was a regular visitor.
- [6] The parties agree that their relationship broke down at the end of August, 2012, and that this separation was intended to be permanent. Mr. Smith testified that he was diagnosed with cancer and he withdrew from the relationship to spare Ms. Cartwright the agony of witnessing his final days. Ms. Cartwright said she never heard anything about this and maintains that the breakdown flowed from irreconcilable differences. Mr. Smith sent her a text while she was on holidays with her daughter, announcing that he was leaving. When she returned home she found a letter from Mr. Smith confirming that they were through for good.
- [7] In fact, the parties lived separate and apart and saw nothing of one another for several months after this breakdown. Just before Christmas 2012, however, Ms. Cartwright gave Mr. Smith a seasonal greeting card and book of photographs in which their time as a couple was warmly and sentimentally commemorated. This had the effect, it seems, of re-kindling the parties' emotional connection. In the early part of 2013, as well, Ms. Cartwright consulted Mr. Smith about starting a small business, something involving the acquisition of a custom embroidering machine, and these discussions drew them closer together. The evidence establishes to my satisfaction that the parties resumed dating in the spring of 2013.
- [8] It is common ground, furthermore, that on September 1, 2013, Mr. Smith gave up his rented apartment in Lantzville - which he had maintained throughout the parties' relationship to that point - and moved into Ms. Cartwright's house on Poets Trail Drive. He testified that this move was intended to be permanent, while Ms. Cartwright viewed it as more of an experiment to see if Mr. Smith was fit for the part of a permanent companion or spouse.
- [9] Mr. Smith acknowledged in evidence that he did not contribute to the mortgage, taxes, insurance, or other costs of maintaining Ms. Cartwright's home while he lived there. Ms. Cartwright testified that the parties had a verbal agreement that Mr. Smith would pay \$1,000 per month in rent, but he paid nothing except for \$500 when he first moved in. Mr. Smith confirmed that he was expected to pay rent, but claimed there was no fixed amount, and that some months he paid \$1,000, other months \$500. He produced no record of any such payments and denied, for some reason, that his banking records would shed any light on the subject. His financial disclosure in this litigation was decidedly lacking. All I was given to

look at was a Form F8 financial statement left completely blank except for the value of an old Cadillac in the "assets" column. No tax returns were attached.

- [10] The totality of evidence satisfies me that, in April of 2015, for a variety of reasons, the parties resolved to end their relationship, and Ms. Cartwright decided to move to Vancouver. The termination of the relationship at this time, I find, was clear to both parties. Mr. Smith announced his intention to separate from Ms. Cartwright, and she readily agreed that this was in their mutual best interests. She told Mr. Smith that she was leaving town and started boxing up her possessions, selling things that she no longer needed, and making trips to the mainland to get organised. Ms. Cartwright's testimony in this connection was corroborated by her daughter, her sister, and a friend who lived nearby and visited regularly.
- [11] The discord that brought on the final dissolution of the parties' relationship, according to Ms. Cartwright, had a number of sources. First of all, it came to light that most of the money that she invested with Mr. Smith, around \$100,000, had somehow been lost. The funds had dwindled mysteriously over the years to a balance of only \$16,000. Ms. Cartwright believes that Mr. Smith misappropriated her funds, but he denied it, and the available evidence does not establish precisely where the money went. At the very least, however, I found it decidedly odd that Mr. Smith, who was Ms. Cartwright's investment advisor and now claims to be her spouse, was totally unable to explain how this large sum of Ms. Cartwright's money was frittered away on his watch.
- [12] The parties also became involved in a business venture together. It was called Shine-On Chrome and Graphic Finishes Inc. ("Shine-On Chrome"), and had to do with chrome and graphic finishes on cars, motorcycles, and the like. Mr. Smith, I find, was the driving force behind this. The business failed and all concerned - not only Mr. Smith and Ms. Cartwright, but two other people as well - lost tens of thousands of dollars. Mr. Smith was later disciplined by the Investment Industry Regulatory Organization of Canada ("IIROC") for becoming involved in such a venture with a client, and was also found guilty on unrelated charges of making unauthorised investments. He is now the subject of a permanent ban from acting as an investment advisor. He has also declared bankruptcy.
- [13] Somewhere along the way, in addition to the previously mentioned woes and calamities, Ms. Cartwright came to suspect that Mr. Smith was having affairs with other women, suspicions that, especially in light of this lawsuit, she has taken assertive steps to confirm by tracking down and interviewing a number of Mr. Smith's former friends and associates. Two of them came to court to testify with considerable vim about Mr. Smith's promiscuity and dishonesty. I admitted and considered this evidence, not only because Mr. Smith's credibility was a key issue in the case, but also because he made a centrepiece of the supposed exclusivity of his relationship with Ms. Cartwright, and specifically denied in evidence that he had ever been unfaithful to her. He also denied any malfeasance with Ms. Cartwright's money and said that he had never been dishonest in his practices as an investment advisor.

