
CANADA / JUDGMENT

Wolfman-Stotland v. Stotland

2011 BCSC 499

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Supreme Court of British Columbia

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2011 BCSC 499 Wolfman-Stotland v. Stotland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wolfman-Stotland v. Stotland,

2011 BCSC 499

Date: 20110208

Docket: E102660

Registry: Vancouver

Between:

Lillian Wolfman-Stotland

Claimant

And:

Hyman Stotland

Respondent

Before: The Honourable Madam Justice Maisonville

Oral Reasons for Judgment

Counsel for the Claimant:

Z. Jimale

Counsel for the Respondent:

D. Marzban Q.C.

Place and Date of Hearing:

Vancouver, B.C.

February 8, 2011

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Vancouver, B.C.

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- [1] THE COURT: I want to thank both counsel for their submissions in this matter. These are my oral reasons. I reserve the right to edit them for grammar and for citations and things of that nature, but I can ensure that the substance of the decision will not change.

Introduction

- [2] Lillian Wolfman-Stotland and Hyman Stotland were married in May 1954. Lillian Stotland met Mr. Stotland, who was a women's fashion sales representative when she was employed at Sandra's of Vancouver, a women's fashion store that used to operate on Broadway near MacDonald in the Kitsilano neighbourhood of Vancouver. They lived for a number of years in Montreal until they left in 1971, coming back to Vancouver where they lived at Langara Gardens together.
- [3] Mr. Stotland is now 93 years of age. Ms. Stotland is 92. She has been resident in the Louis Brier care facility since 2001 approximately. Mr. Stotland lives in the complex in the Weinberg Residence.

Application Before the Court

- [4] The claimant, Ms. Stotland, is before the Court today seeking a declaration pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 that the parties have no reasonable prospect of reconciliation. She is also seeking her costs in this matter. This matter was before this Court on December 3, 2010, and at that time, Madam Justice Lynn Smith ordered that Ms. Stotland be examined by a qualified medical practitioner to determine, amongst other things, whether she had the capacity to form an intention to live separate and apart. Jointly, counsel sent a retaining letter along to a physician.

Issue Before the Court

- [5] The issue before the Court today is whether the claimant, Ms. Stotland has the capacity to form an intention to live separate and apart pursuant to s. 57 of the Family Relations Act and whether on the evidence she has shown there is no reasonable prospect that the parties can reconcile.

Position of the Parties

- [6] Counsel for Ms. Stotland claims that she both has the capacity to form the intention to live separate and apart and has demonstrated there is no reasonable prospect of reconciliation. Counsel for Mr. Stotland disputes that assertion.

Report of Dr. Sloan

- [7] Before the Court was the report of Dr. John P. Sloan, who, as noted, was retained jointly by the counsel for the parties, who examined Ms. Stotland on December 29, 2010 at the Louis Brier facilities. Dr. Sloan is a physician experienced in evaluating the capabilities in older persons, as set out in his report. He has vast experience in geriatric care. I am satisfied he has the requisite expertise to form the opinion that was sought by the Court to guide any decision in this area.
- [8] He performed dementia screening upon Ms. Stotland and specifically the Montreal Cognitive Assessment. Her score was 16 out of 30, which represents, according to Dr. Sloan, for someone of Ms. Stotland's age and life achievements, mild to moderate cognitive impairment. Performance was markedly impaired, as he noted in his report, in certain areas, and in particular markedly impaired on tests of visual, spatial and executive function calculation and delayed recall and curiously remarkably normal for tests of orientation and straightforward repetition.
- [9] She had little knowledge of the Trust that came in issue before the Court today, insofar as it was described to be one of the driving forces of this application, and this Trust had been established by her husband to provide finances for the two of them. It was described by Dr. Sloan to her. She was unable to describe various elements of it however. Counsel for Ms. Stotland indicated that that was simply a function of her never having been much aware of the Trust. However, she was also unable to describe her real diagnosis and following a description of her simply falling and breaking her leg, she was unable to describe anything further without crying.
- [10] She was questioned on when the marriage changed. She was unclear, and then she said, "20 to 30 years ago." She spent much of the time, apparently, describing an operation purportedly done on Mr. Stotland when he apparently bled for some three days, as is noted in the report of Dr. Sloan.
- [11] After being questioned, again, by Dr. Sloan on the reasons for the divorce, she refused to provide any more answers to any questions about it. While she knew that the divorce was "when you legally end a marriage," she appeared to be doing so, from what counsel for Ms. Stotland conceded, was flawed information. Namely, she was seeking the divorce because her nephew, Gerald, whom I understand from his sworn affidavit filed in these proceedings is a lawyer in Montreal, would get her estate.

