F.L.D. A.D. 2001
No. 293 J.C.S.

IN THE QUEEN'S BENCH
(FAMILY LAW DIVISION)
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

ANTON YAKIWCHUK

PETITIONER

- and -

HARRIET MARY OAKS

RESPONDENT

G. P. Wanhella for the petitioner

G. M. Kuse and A. P. Cook for the respondent

JUDGMENT RYAN-FROSLIE J.

March 18, 2003

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[1] In the autumn of their lives Anton Yakiwchuk and Harriet Oaks formed a relationship. At issue in this court action is whether that relationship made them "spouses" within the meaning of *The Family Property Act*, S.S. 1997, c. F-6.3, and, if so, whether Mr. Yakiwchuk is entitled to a share of the home owned by Ms. Oaks.

FACTS

[2] Anton Yakiwchuk was born on February 10, 1933. He is now 70 years of age and retired from his employment with the Saskatchewan Wheat Pool where he worked for 22 and one-half years. His last position with the Wheat Pool was at Tramping

Lake, Saskatchewan where he managed the elevator. Mr. Yakiwchuk owned his own home at Tramping Lake.

[3] In 1993 Mr. Yakiwchuk placed an ad in the Saskatoon Star Phoenix "seeking a companion". At that time he was 60 years of age. He had been married but that marriage ended in separation. He had two children from his marriage, both of whom were grown and on their own. Harriet Oaks responded to Mr. Yakiwchuk's ad and they met at a Burger King in Saskatoon the first week in September, 1993.

[4] Harriet Oaks was 53 years of age when the parties met. She had been married twice. Her first marriage ended in divorce. She had six children from that marriage, four boys and two girls. She was married for the second time in 1984. Her second husband inherited a home at Pike Lake, Saskatchewan from his mother and that home became Ms. Oaks' sole property when her husband passed away in 1992. It is that home that is in issue in this court action. The parties acknowledge Ms. Oaks is the owner of that home even though the titles are registered in Ms. Oaks' name as personal representative for the estate of Marjorie Oaks. The parties also agree this home only includes Lots 2 and 3 of Block 106, Plan 62S14125. An appraisal filed with this Court indicates the current minimum value of the home is $58,000. This is the value both parties agree should be placed on it for division purposes.

[5] At the time the parties met in 1993 Ms. Oaks was unemployed. Ms. Oaks testified that when she first saw Mr. Yakiwchuk she was "...sorry she ever answered the ad". I do not give any credence to this statement as the uncontradicted evidence establishes that after the initial meeting the parties immediately began an intimate

relationship spending their weekends together. Ms. Oaks admitted in cross-examination they were “boyfriend and girlfriend”.

[6] Mr. Yakiwchuk took early retirement from the Wheat Pool, sold his home in Tramping Lake, and on July 16, 1994 moved into Ms. Oaks’ home at Pike Lake where he lived until July 28, 2001. According to Mr. Yakiwchuk’s uncontroverted evidence, Ms. Oaks remained unemployed for approximately four years after they began living together.

[7] On November 1, 2001 Mr. Yakiwchuk initiated this Court action. He seeks a division of the home where he resided with Ms. Oaks. At trial both parties abandoned all claims to any other property in the name or possession of the other.

ANALYSIS

1. Are the parties “spouses” within the meaning of *The Family Property Act*?

[8] Mr. Yakiwchuk argues the parties were spouses and that that relationship existed from July 16, 1994 to July 28, 2001 when he left Ms. Oaks’ home and moved into an apartment in Saskatoon. Ms. Oaks argues the parties never cohabited as spouses and that Mr. Yakiwchuk was no more than a boarder in her home. She argues that if this Court finds the parties did form a spousal relationship, that the relationship terminated in 1997 and as such the limitation period set out in s. 3.1 of *The Family Property Act* applies. That section requires that an application where parties cohabited without marriage must be brought within 24 months after the cohabitation ceases.

[9] The definition of "spouse" contained in s. 2(1) of *The Family Property Act* includes either of two persons who "...is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years".

[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.

