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CANADA / JUDGMENT

## Williams v. Killey

2014 BCSC 1846

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 1846 Williams v. Killey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Williams v. Killey,

2014 BCSC 1846

Date: 20141001

Docket: E043054

Registry: New Westminster

Between:

Danielle Dawn Williams

Claimant

And

Daniel James Killey

Respondent

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for Claimant:

M.C. de Guzman

Counsel for Respondent:

E.C. Walker

**Place and Dates of Trial:**

New Westminster, B.C.

February 24-28, 2014

**Place and Date of Judgment:**

New Westminster, B.C.

October 1, 2014

**Background**

- [1] This is a claim arising out of a three-and-one-half year relationship of living together which the claimant alleges constituted a common-law relationship entitling her to remedies under the Family Law Act, S.B.C. 2011, c. 25, ("the FLA") while the respondent denies that it constituted a common law relationship of at least two years.
- [2] The parties began living together on June 1, 2009 and separated November 1, 2012.
- [3] There are no children of the relationship. The claimant was 27 years of age at the beginning of the relationship and 30 years of age at separation.
- [4] The respondent was 32 years of age at the beginning of the relationship and 36 years at separation.
- [5] The claimant moved into the respondent's townhome at the beginning of the relationship on June 1, 2009.
- [6] The FLA came into effect on March 18, 2013 so this relationship ended between the parties before the Act came into force.
- [7] The claimant commenced her claim on January 22, 2013 prior to the FLA coming into force, but amended her Notice of Family Claim to make a claim under the FLA on May 30, 2013, pursuant to an order of the court.
- [8] In her amended Notice of Family Claim, she seeks under the FLA a spousal support order of \$800 per month, an equal division of family property and family debt under the FLA, and an order for entitlement to the respondent's pension benefits.
- [9] The respondent pleads that he has a vested right to have the claimant's claims determined on the laws as they stood at the time of separation, or on the commencement of this proceeding, or at the latest, on the filing of his counterclaim on March 11, 2013. He denies the FLA applies at all to this claim and pleads alternatively that if it does it apply, he should be entitled to re-apportionment of the family property in his favour under the FLA.

- [10] In his counterclaim he alleges an interest in the townhome, the personal property of the claimant, household contents, vehicles registered in her name, an interest in her bank accounts and other financial accounts, as well as any other assets of hers, including gifts to her from him.
- [11] In final submissions however, the positions of the parties have changed markedly from their pleadings.
- [12] Both parties now agree that Part 5 of the FLA dealing with property division applies to the claims made by the claimant, as a result of the decision of Madam Justice Hyslop in *Meservy v. Field*, 2013 BCSC 2378, that also dealt with a relationship that ended before the FLA came into effect on March 18, 2013. That claim resulted in a declaration that Part 5 of the FLA was applicable to the proceeding. In that judgment, Madam Justice Hyslop noted that the definition of "spouse" in the FLA includes former spouses.
- [13] The parties in this proceeding consent to a declaration that Part 5 of the FLA is applicable to this proceeding and I make that declaration.
- [14] The parties also agree that the assets to be considered by the court are the townhome owned by the respondent, his RRSPs and his vehicle.
- [15] The claimant seeks 25%-30% of these assets as well as lump sum support for three years from separation at the mid-range of support of \$11,631.
- [16] The parties agree for spousal support purposes the respondent's income should be considered at \$147,075 and the claimant's income at \$46,000.
- [17] The respondent submits that a declaration should be made that the parties only entered into a marriage-like relationship on January 1, 2011, and the claimant does not therefore have the necessary standing to claim relief under the Family Relations Act, R.S.B.C. 1996, c. 128 ("the FRA") because she did not live with the respondent in a marriage-like relationship for a continuous period of at least two years, as s. 3 of the FLA requires, prior to their separation on November 1, 2012.
- [18] Alternatively, he submits that if the two year period has been met then the growth in value of his assets should be apportioned entirely in his favour, or the claimant should only be entitled to \$10,800, being 10% of the growth in the value of his townhome, and her other claims should be dismissed including her spousal support claim because it should be subsumed in her share of his assets.
- [19] Finally, he alternatively submits that any spousal support claim of hers should be limited to a lump sum amount of \$5,000.
- [20] He agrees as well that all the claimant's assets at separation should be apportioned entirely in her favour if reapportionment should apply, and he makes no counter claim against them under the principle of unjust enrichment.

[21] I allow the amendment to the respondent's pleading to contest whether the parties were in a marriage-like relationship for a continuous period of two years.