- [12] What would, in fact, happen, is that if her husband dies, she continues to receive from the Trust. On the death of the two parties, it goes to certain charities and then the remainder is divided three ways: two shares to two of Mr. Stotland's nephews (Gerald, of whom is one); and one share goes to Ms. Stotland's half brother, Wilfred Wolfman.
- [13] Importantly, when Ms. Stotland was asked "if Gerald were gone (deceased for example)" she told Dr. Sloan that there would no longer a need to proceed with the divorce. Counsel for Mr. Stotland argued this must be considered when looking to any reasonable prospect of reconciliation, as clearly if that was not in issue, there would be a prospect of reconciliation.
- [14] The Trust referred to in these proceedings is no longer managed by the respondent, Hyman Stotland, and is instead managed by others. Set up in 2003, in May 2003, the trustees became John Blackmore of Solus Trust Co. Ltd., Gerald Stotland, Norma Stotland, Wilfred and Aaron Wolfman, as set out in the Trust document which is before the Court. As noted, it provided Ms. Stotland with a life interest.
- [15] Someone at some point had told Ms. Stotland that Gerald Stotland had taken \$20,000 and instead of that being applied for school fees, it went to a bar mitzvah. He denies this in an affidavit filed with the court. This, however, seems to have disturbed Ms. Stotland and is one of the key reasons for her not being content with Gerald taking anything in these proceedings. Although as noted, that is not the way that the instruments function.
- [16] In the materials before the Court, Dr. Sloan found, in any event, respecting her capacity to appreciate the nature and consequences of abandoning the marital relationship:

I asked specifically why she wishes to divorce her husband now. She replied, if he passes away first, Gerald will take over and he's sneaky. He will come in and take over. I asked her to clarify that her only reason for divorcing is to get away from the influence of her husband's nephew Gerald. She said, yes. I asked whether she has decided on a divorce as a means of doing this on someone else's advice, and she said that she had decided herself. I asked whether anyone had suggested to her any other way she could escape the influence of Gerald without divorcing her husband, and she said no. She said she thought that was the only way.

[17] And again as noted, it is clear that her reasons for wanting a divorce are flawed.

[18] Dr. Sloan goes on to state at page 9 of his report:

Lillian Wolfman-Stotland showed several important deficiencies in her mental functioning based on simple testing and interview on the date of my examination. She consistently made errors in tests of visual spatial ability, which correlates with the domain of functioning called "executive function." This includes planning and multi-tasking. She calculated poorly. Her short-term recall was poor or absent. Her conversation was often tangential and sometimes answers had no relationship to the question, which means her thinking was to some extent disorganized.

[19] At page 10 of his report, he stated:

In my opinion, impairment of the brain and frontal lobe function is likelier than delirium as a cause for these impairments. The impairments I observed are at least moderate in severity.

[20] In respect of her capability formulation, he stated:

Ms. Wolfman-Stotland knows some specifics about her wealth but is vaguely informed or incorrect about most financial matters. She understands the Family Trust only partially and is not aware of the mechanisms of its administration. She can describe, however, although in simple terms only, how she would deal with suspicion about mismanagement of funds and approximately how she would arrange for funds held by herself to be administered. She has marked impairment of short-term memory, which would result in inability to deal with detail in financial matters but should also make it difficult for her to remember professional personnel, for example, whom she might delegate to keep track of her wealth. Also her lack of insight into her own limitations could lead --

and he noted in brackets:

-- (I would say eventually would lead) to errors in instructions to others and vulnerability to financial abuse.

[21] I note that as, an aside in these proceedings, it is not in dispute that Ms. Stotland has already been the victim of a fraud by a personal caregiver.

[22] Dr. Sloan goes on to note:

Divorce involves officially terminating a personal relationship, although that relationship might have ended long ago or might never have existed. In response to questions about the personal aspects of her marriage, she provided non-sequitur responses. On the other hand, she sometimes gave apparently wise generalities in discussing personal relationship.