[11] In the Province of Saskatchewan, as of July 6, 2001 and the passage of *The Miscellaneous Statutes (Domestic Relations) Act* and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, S.S. 2001, c. 51, those spousal relationships outside marriage, be they common-law or same sex, are to be treated the same as “marriages”. The legislation provides little guidance on what constitutes cohabiting in a spousal relationship or when such a relationship may be said to start or end. It is left to the courts to examine the facts of each case and make those determinations. In a perfect world the courts would have all the information necessary to make such a determination but this is not a perfect world.

[12] What constitutes a spousal relationship has been considered in a number of cases. The most comprehensive review of what factors a court should consider in making such a determination is to be found in the case of *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.). The factors enunciated in that case include: (1) shelter (i.e. Did the parties live under the same roof? What were the sleeping arrangements? Did anyone else occupy or share the available accommodation?); (2) sexual and personal behaviour (i.e. Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity? Did they have “feelings” towards each other? Did they communicate on a personal level, eat meals together, assist each other with problems or illness or buy gifts for one another?); (3) services (i.e. How did the parties arrange household tasks such as meal preparation, laundry, shopping, repairs and yard maintenance, etc?); (4) social (i.e. Did the parties participate together in community and

family activities?); (5) societal (i.e. What was the attitude and conduct of the community towards each of them as a couple?); (6) support (economic) (i.e. How did they arrange their financial affairs, ownership and acquisition of property?); and (7) children. *Molodowich* was cited with approval by Justice Carter of this Court in *Nichols v. Hawes* (1997), 31 R.F.L. (4th) 399 (Sask. Q.B.) as well as the Ontario Court of Appeal in *M. v. H.* (1996), 31 O.R. (3d) 417 (Ont. C.A.), aff'd [1999] 2 S.C.R. 3.

[13] Justice Hunter of this Court in *Tanouye v. Tanouye* (1993), 117 Sask. R. 1996 (Q.B.) (varied on other grounds by the Saskatchewan Court of Appeal), stated at para. 36:

> The authorities seem to indicate that a common law relationship or marriage requires perhaps not all but at least a majority of the following characteristics: economic interdependence including an intention to support; a commitment to the relationship, express or implied, for at least an extended period of time; sharing of a common principal residence; a common desire to make a home together and to share responsibilities in and towards that home; where applicable, shared responsibilities of child rearing; and a sexual relationship. As well, it appears that, superimposed on the relationship, there should be the general recognition of family, friends, and perhaps to some extent the larger community, that the particular man and woman appear as a "couple", i.e., a family unit.

[14] These decisions set out factors that may be considered. Those factors are not exhaustive. Other factors come to mind including (1) provisions made in the event of illness or death. For example, were they named as beneficiaries in each others wills, RRSPs or life insurance plans? Were they named as powers of attorney or decision makers in health care directives? Were they named as beneficiaries under pension or health benefit plans? (2) Documents may be available to verify the status of their relationship such as income tax returns and elections under pension and health plans.

(3) Did their future plans include each other? For example, were there plans to marry, have children or for a joint retirement? (4) motivation for the relationship i.e. why were the parties together?

[15] Because of the variety of relationships, no one factor can be determinative of the issue of whether a spousal relationship actually exists. All relevant factors must be weighed to reach such a determination, though some factors may well be given more weight than others. In applying the various factors to this case, I find the following:

1. That Ms. Oaks and Mr. Yakiwchuk lived under the same roof for a period of seven years from July 16, 1994 to July 28, 2001.

2. That during the whole period of cohabitation the parties shared the same bed.

3. That Ms. Oaks and Mr. Yakiwchuk had sexual relations throughout the seven year period (at least up to and including February, 2001). The frequency of those relations is of little consequence in the fact situation before me. What is of greater importance are the relations themselves and the fact they were consensual.

4. While Ms. Oaks raised allegations of “infidelity” by Mr. Yakiwchuk, the only evidence of this was the testimony of Ms. Romenuck who testified he made a “pass” at her in 1996. There is no evidence that either party dated or was involved in an intimate relationship with anyone other than each other during the period of their cohabitation.