- [14] The respondent's first witness was Bob Falk, who testified that he has known Mr. Smith since they were both children. They used to be friends, but no longer. Mr. Falk invested over \$30,000 with Mr. Smith. Almost all of this money was lost in unauthorised transactions involving futures contracts that Mr. Smith was not licenced to trade. Mr. Smith also borrowed money from Mr. Falk for Shine-on Chrome that he has not repaid. Mr. Falk testified, furthermore, that Mr. Smith bragged about his sexual exploits with other women during his relationship with Ms. Cartwright, including the manager of a local pub and the woman with whom Mr. Smith is presently sharing a house. Mr. Falk testified that Mr. Smith never gave him the impression that the relationship with Ms. Cartwright was a long-term, committed one. Mr. Falk added that Mr. Smith used to talk to him about wanting to have sexual relations with Ms. Cartwright's daughter.
- [15] The second witness who gave evidence of this variety was Colleen Butler. She has known Mr. Smith for 18 years. She met him first in a business context, but over the years they became friends and socialised together. They shared a lot of confidences, including about their love lives. Ms. Butler testified that Mr. Smith confessed to a string of sexual affairs with other women before, during, and after Mr. Smith's relationship with Ms. Cartwright. She said that Mr. Smith "goes through women almost like popcorn." According to Ms. Butler, "There's always one or two [women] that he's had on the roll at the same time". She called him a "true predator", and said that he used his position as an investment advisor to target and exploit vulnerable women for his own financial gain.
- [16] Ms. Butler invested \$10,000 with Mr. Smith in or about July 2015. He asked her to make the cheque out to a numbered company. For some reason this did not raise alarms for Ms. Butler. She said that she expected to get account statements from time to time, but she received none for six to eight months, and "had to virtually beg" Mr. Smith to provide them. He did so, but she later "discovered they were all bogus". When she asked him to return her money to fund an international trip, he told her the money was "locked down" in a specific type of investment. This turned out to be untrue. She realised eventually that Mr. Smith was giving her the run-around and made a complaint to IIROC in 2017. The investigation revealed that Mr. Smith had lost her money. According to Ms. Butler, Mr. Smith has promised to repay her from the proceeds of this claim against Ms. Cartwright.
- [17] I would note that Mr. Smith challenged none of this evidence on cross-examination. His questions of Mr. Falk were directed at establishing that the witness himself was no angel, and he did not ask Ms. Butler many questions about relevant matters. I encouraged him to question her about the veracity of her testimony if he cared to, but he conceded on the record, specifically concerning her narrative about his mismanagement of her money, that she had told the truth. As to his statements about other women, I accept that he made these utterances, and whether or not they are true, they have probative value, at the very least, on the issue of Mr. Smith's attitude towards his relationship with Ms. Cartwright.

- [18] Ms. Cartwright, in turn, testified that her relationship with Mr. Smith was an economic and emotional rout. In addition to her investment losses, already described, she was left with joint and several liability to repay a \$60,000 business loan taken for Shine-on Chrome, and has lost a further \$28,000 in the form of a shareholder loan to the company that will never be recovered. Her view of the present claim is that Mr. Smith, after deceiving her with other women, losing her life savings, and steering her into a doomed business whose debts she will be paying for years, is now circling back for her only remaining asset, her residence in Nanaimo.
- [19] Ms. Cartwright's evidence was that between August 2009 and the end of August 2012, the parties had a casual, on-again off-again dating relationship. They socialised together. They went on excursions together, including camping trips and that sort of thing, but they kept separate residences and finances. The commitment was not profound. She said that there were many brief breakups during this period, ten to twelve in number perhaps. Most of these hiatuses lasted a week or two, and usually had trivial causes of Mr. Smith's conjuring. It was impossible, she said, to take the relationship seriously, and she certainly did not consider it to be an economic and emotional union akin to a marriage.
- [20] I have already said that at the end of August 2012, the parties split up and intended to separate permanently. They had no contact until just before Christmas 2012. Ms. Cartwright acknowledged delivering the book of photographs and the seasonal greeting card to which I have already referred. She explained that she gets sentimental at Christmas time. She decided that, despite their difficulties, she had enjoyed some good times with Mr. Smith, and she did not want to be on bad terms with him. After making this Christmas gesture, however, she maintained that the parties continued living apart and had little or no contact for several months. She confirmed that they started dating again in the spring of 2013.
- [21] There is no dispute that Mr. Smith moved into Ms. Cartwright's residence on September 1, 2013, but the various problems in their relationship referred to above surfaced fairly rapidly thereafter. The parties agree that the failure of Shine-On Chrome placed tremendous strain on them, and Ms. Cartwright testified that, by degrees, she realised that Mr. Smith was not the man she thought he was. He did not pay rent as agreed, or help with household expenses in any appreciable way. He did not pull his weight at Shine-On Chrome, leaving her and the other participants to deal with the mess, and as the business foundered he reprised his old habit of threatening break-ups at the drop of a hat.
- [22] According to Ms. Cartwright, the parties ceased having any sort of sexual relations by the end of summer 2014, and the parties split up in April 2015. She said that it was Mr. Smith who first announced the end of their relationship. Things moved quickly after that. Ms. Cartwright resolved, as I have said, to relocate and leave Mr. Smith behind. Mr. Smith claimed that, as far as he was concerned, a marriage-like relationship persisted until February 2016, when Ms. Cartwright finally moved to Vancouver, but I reject this contention. However the parties' relationship might be characterised, the evidence establishes that it was entirely defunct by the early spring of 2015.