[23] He gives an example, "affection changes":

Her tangential and disorganized thinking was most evident in discussing these issues. Because there is no factual basis against which to compare her understanding of the personal aspects of her marriage, I must estimate her ability to evaluate this from her measurable mental abilities and deficiencies and the nature of her conversation on the topic of marriage. I found her judgment, insight and thinking process deficient here and so conclude that she has impaired understanding in this area and so lacks the capacity to form the intention to live separate and apart. Questioning about the financial aspects of the divorce brought more coherent responses. She knew her mind about her husband's nephews and had formulated a plan which she believes would prevent them from gaining control of her finances. I am not provided with factual information to assess the likelihood of success of this plan or whether there is another strategy that would accomplish the same end perhaps more easily.

I conclude that Ms. Wolfman-Stotland had an apparently logically coherent plan and must assess her capacity to appreciate the nature and consequences of proceeding with it from her mental strengths and deficiencies found at my examination. Although memory and calculation

deficiencies might make understanding of the financial aspects of divorce difficult, Ms. Wolfman-Stotland's consistently in discussing what he intends to accomplish convinced me that she understands it. If this is true, she could also understand realistic information provided to her by a lawyer in the event that the plan that she has in mind is in some my impractical, although she might need to be reminded of that information. I believe it is likely that she has the capacity to instruct counsel on the matter of her divorce, limited to the financial aspects of the divorce.

[24] Ultimately Dr. Sloan concluded that Ms. Stotland had the capacity to instruct counsel in the matter of her divorce, as noted in the context of his report, and did not have the capacity to manage her financial affairs and did not have the capacity to inform the intention to live separate and apart from her husband, and had the capacity to appreciate the financial nature and consequences of abandoning her marital relationship.

[25] Overall, Dr. Sloan had found that she was suffering from dementia and accordingly he has reached his conclusions.

[26] Counsel for Ms. Stotland argues that the Court should, nonetheless, disregard Dr. Sloan's findings with respect to the intention to live separate and apart and make a finding that there has been such an intention formed. Starting with the presumption that adults have capacity, it was argued that she made a new will in February 2010, thus proving that she has testamentary capacity.

The Law

[27] The decision of Calvert (litigation guardian of) v. Calvert, 1997 CanLII 12096 (ON S.C.) Ontario Court General Division and from the Court of Appeal of Ontario, was cited as authority for the proposition that it is a very low threshold to form the necessary capacity to divorce. It is suggested by counsel that Ms. Stotland, while suffering dementia, that she meets that lower threshold.

[28] Counsel for Mr. Stotland, however, emphasized another aspect of the Calvert decision. The Ontario Court General Division at paragraph 61 held:

The real question is whether Mrs. Calvert understood what she was doing.

[29] And this is the same test before this Court. The real question is whether the claimant here understood what she was doing.

[30] In Calvert decision, the court continued:

The evidence of this is overwhelming. Every professional person who saw her before, at, and after the relevant time confirmed her capacity.

- [31] That evidence is non-existent in this case. The only evidence that we have in the case before the Court is the evidence of Dr. Sloan, who indicated that he believes that she suffers from a form of dementia which reduces her ability to form the capacity in the areas that I have described.
- [32] One of the leading cases in British Columbia is that of *M.K.O. (by his Litigation Guardian) v. M.E.C.*, 2005 BCSC 1051, which considered the capacity to obtain a divorce. There, at paragraphs 39 and 40, Mr. Justice Ehrcke stated in respect of s. 57 of the Family Relations Act as well:

39 Does M.O. have the intention of living separate and apart? He was called to give evidence in this trial. Neither party took issue with his competence to testify. Nevertheless, it was clear when he was on the witness stand that he was very confused. His examination-in-chief started with the question, "Who is your wife?" He replied, "Right now I don't have a wife, as far as I can remember." In cross-examination he was asked, "So do you know why you want to divorce [M.C.]?" He replied, "I can't remember that." I must conclude that he is currently incapable of deciding whether he wants a divorce or even whether he wants to be separated from M.C.

40 In the case of a patient who lacks capacity, however, it is not necessary to show a current intention. If M.O. had the intention to live separate and apart from M.C. and maintained that intention while he was still competent, then the finding of a one-year separation would still be possible even if he later became incompetent: See *Calvert (Litigation Guardian of) v. Calvert* [1997 CanLII 12096 (ON S.C.)], (1997), 27 R.F.L. (4th) 394 (Ont Gen. Div), *aff'd* 36 R.F.L. (4th) 169 (Ont C.A.).

