Separation and Termination of Marital Relationships in B.C.: Impacts on Estate Litigation and Administration

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There is an old *Seinfeld* episode ("The Strongbox") in which the character of George Costanza struggles to convince his girlfriend that they have actually broken up, and despairs that he may need to prove his case beyond a reasonable doubt. The girlfriend suggests that they are like the commanders of a nuclear submarine who must each "turn their keys" before launching missiles, prompting George to exclaim: "turn your key!". In the remainder of the episode, George resorts to a more outlandish scheme to end the relationship.

It will be no surprise that the law in British Columbia relating to marital breakdown is quite different. It is not required that both spouses "turn their key" to end the relationship; it is well-settled that only one spouse needs to form the necessary intention to end the relationship. However, the law requires additional action: the spouse must *communicate* his or her intention to separate or terminate the relationship, either verbally or though conduct, and in such a manner as to demonstrate the *settled intention* in a convincing and unequivocal manner: *H.S.S. v. S.H.D.*, 2016 BCSC 1300.

In regards to married couples, the key concept under both the *Wills, Estates and Succession Act* (*WESA*) and the *Family Law Act* is "separation": *Malacek v. Leiren*, 2021 BCSC 1052 at paras. 36-39. For common law marriages, or marriage-like relationships, the WESA uses a different term. Section 2(2)(*b*) of this statute provides: "Two persons cease being spouses of each other for the purposes of this Act if … in the case of a marriage-like relationship, one or both persons **terminate** the relationship". The B.C. Court of Appeal has held that, based on the legislative history, the "termination" of a marriage-like relationship is different than "separation": *Robledano v. Queano*, 2019 BCCA 150. There was a policy choice not to adopt a period of separation as the test for termination, but to focus on statements or acts that unilaterally and "instantly" terminate the relationship. Despite such dicta, a review of the caselaw shows that there is no discernable difference in the tests applied by the courts in B.C. to determine whether a "separation" or "termination" of a marriage-like relationship has occurred.

Most cases relating to separation or termination arise in the family law context. In such cases, there will be no dispute that a separation has occurred; the sole dispute is the

precise date of separation as that would bear upon the division of family property: *Price v. Price*, 2020 BCSC 1558; *Quirion v. Lovett*, 2022 BCSC 1693.

In the estates context, the dispute will focus on whether a separation or termination indeed occurred prior to the death of one of the "spouses", rather than the precise date: see *Mother 1 v. Solus Trust Company Limited*, 2021 BCCA 461. If such an event occurred, then the surviving (former) spouse would only be left with remedies under family law legislation, not the *WESA*. (On the interplay between the WESA and the *Family Law Act*, see *Weaver Estate v. Weaver*, 2022 BCCA 79, aff'g 2021 BCSC 881). The surviving ex-spouse would not have standing to bring a wills variation claim: *Lee v. Chau Estate*, 2021 BCCA 474. Any gifts to the ex-spouse, as well as any appointment as executor, may be revoked pursuant to s. 56 of the *WESA*. If there was an intestacy, the ex-spouse would receive no share of the estate pursuant to Part 3 of the *WESA*. Further, the separation would have automatically converted any joint ownership of property into a tenancy in common, so that (generally) 50% of assets that would have otherwise passed outside the estate to the surviving spouse now form part of the Deceased's estate. This factor may be extremely important for other parties, such as children of the Deceased, and may be a primary reason for pursuing a claim that a separation or termination occurred.

What exactly is the test for determining whether a separation or termination has occurred? The courts have stressed that, like the test for determining whether a spousal relationship exists, a "holistic" approach is required: *Robledano*. There is no checklist to follow. As a result, this area of law is fraught with unpredictability. In regards to the termination of marriage-like relationships, the courts have explicitly stated that it is "a rather imprecise and flexible legal standard" and ultimately a "judgment call" for the trial judge: *Robledano* at para. 55; *Knelsen Estate,* 2020 BCSC 134,