5. Mr. Yakiwchuk testified Ms. Oaks told him she loved him and that he had strong feelings for her as well. He stated when he moved in with Ms. Oaks he thought it would be for the rest of his life. Ms. Oaks testified Mr. Yakiwchuk "disgusted" her. While Ms. Oaks may well feel that way now, the evidence does not substantiate that she felt that way throughout the relationship. It is clear from Ms. Oaks' testimony that the parties were "boyfriend and "girlfriend" when they started living together. This militates in favour of a finding of a spousal relationship versus a situation where Mr. Yakiwchuk was merely a boarder.

6. Ms. Oaks and Mr. Yakiwchuk did communicate on a personal level. Ms. Oaks shared with Mr. Yakiwchuk her financial difficulties. They shared with each other information about their pasts, their families, and their day-to-day activities. For example, I accept Mr. Yakiwchuk's testimony that Ms. Oaks would phone him if she was staying to play bingo after work.

7. Mr. Yakiwchuk testified they ate together and he barbequed during the week when she worked. Ms. Oaks denies eating meals with Mr. Yakiwchuk. She testified she ate out "every" night. I do not believe her evidence on this point. Firstly, the evidence establishes Ms. Oaks was not employed for the first four years of the parties' relationship and she was having financial difficulties. How could such a woman afford to eat out every night? Secondly, Ms. Oaks has diabetes. She testified she needed to eat lots of fruits and vegetables and to "lay off the sweets". The evidence was uncontradicted that Mr. Yakiwchuk grew a garden and that Ms. Oaks

canned the produce from it. I accept Mr. Yakiwchuk's evidence that this produce was used for their joint benefit.

8. It is uncontroverted that Mr. Yakiwchuk asked Ms. Oaks to marry him in July, 1994 and that Ms. Oaks accepted that proposal. Ms. Oaks testified that she only accepted the proposal because it was made in public before Mr. Yakiwchuk's co-workers. She did not want to embarrass him and accordingly said "yes". Ms. Oaks testified that a few days later she told Mr. Yakiwchuk she would not marry him. Mr. Yakiwchuk denies this. It is uncontroverted that Mr. Yakiwchuk gave Ms. Oaks a "ring" in September of 1994. Mr. Yakiwchuk said this was an engagement ring. Ms. Oaks says it was merely a dinner ring, that she would not accept an engagement ring from him. I find Mr. Yakiwchuk's evidence in this regard more credible than Ms. Oaks'.

9. There was little evidence with regard to whether the parties gave each other gifts for special occasions. Mr. Yakiwchuk testified that he put $100 towards a "family" gift for Ms. Oaks. Ms. Oaks denies this and says she put the $100 towards her own gift and told her daughters it came from Mr. Yakiwchuk. She did this to "keep peace" in the family. This statement by Ms. Oaks seems to support that Mr. Yakiwchuk was considered a member of Ms. Oaks' family. Exhibit P-9 is a letter written by Ms. Oaks' daughter to Mr. Yakiwchuk requesting the money for the gift. That letter is dated April 4, 1999 and seems to support the view that Mr. Yakiwchuk was considered a part of Ms. Oaks' family. It also clearly indicates that the gift

for Ms. Oaks was a “secret”. I accept Mr. Yakiwchuk’s evidence that he contributed to the gift.

10. There was little evidence of who performed the household “services” such as laundry, cooking, cleaning and dishes. I accept from the evidence presented that Mr. Yakiwchuk did barbeque for both him and Ms. Oaks and that he did most of the grocery shopping and household maintenance. There was evidence he fixed the toilet and was involved in arranging for repairs to the septic tank. It is uncontroverted that he mowed the lawn, blew snow in winter, and started Ms. Oaks’ car in the mornings before she went to work. It is also uncontroverted that he grew a garden, picked the vegetables, and that Ms. Oaks did the canning. Mr. Yakiwchuk enclosed the deck on Ms. Oaks’ home, albeit with help from others. He also purchased, planted and cared for trees in the yard. He acquired a satellite dish for the home.