- [33] That is not the evidence before this Court. The only evidence that we have in this matter is that Ms. Stotland attended at and went into the care facilities of Louis Brier in approximately 2001. According to the affidavit evidence of Mr. Stotland, it was possibly as early as 1999 or 2000. In any event, that was for reasons of health, not for reasons of a desire to live separate and apart.
- [34] Accordingly, the issue becomes whether at the present time one can find an intention to live separate and apart, and given the nature of the evidence from Dr. Sloan, that is one of the difficult questions before the Court.

- [35] Respecting s. 57 of the Family Relations Act, at paragraph 49, Mr. Justice Ehrcke stated:

49 Counsel for the plaintiff seeks, as an alternative to a divorce, a declaration under s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128, "that the spouses have no reasonable prospect of reconciliation with each other". He submits that a s. 57 declaration can be made simply on the basis that M.O.'s mental condition makes it impossible that the parties will ever resume their life together. He submits that a s. 57 declaration should be made in recognition of that practical reality, even if a divorce is not granted. He relies on *Dediluke v. Dediluke* (Public Trustee of), [2000] B.C.J. No. 590, 2000 BCSC 487; and *Finden v. Finden*, [1996] B.C.J. No. 215 (S.C.).

[36] At paragraph 50, Mr. Justice Ehrcke continued:

50 I cannot agree with that submission. In my view, since it has not been established that the parties are, or ever were, intentionally living separate and apart, it is impossible to make a declaration that they have no reasonable prospect of reconciliation with each other. When s. 57 speaks of the possibility of reconciliation, it means reconciliation of the kind of marital rift that could lead to a divorce. Without such a marital rift, s. 57 can have no application. Dediluke is distinguishable because in that case, the matrimonial proceedings were commenced by the spouse who was mentally competent; the hospitalized spouse was the respondent. Therefore, in Dediluke, unlike the present case, one of the parties had the intention to live separate and apart.

[37] He continued:

The plaintiff's application for a s. 57 declaration is refused. As neither an order for divorce nor a s. 57 declaration has been granted, the various requests for corollary relief under the Divorce Act and the Family Relations Act must also be dismissed.

[38] In *A.B. v. C.D.*, 2009 BCCA 200, a decision of our Court of Appeal, also considered a long term marriage in circumstances, though, different from here. In that case, there was a concession that the wife had the ability both to manage her affairs and instruct counsel. Here the report of Dr. Sloan, again, was clear that the claimant does not have the ability to manage her affairs.

[39] In *A.B. v. C.D.*, the wife left with the intention to live separate and apart, entirely different from the circumstances here. At page 8 at paragraph 33 of the Court of Appeal's decision, Madam Justice Smith stated:

33 The circumstances in this case are very different. Here, the husband concedes that the wife was mentally competent when she physically left the family home and therefore has the capacity to manage her own affairs and instruct counsel. He agrees that she continues to be mentally competent. The wife's family doctor confirms that admission. The husband also acknowledges that shortly before the wife left the family home, she had the capacity to hold a power of attorney for the benefit of his mother and to provide for her personal care. He further acknowledges that, since their physical separation, the wife has been functioning normally and appears to be content with her decision to live separate and apart. In addition, Dr. Elterman relates the rational reasons provided by the wife for her intention to leave the marriage.

[40] At paragraph 34, Smith J.A., for the court, continued:

34 In my view, the husband cannot meet the threshold requirement that the wife's mental condition (assuming she was found to be suffering from delusional disorder) is in issue in the proceeding. Given that the wife is mentally competent, she has a higher level of capacity than that required to form an intention to live separate and apart. As a result, the issue the husband seeks to raise in his statement of defence is not relevant to the issue of her intention to live separate and apart. Stated otherwise, there is no nexus between a determination that the wife is suffering from a delusional disorder and the issue of her capacity to form the intention to live

separate and apart, and such a determination would have no probative value. Her level of capacity, as admitted by the husband and confirmed by her family doctor, precludes any relevant deficiency in her capacity which the husband may seek to prove. The fact of the wife's mental competency forecloses the husband from challenging her statement that she intended to live separate and apart when she left the family home on March 28, 2007.

