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Family Law Newsletters

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— **Franks & Zalev - This Week in Family Law**

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Contents

- Cases About "Living Together" When You're Not Actually "Living Together"

Cases About "Living Together" When You're Not Actually "Living Together"

Estate of Bourque (2025), 20 R.F.L. (9th) 126 (N.W.T. S.C.) — S.M. MacPherson J.

Bourque was an application by Doraine Grener ("Doraine") for the administration of the estate of Vance David Bourque ("Vance"), the deceased. This was not a "Big Money" case. It was under an expedited process because the value of the estate was essentially nil. (There is an expedited process in the Northwest Territories for estates having a net value of less than \$35,000.) Doraine needed the administration to deal with the deceased's vehicle and issues related to credit card insurance.

A question arose, however, as to whether or not Doraine met the definition of "spouse" if they had not lived together in the same residence but had, in all other respects, conducted themselves as if they were in a committed spousal relationship. The materials filed by Doraine set out that she and Vance had lived together for 1 ¹/₄ years just prior to Vance's death.

In the Northwest Territories, a surviving spouse has priority to administer an estate under Rule 12(a) of the *Estate Administration Rules*, R-123-2016 (the "*Rules*"). The *Rules* adopt the definition of "spouse" as found under the *Family Law Act*, SNWET 1997, c. 18 (which will look strikingly similar to those of us who do not live in the Northwest Territories):

"spouse" means a person who

(a) is married to another person,

(b) has together with another person entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or

(c) has lived together in a conjugal relationship outside marriage with another person, if

(i) they have so lived for a period of at least two years, or

(ii) the relationship is one of some permanence and they are together the natural or adoptive parents of a child.

As Vance and Doraine were not married at the time of Vance's death and did not have a child together, the only basis for finding Doraine was a "spouse" was to find that they had been living together in a conjugal relationship for a period of at least two years. Initially, the application was denied as Doraine had set out that she had only lived with Vance for 1 ¹/₄ years. Further evidence was requested of Doraine to support her application.

Doraine argued that, while they had not "lived together" under the same roof for the whole period, she and Vance had nevertheless been in a committed conjugal relationship for over 20 years. The pair did not share a home because Doraine had a caregiving

role for her grandchildren and Vance's physical limitations required him to live in a single-floor dwelling. Doraine provided evidence that the pair:

- Shared a mailing address;
- Shared a bank account from 2018 onwards (though at one point Vance opened another account to facilitate making a truck payment);
- Shared a vehicle which they purchased together and maintained on insurance together; and
- Traveled extensively together, both domestically and internationally.

Doraine also submitted evidence from family and friends (including Vance's siblings) that she and Vance held themselves out as a couple to third parties.

The Court considered whether a couple could be "spouses" if they have not actually shared a physical residence for two years or more.

The phrase "lived together in a conjugal relationship" has been interpreted by courts in Canada as a flexible, fact-driven concept — a concept that changes with evolving societal norms. The existence of a conjugal relationship is not determined solely by whether or not the parties share a single residence. Rather, courts must assess the *totality* of a the relationship, with weight to be given to a number of factors generally associated with a conjugal relationship such as shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. The Court cited *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) as adopted and affirmed by the Supreme Court in *M. v. H.* (1999), 46 R.F.L. (4th) 32 (S.C.C.) at para. 59.

The Court also placed significant reliance on *Climans v. Latner* (2020), 45 R.F.L. (8th) 283 (Ont. C.A.). *Climans* considered a similarly worded definition of spouse in Ontario's *Family Law Act*, RSO 1990, c F.3, and set out that, while there needs to be "some element of living together under the same roof," *a lack of continuously shared residence is not determinative*. Instead, the Court of Appeal considered the entirety of the relationship including periods where the parties intermittently shared a roof - through overnight stays, shared vacations and other periods of cohabitation and whether, overall, the relationship bore the hallmarks of marriage-like interdependence.