11. The uncontradicted evidence also establishes that Ms. Oaks and Mr. Yakiwchuk participated in community events. They bowled together from 1994 to 1996. They played in card tournaments together. Mr. Yakiwchuk assisted Ms. Oaks at a yearly pancake breakfast in the park which Ms. Oaks was in charge of. The parties went camping and fishing together. They took vacations together to visit Ms. Oaks’ daughter in British Columbia and her sister in Yorkton. They attended family weddings together including Mr. Yakiwchuk’s son’s wedding in July of 1996, where Ms. Oaks sat at the head table with Mr. Yakiwchuk. It is uncontroverted that they attended the wedding of Ms. Oaks’ sister in Regina and her

nephew's wedding in Yorkton. I also find that they attended Ms. Oaks' son Dean's wedding in December of 1995 and the reception which occurred some months later. Ms. Oaks' daughter-in-law, Michelle, testified that Mr. Yakiwchuk was not present when she married Dean or at the reception which followed some months later. A guest book was filed as Exhibit R-5. This book does not contain Mr. Yakiwchuk's signature. I am satisfied the purpose of filing a copy of the guest book was to give the impression that Mr. Yakiwchuk was not present at the reception. The evidence of both Ms. Oaks and Mr. Yakiwchuk was that Mr. Yakiwchuk did attend both the wedding and the reception. Michelle herself acknowledged in cross-examination that he was in fact present at the reception.

12. Ms. Oaks' daughter-in-law, Michelle, testified she did not consider the parties a "couple" though in cross-examination, she acknowledged they slept in the same bed. I did not find her testimony very compelling.

13. The evidence establishes there was no written agreement between the parties when Mr. Yakiwchuk moved in on July 16, 1994. Mr. Yakiwchuk testified there was no oral agreement between him and Ms. Oaks as to how their finances would be arranged. Ms. Oaks testified she was having financial difficulties and that Mr. Yakiwchuk moved into her home as a boarder. Ms. Oaks testified Mr. Yakiwchuk agreed to pay her rent and that that rent would equal the cost of the utilities and groceries. Mr. Yakiwchuk denies this. He says he moved into Ms. Oaks' home because she told him she loved him and he had feelings for her. He was aware that she was having financial difficulties and was unemployed at the time they started

living together. As a result, Mr. Yakiwchuk testified he assumed payment of the utilities which included gas, power, telephone, the septic tank and cable. He also purchased 99 percent of the groceries. I accept Mr. Yakiwchuk's version of what took place over that of Ms. Oaks. I am reinforced in the view that Mr. Yakiwchuk was not a mere boarder by the fact that when he moved in with Ms. Oaks he moved in with his furniture. At that time he had his own bedroom suite. Ms. Oaks' home had several bedrooms. He could have had a room of his own. He did not. Instead, his furniture was moved into Ms. Oaks' bedroom and they shared that room and a bed.

14. The evidence clearly establishes Ms. Oaks and Mr. Yakiwchuk kept their finances separate. Mr. Oaks sold his home in Tramping Lake as well as other assets such as vehicles and boats. He retained the proceeds from the sale of these items and did not share them with Ms. Oaks. When they went on vacation, they split the costs between them. Ms. Oaks was 54 in July of 1994 when they began cohabiting. Mr. Yakiwchuk was 61. Both parties had grown children from prior marriages. They had acquired assets through their prior relationships and their own efforts which had nothing to do with their relationship. They kept their finances separate and when one considers their age and the fact that they had children they wanted to benefit from the estates they had accumulated thus far, this is not surprising. They were, however, financially interdependent. Ms. Oaks provided the home which was paid for and for the most part paid the taxes and insurance on it. Mr. Yakiwchuk paid the monthly living expenses. This financial interdependence militates in favour of finding a spousal

relationship existed. This relationship did not change until the end of June, 2001. At that time Mr. Yakiwchuk gave Ms. Oaks $280 as opposed to paying the utilities. I find this was done because two of Ms. Oaks' sons had moved in with the parties and a third son came and went on a regular basis. Mr. Yakiwchuk, who did not have a good relationship with Ms. Oaks' sons, was complaining about the cost of paying utilities which were increasing because of the presence of her children in the home. The parties' relationship was deteriorating and separation was looming.

15. Mr. Yakiwchuk testified Ms. Oaks had told him in the spring of 2001 that she had provided in her will that if anything happened to her, he could remain in the home. Ms. Oaks filed a copy of her will dated February 7, 2001. This will clearly makes no provision for Mr. Yakiwchuk. This will was drafted towards the end of the parties' relationship. There is no evidence as to the contents of any of her earlier wills.