[41] Madam Justice Smith sets out the test at paragraph 35. She states:

35 Similar reasoning applies to the husband's challenge to the wife's application for a declaration under s. 57 of the FRA. If the wife is mentally competent to manage her own affairs and instruct counsel, then she has the capacity to form the belief that there is no possibility of reconciliation between herself and the husband.

[42] In conclusion, Madam Justice Smith stated:

In summary, disordered or delusional thinking which may contribute to an individual's intention to live separate and apart, does not diminish that individual's capacity to form that intention, provided it does not reach the level of incapacity that interferes with the ability to manage his or her own affairs and instruct counsel. In this case, there is no probative value to the evidence the husband seeks to obtain by his R. 30(1) application as the wife admittedly has the higher level of capacity to manage her own affairs. As a result, the wife's mental condition, even if she was found to be suffering from delusional disorder, cannot be an issue in the proceeding.

[43] The appeal was dismissed.

[44] In this case, however, there is a distinction. There is no issue that she was found on the evidence of Dr. Sloan to be suffering from dementia. The question becomes essentially does she understand what she is doing, and it apparently would not appear to be the case.

[45] That she has difficulty thinking clearly was also shown in the cross-examination of counsel on her affidavit in these proceedings. Her cross-examination on her affidavit was disjointed and frequently unresponsive and very difficult for the reporter to catch in terms of all of it, apparently, as there is much note of "unable to continue" in the proceedings and the proceedings are somewhat disjointed.

[46] At the question at which appears at Q. 59, the following question was put by counsel:

Q Okay. But did you -- okay. Do you know what an affidavit is?

A Right.

[47] Q. 60:

Q Do you know what that is?

A This is another thing I want to tell you. I phoned and I said I need some bank statements. I want to sign some cheques. Hy, said, how many cheques do you need? I said, no.

[48] Q. 61:

Q Okay. Let's stop for the answer.

A I want the whole book.

[49] Again, it is clear that her questioning was disjointed, that is but one example of the disjointed nature of the answers to the questions that were put to her on her affidavit.

[50] There is no question that up to the commencements of these proceedings that Mr. Stotland regularly visited the claimant. They played bingo together, and while she complained that he had an angry temper, the only actual complaint that she mentions in the evidence was that he fell "asleep playing bingo."

[51] In his affidavit, Mr. Stotland challenged anyone to come up with any evidence of him treating her in a manner that had been described by her, and that challenge was not met. There is no other evidence before the Court that she has the requisite ability to form the intention, although that has been in issue clearly since December.

[52] Mr. Stotland's sworn affidavit in these proceedings noted his devotion to her and her diagnosis of what one physician said was ALS in 1980. Thereafter Mr. Stotland sold his sales agency business to take care of her. She had special needs and could not get around without his assistance. He noted her fall hospitalizing her, which resulted in a long stay in the hospital for her.

[53] It is then, that he deposed, that she went to Louis Brier in about 1999 or 2000. He stayed in their apartment visiting her daily until his health deteriorated and he, too, secured an apartment in the Louis Brier complex, as noted three years ago. He described how Wilfred, her half brother, became an heir, and that was the result of discussion with Ms. Stotland that Wilfred be included. Because Wilfred was a bachelor and had expressed an intention to give his estate to someone outside of the family, they had arrived at the decision that Wilfred would only receive an annual income in his share from the Trust, and that is what is reflected in the documents that are before the Court.

[54] It is clear that Wilfred had arranged for her to see the attorneys, and Mr. Stotland deposes how Wilfred sought to persuade Ms. Stotland to change matters.

[55] There is no question on the evidence before the Court that Ms. Stotland lacks the necessary capacity as set out in the test in A.B. v. C.D. that would result in a s. 57 order. Unlike the case of A.B. v. C.D., there is definitely no ability of Ms. Stotland to manage her own affairs. Although there is the opinion of Dr. Sloan that she instruct counsel, she clearly does not meet the test set out of both managing her affairs and instructing counsel in any event.

[56] Accordingly the application is dismissed. I will hear counsel on costs.

[57] MR. MARZBAN: I'm not seeking costs when it's all coming out of the same pocket anyway.

[58] THE COURT: Yes. Thank you.

[59] MR. MARZBAN: Thank you.

[60] THE COURT: Thank you again, counsel.

[61] MS. JIMALE: Thank you, My Lady.

"Maisonville J."

The Honourable Madam Justice Maisonville

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