Despite such unpredictability, the courts have tried to provide some guidelines (but not a checklist) for determining whether a separation or termination has occurred: see *S.A.H. v. I.B.I.*, 2018 BCSC 544 at para. 55; *Sachdeva v. Sachdeva*, 2013 BCSC 313. A number of factors may be considered, with financial interdependence and sexual relations being given significant weight. However, the analysis is intensely fact-specific. A happy relationship is not a pre-requisite for an ongoing marriage, and the presence of intense conflict between the spouses does not necessarily mean that a separation or termination has occurred. The Court should review the entirety of the relationship over time, as that would indicate whether a significant change has occurred that may amount to a separation / termination. For instance, in *Tam v. Li*, 2022 BCSC 1412, the Court reviewed the history of the relationship to determine if certain events, such as the parties sleeping in separate bedrooms, would indicate that a separation had occurred. It was significant that the parties had not had an especially close relationship up to that point, to the extent that Ms. Li did not even know what her husband did for a living. They had no intimate conversations, and perhaps no sexual relations. In this context, the events of November 2014, when the parties moved into separate bedrooms to allow Ms. Li's adult son to move into the main bedroom, did not change much. Justice Matthews concluded that the date of separation did not occur until the summer of 2016 when Ms. Li returned to China for an extended period.

A thorough review of these principles can be found in the recent case of *Re Jadidian Estate; Razafsha v. Heidary,* 2022 BCSC 1357 (10 August 2022, Winteringham J.). The facts of the case are tragic, and involved the estate of Ms. Jadidian who committed

suicide in February 2020. The Deceased died intestate. The Deceased's sister did not recognize that the petitioner, Ms. Razafsha, and the Deceased were in a marriage-like relationship, and instructed her lawyer to obtain a grant of administration. The Court granted the petition filed by Ms. Razafsha to revoke the grant of administration, and made an order declaring that Ms. Razafsha was the "spouse" of the Deceased.

The Court first confirmed that the Deceased and Ms. Razafsha were in a marriage-like relationship for at least two years prior to February 2020. (As emphasized in *Robledano* and *Mother 1*, it would be an error for a court to focus exclusively on the two-year period prior to a spouse's death. The *WESA* only requires that the alleged spouses lived together in a marriage-like relationship for two years "but not necessarily for the two years immediately preceding the deceased's death". The issue then becomes whether there was a termination of the relationship). Justice Winteringham found "overwhelming" evidence of a marriage-like relationship. The Deceased and Ms. Razafsha purchased a house together in Coquitlam; Ms. Razafsha listed the Deceased as her spouse on income tax returns; and, there was a marriage ceremony in Cancun.

The Court then turned to the issue of whether the marriage-like relationship had terminated before February 2020. Drawing upon the cases noted above, Justice Winteringham took a broad and holistic approach to this issue, and ultimately found that there was no termination. Much of the evidence concerned the mental health challenges of the Deceased during these years. There were indeed various factors that supported a finding that a termination had occurred, but the Court held that they were outweighed by other factors. Winteringham J. made a "judgment call" that, on the balance of probabilities, the Deceased and Ms. Razafsha continued to be spouses. The Court found that neither the Deceased nor Ms. Razafsha had formed the requisite intention to terminate the marriage-like relationship. Accordingly, Ms. Razafsha was entitled to be appointed as administrator of the Deceased's estate and would be the sole beneficiary.

The result in *Re Jadidian Estate* illustrates the fact-specific nature of the analysis, and how difficult it can be to predict the outcome of a case. It also shows that there is no discernable difference in the legal tests for the "termination" of marriage-like relationships and a "separation" between married spouses. There were many factors, such as a signed "separation agreement" between the parties, that could have easily led to a conclusion that the marriage-like relationship had been terminated. Justice Winteringham, however, looked at the history of the relationship as a whole, including both subjective and objective factors. Taking this holistic approach, the Court held that "[r]elationships evolve and adapt according to the life circumstances of those involved". In this case, the marriage-like relationship had certainly bent due to the sad circumstances, but was not broken.

The "rather imprecise and flexible" approach to the issue of separation / termination creates a great deal of uncertainty in the administration of estates. Litigation may become inevitable to determine whether a party is a "spouse" with rights under the WESA to vary the terms of a will, or receive a share of the estate if there is an intestacy, or other circumstances.

By

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