Justice MacPherson found that the parties' relationship had all the hallmarks of a committed marriage-like relationship. They shared a mailing address and bank account, shared insurance for a vehicle, travelled extensively together and held themselves out to friends and family as a couple. There were clear reasons behind their decision not to share a residence until shortly before Vance's death and these reasons were "external to their relationship and did not define or limit the nature of their relationship."

Doraine was a "spouse." Her application was granted and she was permitted to administer the estate.

***Somers Estate (Re)*, 2025 CarswellAlta 2711 (C.A.) — Khullar C.J., and de Wit and Shaner J.J.A.**

The Respondent, Linda Kendall ("Linda") was seeking a declaration that she was an adult interdependent partner of the deceased, Dean Somers ("Dean"), at the time of his death so that she could apply for support and maintenance from his estate. Dean's sister, who was the Executor of his estate, resisted Linda's claim and argued that she was not Dean's adult interdependent partner. The matter proceeded by way of Affidavit evidence with Questioning of Linda.

Alberta's *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 ("*AIRA*") provides that "a person is an adult interdependent partner of another person if, (a) the person has lived with the other person in a relationship of interdependence (i) for a continuous period of not less than three years [. . .]"

Relationship of interdependence is then defined in Section 1(1)(f) of the *AIRA* as follows:

"relationship of interdependence" means a relationship outside marriage in which any two persons

- (i) share one another's lives,
- (ii) are emotionally committed to one another, and
- (iii) function as an economic and domestic unit.

The *AIRA* at s. 1(2) also provides guidance to courts in determining whether two persons "function as an economic and domestic unit":

In determining whether two persons function as an economic and domestic unit for the purposes of subsection (1)(f)(iii), all the circumstances of the relationship must be taken into account, including such of the following matters as may be relevant:

- (a) whether or not the persons have a conjugal relationship;
- (b) the degree of exclusivity of the relationship;
- (c) the conduct and habits of the persons in respect of household activities and living arrangements;
- (d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
- (e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
- (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well being;
- (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
- (h) the care and support of children; and
- (i) the ownership, use and acquisition of property.

If Linda could establish that she was the adult interdependent partner of Dean, then she would be able to claim support as a "family member" under s. 72 of Alberta's *Wills and Succession Act*, SA 2010, c. W-12.2. Like most provincial Evidence Acts, s. 11 of the *Alberta Evidence Act*, RSA 2000, c A-18 ("*Evidence Act*") requires that there be some corroborating evidence for a person claiming to be a family member under the *Wills and Succession Act* over and above just their own evidence. This was intended to protect against situations wherein an individual can make statements and the deceased is no longer around to dispute them.

Dean was married in April 1981. He and his former spouse separated in 2011, and they divorced in 2014. Dean had two adult children from that marriage. Dean died on October 7, 2021, leaving a will dated December 29, 1994. Dean's will named his former spouse as the personal representative for the estate, but she renounced that appointment. Consequently, Dean's sister acted as the representative. The will made no mention of Linda, as Dean and Linda had not even met in 1994.

Dean and Lina met in 1997 when Linda began to work for Dean at his landscaping business. She became office manager in 2006, and in 2007, she started a separate company that imported and sold furniture and operated out of the same commercial space. According to Linda's evidence, the parties began exclusively dating in 2012. In 2013 she purchased a home in her sole name and she and Dean lived in that house beginning in May of 2013.

In August of 2016, Dean purchased a vacant lot within a five minute walk of the home Linda purchased. While Linda was not on title to the property, her evidence was that she and Dean worked together on the construction of the house, and she made significant financial contributions to it. She provided receipts supporting the amounts contributed as exhibits to her affidavit.

Dean took possession of the completed home in October of 2017. Linda's evidence was that she and Dean lived there together primarily after that date, but they would occasionally stay together at her property. Importantly, Linda claimed that Dean did not tell his adult children they were living together because he did not want them to know. Dean's adult children did not like Linda.