Provisions of the FLA

[22] The provisions of the FLA relevant to the circumstances are:

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

(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,

(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;

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.

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

(a) on the date the spouses separate,

(i) property that is owned by at least one spouse

(2) Without limiting subsection (1), family property includes the following:

(d) money of a spouse in an account with a financial institution;

(e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;

(g) the amount by which the value of excluded property has increased since the later of the date

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both,
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
  - (a) the duration of the relationship between the spouses;
  - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

96 The Supreme Court must not order a division of excluded property unless

- (b) it would be significantly unfair not to divide excluded property on consideration of
  - (i) the duration of the relationship between the spouses, and
  - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

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].

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;

## Evidence of the parties

### The claimant's evidence

- [23] The claimant was 31 years of age at trial. It is her evidence that she met the respondent online in April 2009, commenced dating him and moved into his residence on June 1, 2009 when he gave her a set of keys to his place.
- [24] She says that both occupied the master bedroom until almost the last days of their relationship.
- [25] She says they both wanted a serious relationship, they travelled extensively through the years 2009-2012, including to Ontario to meet his parents, to meet her family, to places in the United States, over to England, and to Australia.
- [26] She says she introduced the respondent to her parents as her boyfriend in May 2009 and at some point thereafter presented him as her spouse, although she agrees they never referred to each other as husband and wife.
- [27] Throughout all of their travels she says they basically split the costs of their trips.
- [28] She says that in the period January-March 2010 when the respondent was on a five week trip to South America while she remained at home for work purposes, they discussed marriage for the first time by Skype and he said they would get married the following summer in 2011 for sure.
- [29] On Valentine's Day, February 14, 2010, he sent her a Happy Valentine's Day email in which he said:

I am sorry that I am away from our first V-day, however I know this is but one a lifetime of days and that we will survive being apart this one time.

I meant what I said during my drunkenness, that we are on a great path to a promising future.

- [30] In October-November 2010 he asked her for her social insurance number to add her to his extended health benefits package as an additional beneficiary, and in January 2011, he did add her.
- [31] On February 5, 2011, the claimant says they had dinner out and discussed marriage and a family. She says they agreed to wait until they returned from Australia in December 2011 for six weeks. She says they knew they were in a committed relationship and all that was missing was the marriage certificate and therefore marriage assumed less importance as time went on. I accept her evidence on this issue.

### The respondent's evidence

- [32] The respondent purchased his townhome in 2006 and says between 2006 and 2012 there were no significant renovations that took place.

- [33] He confirms he met the claimant in April 2009 and says he never had a girlfriend live with him before meeting her.
- [34] He confirms he and the claimant shared most household expenses although he says he contributed much more than she did.
- [35] He confirms he put the claimant on his extended health benefits plan through his employment and accepts that the requirements for that were that the beneficiary had to be a spouse legally married or to have lived common-law and publicly presented as a spouse or partner for 12 months or longer. However, he says he never read these requirements at that time.
- [36] He denies he ever referred to the claimant as his wife and he denies when he was in South America in January-March 2010 that they talked on Skype about marriage at all, although he says they did talk about their relationship going well.
- [37] He says he has no recollection of discussing marriage in February 2011 with her and no memory of any dinner on February 5, 2011.
- [38] He confirms that they took a number of trips together.
- [39] He says when they started dating they both saw marriage and children developing through their relationship but that all ended at separation.

### Analysis and decision

- [40] The major issue in this case is whether the parties were in a common law relationship for a period of at least two years prior to separation.
- [41] Claimant's counsel relies upon the judgment of Madam Justice Huddart in *Takacs and Boucher v. Gallo* (1998), 157 D.L.R. (4th) 623 where she adopted the seven part test of "spouse" set out in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.)
- [42] However, I observe that on this issue Madam Justice Huddart was in dissent as Madam Justice Newbury, with Chief Justice McEachern concurring, said she read the comments of Lambert J.A. in *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264, differently than had Madam Justice Huddart.
- [43] In her judgment, Madam Justice Huddart said as follows:

The test developed by Mr. Justice Lambert in *Gostlin* has two aspects. The first is the couple's subjective intention. At 267-68, he commented:

So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that

partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.

The second is an objective test, set out at 268:

Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement?