- [23] Throughout the time that the parties cohabitated, according to Ms. Cartwright, Mr. Smith paid only \$500 in rent. This was in September 2013 just after he moved in. He paid no rent and only minimal expenses between October 2013 and the breakdown of the parties' relationship in April 2015. After that, Ms. Cartwright insisted that he should at least pay something. Mr. Smith agreed but, by his own admission, he failed to perform. He said that every spare penny he had was sunk into Shine-On Chrome. Ms. Cartwright continued paying almost all of the household bills and expenses.
- [24] When Ms. Cartwright moved to Vancouver in February of 2016, she agreed that Mr. Smith could remain in her residence as a renter. Mr. Smith committed to pay \$700 in rent for the basement suite of the house, or \$500 if he took care of the garden and landscaping. There is no doubt about this. Mr. Smith confirmed that this was the deal. He conceded, as well, that over the period February 1, 2016, to September 19, 2016, he paid a grand total \$850 in rent and did no work in the garden, which was left to go to seed. I was shown the photographs to prove it.
- [25] Eventually, in September 2016, Ms. Cartwright ordered Mr. Smith to vacate the premises but he refused, saying the house was his and he had a right to live there. She finally turned him out by removing his property from the basement suite while he was at work. She found the place in a foul mess. It looked like it had not been lived in for months. There were dirty dishes strewn about. There was rotten food left on counter-tops and in the fridge. There had been an infestation of bugs. There was sodden, decomposed clothing in the washing machine.
- [26] Ms. Cartwright's evidence about this, I should stress, was corroborated by a friend who helped her clean up the suite. It was not denied by Mr. Smith, either, but nevertheless he lodged a complaint against Ms. Cartwright before the Residential Tenancy Branch claiming damages for wrongful eviction and damage to his property. When Ms. Cartwright testified about this, Mr. Smith leapt to his feet and, in an effort to control the damage, I thought, he announced that he would not be pursuing that claim. Whether or not he ultimately abandons it remains to be seen.

## DISCUSSION

- [27] I intend to make reasonably short work of this. On the issue of marriage-like relationships, cases such as *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376, *Austin v. Goerz*, 2007 BCCA 586, *Weber v. Leclerc*, 2015 BCCA 492, and *Dey v. Blackett*, 2018 BCSC 244 must be taken as read. To qualify as a "spouse" for the purposes of property division under Part 5 of the Act, a "marriage-like" commitment must be combined with sufficient evidence of two years of continuous cohabitation. The FLA has no application to more transitory connections: *Parke v. Veale*, 2015 BCSC 2554 at para. 79.