On September 30, 2021, Linda tested positive for COVID-19 and isolated herself at her property. Soon after Dean was also diagnosed with COVID-19 and isolated himself at the new property. He died a few days later while the parties were still in self-isolation.

At some point before his death, Dean designated Linda as the beneficiary of a \$50,000 life insurance policy, describing Linda as a "friend."

Dean's sister argued that Dean and Linda were not in an adult interdependent relationship. She relied on the fact that they held themselves out as residing in their own respective residences — the addresses on their drivers' licences, vehicle registrations and personal tax returns listed their respective houses as their place of residence. Dean's sister also relied on the fact that Linda had not contributed to the ongoing expenses such as the mortgage or utilities for the newly constructed home.

The Chambers judge found that Linda was Dean's adult interdependent partner when he died. The Chambers judge accepted Linda's evidence that the parties began living together in 2013 and that the property Dean purchased in 2016 was intended to be their joint home. The Chambers judge considered Linda's evidence that she and Dean had lived together, vacationed together, shared one another's lives and supported one another in their personal and business ventures. He accepted photographs provided by Linda depicting her and Dean together in a variety of circumstances, including family celebrations and traveling together, as evidence of two people sharing a relationship of familiarity and intimacy. Similarly, the Chambers judge referred to a number of greeting cards (including Christmas and Valentine's Day cards) that Dean gave to Linda, concluding that the cards reflected sentiments of "love, affection and commitment" by Dean towards Linda.

In considering whether or not Dean and Linda had held themselves out as a couple, the Chambers judge considered a number of emails and letters from friends and acquaintances stating that they viewed Dean and Linda as a couple, who acted as husband and wife. The Chambers judge correctly recognized that these were hearsay (these individuals did not provide their own affidavits) and gave them little weight. The Chambers judge also referred to a series of Facebook posts provided by Linda made in response to her announcement of Dean's death stating that "it is evident that a number of people viewed them as a couple."

The Chambers judge concluded on all of the evidence, including Linda's affidavit evidence and evidence on questioning, corroborated by the photos, cards and Facebook posts, that Linda and Dean "shared each other's lives, were emotionally committed to one another and functioned as an economic and domestic unit." He was satisfied that they were in a relationship of interdependence for a continuous period of at least three years, ending with Dean's death.

There were three questions to deal with on the appeal:

1. Did the Chambers judge err in his interpretation of "living together" under section 3(1)(a) of the *AIRA*?
2. Did the Chambers judge err in his determination that Linda's evidence was corroborated by other material evidence as required by s. 11 of the *Evidence Act*?
3. Did the Chambers judge err in his finding that Linda and Dean functioned as an economic and domestic unit and were in a relationship of interdependence?

The estate argued that the term "lived with" under the *AIRA* means "cohabitation in the same residence" relying on *Henschel Estate (sub nom Brandenburg v McLeod)* (2008), 56 R.F.L. (6th) 406 (Alta. Q.B.) at paras. 49-50. The Chambers judge stated

that "cohabitation itself should not be treated as a condition precedent to finding an adult interdependent relationship." Rather, he considered the parties' living arrangements as one *factor* in determining whether they functioned as an economic and domestic unit and treated the concept of "living together" as part of the overall analysis of whether the parties were in a relationship of interdependence.

The Court of Appeal set out that each of the criteria in s. 3(1)(a)(i) — two people living together, in a relationship of interdependence for a continuous period of no less than three years — is an *independent prerequisite*. To the extent that he stated otherwise, the Chambers judge had erred. The factors in s. 1(2) of the *AIRA* inform whether two parties function as an "economic and domestic unit" *not* whether the parties "lived together." (See *Henschel Estate, Re*, at para. 50 and also *Riley Estate, Re*, 2014 CarswellAlta 2175 (Alta. Q.B.) at para. 17). However, while the Chambers judge erred in this statement, the Court of Appeal was satisfied that, on a proper interpretation and application of the statute and the evidentiary record, the Chambers judge made factual findings sufficient to meet the condition precedent that the parties lived together.