[44] On this issue, Madam Justice Newbury said as follows:

The starting point in this province for the analysis required in cases of this kind is the judgment of this court in *Gostlin v. Kergin* (1986) 3 B.C.L.R. (2d) 264, and in particular, the comments of Lambert J.A. at 267-8 which are quoted in Madam Justice Huddart's judgment. I read those comments as focussing first on the intentions of the parties to live "as husband and wife", or in a marriage-like relationship. Such an intention may or may not include financial dependence. The various "objective indicators" referred to in *Gostlin* were advanced as a means of divining those subjective intentions where the latter "prove elusive". By the same token, of course, subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such. (para. 53)

Madam Justice Huddart analyzes *Fitton* as departing somewhat from *Gostlin* and as exemplifying the fact that financial intertwining and dependency between a couple may be sufficient to lead to the inference that the relationship is marriage-like "even in circumstances where neither party intended a lifetime commitment." With respect, I do not think *Fitton* fairly bears that interpretation, nor that the Court intended to depart from *Gostlin* and its recognition that persons living together should not be forced into mutual commitments they do not want or intend. Braidwood J.A. referred at several points in his judgment in *Fitton* to the parties' intentions and indeed his conclusion on the first branch of the statutory definition was that they had "intended throughout the relevant period to live together as husband and wife". He then turned to the second question arising under the Yukon statute, namely whether the appellant had been dependent upon the deceased for maintenance and support. He found the trial judge had erred in the test he applied on this branch. That test had been expressed by the trial judge as follows:

But it is certain in this case that the plaintiff did not depend upon the deceased for her living expenses at any time. I am quite sure that if either the plaintiff or the deceased, when he was alive, had been asked whether one would look after the other in ill health or other change in circumstances, the answer would have been "No." [at para. 32]

The Court in *Fitton* was of the opinion that dependence does not require an applicant to prove that "without the support of her partner during the period of cohabitation she would have been seriously deprived or even destitute." [at para. 37] (para. 54)

In both *Gostlin* and *Fitton*, the question of whether persons were living together as spouses notwithstanding that they were not legally married involved the court in an examination of their intentions and not simply an objective assessment of whether their financial and living arrangements were "intertwined". If the Legislature had intended the latter, it would have been an easy matter to so state. Objective factors will of course be relevant to determine the parties' intentions as Lambert J.A. noted in *Gostlin* but those factors will rarely be determinative in and of themselves. Many combinations of people may live together and meet many of the criteria set forth in *Molodowich v. Penttinen* (1980) 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), but without intending or in fact entering the kind of psychological and emotional union that one associates with marriage. (para. 55)

[45] In addition in *Austin v. Goerz*, 2007 BCCA 586, Frankel J.A. stated at para. 58:

It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages.

[46] He went on to quote from *Yakiwchuk v. Oaks*, 2003 SKQB 124:

[10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people

begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.

- [47] In the respondent's written submissions after trial, he expressed the view that his relationship with the claimant became marriage like when the parties planned their only major expense together, their trip to Australia, in December 2010/January 2011, commencing a marriage like relationship of less than two years before separation.
- [48] The parties met in April 2009 and the claimant moved into the respondent's townhome on July 1, 2009 when he gave her a set of keys to the premises.
- [49] They lived together in his townhome continuously from June 1, 2009 to separation on November 1, 2012.
- [50] They shared the master bedroom at all times and the claimant says they both wanted a serious relationship. I accept her evidence on this issue.
- [51] They travelled extensively through the years 2009-2012 and introduced each other to their families and friends.
- [52] Australia was not the first big trip to be taken by the couple. It is the claimant's evidence that in June 2009 they travelled to Toronto, in July 2009 to Las Vegas, and in October 2009 to England for two-and-a-half weeks.
- [53] There is no evidence that they were unfaithful to each other for any of the period of time between June 1, 2009 and November 1, 2012.
- [54] At some point, the claimant presented the respondent to others as her spouse. I accept her evidence in this regard as well.
- [55] I accept her evidence that they discussed marriage for the first time by Skype in the period January-March 2010 when the respondent was in South America. During that conversation, the respondent told the claimant that they would get married the following summer in 2011 for sure.
- [56] In that same time period, he sent her a Valentine's card on February 14, 2010 in which he said "it is but one of a lifetime of days (apart)" and "we are on a great path to a promising future".
- [57] This attitude of both was cemented further when the respondent enrolled her in his extended health benefits package as a beneficiary. He obtained her social insurance number for that purpose in October 2010 and made her a beneficiary in January 2011.

- [58] On February 5, 2011, the claimant says they discussed marriage and a family at a dinner out and I accept her evidence on this issue as well.
- [59] Finally, I accept both of their evidence that they saw marriage and children developing through the relationship when they first started dating.
- [60] I consider their marriage like relationship began soon after the claimant moved into his townhome on June 1, 2009 and they commenced a continuous common law relationship thereafter of approximately three and one-half years prior to separation on November 1, 2012.