- [28] Overall, I was impressed by Ms. Cartwright's presentation in court and I accept her evidence more or less entirely. I'm afraid that I haven't anything like the same confidence in Mr. Smith's credibility or reliability, and while I am prepared to accept some of the things he said, wherever his evidence conflicts with Ms. Cartwright's, I prefer the latter by a reasonably wide margin.
- [29] In my view, it has not been proved on a balance of probabilities that Mr. Smith was ever Ms. Cartwright's spouse. I conclude that, during the period between August 2009 and August of 2012, the parties were in a casual dating relationship. They did not live together but kept separate residences. Their finances were not integrated. They had no joint accounts or assets. They did not refer to one another as husband and wife or exhibit any other trappings of a marriage-like relationship. There was nothing at all about their relationship indicating an economic or emotional union akin to marriage.
- [30] In any event, in August of 2012 the parties split up. Their joint intention was to separate permanently. From Mr. Smith's perspective, this separation was brought on by his cancer diagnosis and his desire to confront this crisis by himself. In my view, this amounted to an open and express avowal by Mr. Smith that, contrary to his position taken at trial, in late August 2012 he did not consider himself to be in the midst of a union that persisted, like a marriage, through illness or other serious personal tribulations. Furthermore, even if the parties had been in a marriage-like relationship since the spring of 2011 as Mr. Smith's contends, their mutual intention to separate permanently in August 2012 definitively stopped the clock well before two consecutive years had elapsed, preventing him from qualifying as a "spouse" under s. 3(1)(b)(i) of the Act.
- [31] The parties started dating casually once again in April of 2013, followed by cohabitation as of September 1, 2013. However, I accept Ms. Cartwright's evidence that moving in together was a trial run to see how things would go, and the permanence of the arrangement would be dependant, as it were, on Mr. Smith's performance. I find, to put it bluntly, that it was an experiment that failed spectacularly almost from the beginning. While it is clear that for a comparatively short time, the parties lived together, had sexual relations, shared the same bedroom, and so on, their relationship soured very quickly and was decisively terminated in the spring of 2015.
- [32] For emphasis, I conclude that the parties were never involved in a marriage-like relationship at any time. Even if it were assumed that such a relationship started on September 1, 2013, when the parties began cohabitation, it ended well before the expiry of two years thereafter, once again preventing the claimant from qualifying as a "spouse" under s. 3(1)(b)(i) of the Act. Mr. Smith's claim to a division of Ms. Cartwright's property under Part 5 of the Act is therefore dismissed.

## COUNTERCLAIM

- [33] Pursuant to R.4-4(7) of the Supreme Court Family Rules, Ms. Cartwright's counterclaim for unpaid rent may proceed despite my dismissal of Mr. Smith's family claim. I accept that the parties came to terms about the payment of rent when Mr. Smith first moved in on September 1, 2013, and then again in February 2016, when Ms. Cartwright moved to Vancouver and Mr. Smith relocated to the basement suite.
- [34] Mr. Smith does not suggest Ms. Cartwright welcomed him into her home to live absolutely expense free. To the contrary, he agreed in evidence that he was expected to pay rent. I accept that Ms. Cartwright set the amount at \$1,000 per month but that, from September 1, 2013, until February 1, 2016, Mr. Smith only paid a total of \$500.
- [35] I do not believe Mr. Smith's evidence that he paid more than this, and I would note once again his failure to produce any evidence to prove that he did. I accept Ms. Cartwright's evidence about the very small and sporadic amounts of money that he contributed to the household over the years. Mr. Smith himself agreed that, after Ms. Cartwright moved to Vancouver, he only paid a total of \$850 in rent and failed to look after the garden, in which case the agreement was that he should pay \$700 per month to live in the basement suite. In my view, this was merely the continuation of a firmly entrenched and long-standing pattern of free-loading behaviour.
- [36] In the end, I am satisfied that Mr. Smith lived in Ms. Cartwright's residence for over three years during which he paid a grand total of \$1,350 in rent. I am prepared to accept that he contributed, here and there, to household expenses, but I do not think those contributions amounted to much. The documentary evidence about these matters is lacking, but I must do my best with the materials before me. In brief terms, I accept Ms. Cartwright's testimonial evidence that Mr. Smith agreed to pay \$1,000 per month from September 1, 2013, to February 1, 2016. This amounts to a total of \$29,000 for 29 months of accommodation. That was followed by eight months in the basement suite at \$700 per month, which adds \$5,600 to the total. Subtracting the \$1,350 that Ms. Cartwright acknowledges was paid, there is a cumulative total of \$33,250 in arrears of rent.
- [37] To put a decisive end to all matters between these parties, I will accept Mr. Smith's evidence that he put in approximately 250 hours of work on the various renovations to Ms. Cartwright's house. At the rate of \$30 per hour, which Mr. Smith conceded is slightly more than the present day wage of a journeyman carpenter, this amounts to a sum of \$7,500. Ms. Cartwright not only agreed that this amount should be deducted from her counterclaim award, but also that the off-set should be rounded up to an even \$10,000 to account for occasional bills that Mr. Smith likely paid during cohabitation. This was a sensible position for Ms. Cartwright to take and I endorse it.

**DISPOSITION**

[38] In summary, Mr. Smith's claim is dismissed. Ms. Cartwright's counterclaim is allowed, and I hereby grant her judgment thereunder in the amount of \$23,250. In my view Ms. Cartwright has been successful on both claim and counterclaim and is entitled to ordinary costs throughout.

"Baird J."

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