The Court of Appeal rejected the estate's argument that the parties must cohabit continuously under one roof. While in *Henschel Estate, Re*, it had been determined that the parties had not lived together because they had not cohabited in the same residence for three years, in that case the applicant had admitted that the parties had *never* lived in the same residence. There is no mention of other forms of cohabitation in *Henschel Estate, Re*.

In contrast, other cases have held that parties do not necessarily have to live under the same roof or occupy a single home to be "living together" and instead stress the importance of taking into account the parties' particular circumstances and context. (See *Wright v. Lemoine* (2017), 95 R.F.L. (7th) 318 (Alta. Q.B.) [*Wright*]; *Rockey v. Hartwell* (2016), 86 R.F.L. (7th) 395 (Alta. Q.B.); *Racz Estate, Re*, 2013 CarswellAlta 2390 (Q.B.); *Ross v. Doehl* (2021), 67 R.F.L. (8th) 179 (Alta. Q.B.).) As set out in *Wright*:

Given the many ways parties may structure their living arrangements, it is important to take a flexible approach and to consider the intentions of the parties in determining whether they have cohabited for the requisite period of time in order that the purpose of the *AIRA* is met. Section 10 of the *Interpretation Act*, RSA 2000, c I-8, requires that "an enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects".

The Supreme Court of Canada made similar comments in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 CarswellNat 3695 (S.C.C.), when considering cohabitation in the context of an application for survivor benefits under the Canada Pension Plan:

"Cohabitation" in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue.

The fact that parties own or maintain separate residences does not necessarily mean that those parties are not "living together" in a relationship of interdependence: *Climans v. Latner* (2020), 45 R.F.L. (8th) 283 (Ont. C.A.); *R. Roach v. Dutra* (2010), 82 R.F.L. (6th) 42 (B.C. C.A.); *Carlson v. Shay* (2023), 88 R.F.L. (8th) 466 (B.C. S.C.). The Chambers judge undertook a detailed analysis of the evidence and concluded that it was the intention of the parties to live together in the newly constructed property and treat it as their joint home. The Chambers judge was not troubled that Linda maintained another residence. There was no reviewable error in his conclusion that the parties lived together in a relationship of interdependence.

The estate argued that there was a lack of corroborating evidence supporting Linda's claim, as required by the *Evidence Act*. Specifically, the estate claimed that the only corroborating evidence was unsworn statements from individuals who purported to know the couple. Those letters were concerned with the nature of the parties' relationship and not whether or not they lived together. The Court of Appeal rejected this claim. Corroborating evidence can include circumstantial evidence and fair inferences. Corroboration does not require complete proof, but rather the test is whether the evidence in question makes the

plaintiff's evidence more probable or "strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements." Independent proof of the plaintiff's evidence is not required.

In this case, the Chambers judge was aware of the issues present in the statements from third parties about the nature of the parties' relationship. He identified that they were hearsay and set out that he put little weight on them. His findings were based on the *totality* of the evidence, including the photos, cards and Facebook posts provided by Linda in her evidence. There was also evidence of Dean's financial support for Linda and her business during their relationship. There was no error in the Chambers judge's approach.

Finally the estate argued that the Chambers judge had erred in considering s. 1(1)(f) of the *AIRA* — whether the parties functioned as an economic and domestic unit. Specifically, the estate focused on the lack of formal documentation of the parties' legal obligations to one another and the lack of intermingling in their financial lives. However, the Chambers judge had considered these specific concerns. He had noted in his decision that the parties did not share bank accounts, debts or formally co-own property. Many couples separate property interests, but that does not make them less involved in a relationship of interdependence. The Chambers judge also pointed to evidence of financial arrangements between the parties' businesses that indicated more than just "arm's length" dealings between two third parties. The fact that the parties had not formalized their relationship with agreements or other documentation was not fatal to the application — but it was something the Chambers judge considered in the specific context for these parties.

Appeal? dismissed. Interdependence? Found. Support? Pending.