## Property Division

- [61] The assets to consider for division under s. 95 of the FLA, either by way of equal division or unequal division, are the net values of the respondent's townhome, his RRSPs, and his vehicle.
- [62] Section 85 of the FLA excludes from consideration property acquired by a spouse prior to the relationship between the spouses beginning, while s. 84(2)(g) modifies that somewhat by including within family property the amount by which the value of excluded property has increased since the later of the date the relationship between the spouses began or the excluded property was acquired.
- [63] On the evidence the respondent's townhome, his RRSPs, and presumably his vehicle as well, were all acquired prior to the common law relationship beginning with the claimant. Therefore all are excluded property.
- [64] Applying s. 84(2)(g) to these assets, the parties agree the townhome increased in net equity by \$107,173 during their relationship, and the RRSPs increased in value by \$96,661.
- [65] There is no evidence of any increase in the value of the respondent's vehicle during their relationship so I will not consider that item as part of excluded property for consideration.
- [66] His vehicle had a fair market value as at November 1, 2012 of \$17,000 with no evidence of its original purchase price. It is a safe assumption by the make of the vehicle that it was worth a lot more when it was first purchased and actually lost value during the relationship.
- [67] Section 95 is the re-apportionment section of the FLA. Here under s. (a), the duration of the common law relationship between the parties is to be considered, which was approximately three and one-half years. Under s. (i), the only other factor applicable would appear to be one that results in significant unfairness.
- [68] The respondent's cases I consider to be a lot more helpful than the claimant's cases and they put the contribution of a spouse in a short term relationship as being valued at 10-15% of property.

- [69] The claimant here did contribute significantly to the household expenses and to the preservation and maintenance of the townhome. I consider it would be significantly unfair to her for her efforts to be denied any part of the increase in the townhome which was due only to market forces while she resided there.
- [70] I award the claimant 15% of the \$107,173 increase in net value of the townhome during their relationship time. The amount awarded for the increase is \$16,075.95.
- [71] RRSPs are family property by virtue of s. 84(2)(e). The respondent's RRSPs were acquired prior to the relationship so s. 85(1) is also applicable to the RRSPs as excluded property.
- [72] However, again, s. 84(2)(g) takes into account any increase in excluded property during the relationship for the purpose of division and brings into play as well s. 95 for re-apportion purposes.
- [73] While the respondent's RRSPs increased in value by \$96,661 during the relationship, during that same period of time the evidence is that he contributed over \$85,000 to his RRSPs.
- [74] In these circumstances, I apportion the RRSPs 100% to the respondent.
- [75] In terms of expenses on the home front, the claimant says they never had any actual verbal agreement about what each would pay of expenses. She says the general understanding was he would pay their housing costs and she would pay for trips, vacations and entertainment. She says he was responsible for the outside of the townhome and she took care of the majority of the inside.
- [76] She says he did not eat breakfast and bought his own lunch, but they had dinner together three or four times per week when work for both did not interfere.
- [77] She says they attended all his company parties together and all their family affairs together.
- [78] The respondent paid the mortgage and strata fees and property insurance and taxes as well as the utility fees but she says he always referred to the townhome as "our house". I accept this evidence.
- [79] They did have a housekeeper for a period of time and he paid for that as well.
- [80] They never opened a joint bank account or had a joint credit card and they never discussed their individual investments.
- [81] They never discussed what each made by way of income and they never declared each other as "spouse" on their tax returns.
- [82] The claimant says that they bought each other gifts and confided in each other and comforted each other when sick. I accept this evidence.
- [83] She has gone through her financial records and determined that in 2011 she paid expenses for the two of them of \$19,462.23 and in 2012 \$16,657.10.

[84] She says the respondent contributed \$17,623.56 in 2011 and \$6,005.02 in 2012. I accept that the respondent contributed much more than these amounts in those years.

### Spousal support

[85] The claimant continued to work at her chosen employment during the length of the relationship. She did not suffer any adverse economic consequences to that employment from the relationship.

[86] She was offered two other positions outside of her normal employment, that were slightly more remunerative. However she did not take up either of these positions in order to remain near the respondent.

[87] While this might be considered an economic disadvantage arising from the relationship, it is at most a very minor disadvantage.

[88] In all the circumstances I award a lump sum amount of \$10,000.

"The Honourable Mr. Justice Truscott"

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