16. Ms. Oaks testified she filed tax returns in 2000 and 2001 as a "single" person. The tax returns themselves were not filed, nor was any evidence provided how she designated her marital status on the tax returns from 1994 to 1999. It is notable that Ms. Oaks' 2001 tax return would have been filed after the parties' separation. The evidence of her designation as a single person on her 2000 and 2001 tax return is of little use to the Court without verification of what occurred for the other six years of the relationship.

[16] Weighing all of the factors, I find the parties were "spouses" within the meaning of *The Family Property Act*. I do not accept Ms. Oaks' evidence that Mr. Yakiwchuk was a mere boarder. She shared a far more intimate life with Mr. Yakiwchuk than she would have with a mere boarder. Her relationship with Mr. Yakiwchuk was not a "business" arrangement. It was a spousal relationship.

[17] Nor do I believe Ms. Oaks' evidence that the relationship between herself and Mr. Yakiwchuk changed in 1997. There is simply no evidence to support this. While Ms. Oaks may have spoken to her daughter-in-law and Ms. Romenuck about wanting to get Mr. Yakiwchuk out of her house, it is clear that any such comments came after 1997. There is no evidence Ms. Oaks took any steps to terminate the relationship with Mr. Yakiwchuk prior to 2001. Nor is there any evidence that anything changed in the relationship itself. The parties continued to share a bed, continued to have sexual relations and continued to be financially interdependent. This view is strengthened by Exhibit P-10 which is a note Ms. Oaks wrote to Mr. Yakiwchuk after the parties' separated in 2001. That note reads in part: "[i]f you have a girlfriend, don't be afraid to talk to me I'll understand, you have to move on with your life. But I hope will [*sic*] still be friends...." It is clear from the contents of this note that the parties' relationship was a personal and intimate one.

[18] I find that Mr. Yakiwchuk and Ms. Oaks are spouses with the meaning of *The Family Property Act* and that their relationship continued from July 16, 1994 to July 28, 2001. Given my findings, s. 3.1 of *The Family Property Act* has no application to this situation.

2. What division should be made with regard to Ms. Oaks' home in Pike Lake?

[19] Section 2(1)(b) of *The Family Property Act* defines a "family home" to include property "...that is or has been occupied by one or both spouses as the family home or that is mutually intended by the spouses to be occupied by one or both of them as the family home". Ms. Oaks' home at Pike Lake clearly falls within this definition.

[20] Section 22(1) of *The Family Property Act* deals with the division of the family home. That section provides a presumption that the family home is to be divided equally between the spouses having regard to any tax liability, encumbrance or other debt or liability pertaining to the home except where the court is satisfied that it would be "unfair and inequitable to do so" having regard only to any extraordinary circumstance or the spouse who has custody of the children. In this case there are no children within the definition of *The Family Property Act* that would be affected by a division of Ms. Oaks' home. Accordingly, for there to be an unequal division of the family home, an extraordinary circumstance must be found to exist.

[21] Mr. Yakiwchuk indicated in argument that he should not receive an equal division of the home. I take this as an acknowledgment by him that an "extraordinary circumstance" exists pursuant to s. 22(1)(a). He requested this Court to give him less than a 50 percent share of the home, though he did not specify what share he felt equitable in the circumstances. As Mr. Yakiwchuk has made this admission, I am prepared to divide the home on less than an equal basis. In doing so, I make no finding that the facts of this case constitute "an extraordinary circumstance" that would warrant a less than equal division.

[22] The home is valued at $58,000. I order that Mr. Yakiwchuk receive a 30% share of this home, being $17,400. Ms. Oaks shall pay this amount to Mr. Yakiwchuk within 60 days from the date of this judgment. If the sum is not paid, Mr. Yakiwchuk shall be at liberty to apply to this Court for a sale of the home.

[23] Ms. Oaks shall pay to Mr. Yakiwchuk his costs of the within action to be taxed in accordance with Schedule I “B”, Column 3 of *The Queen’s Bench Rules of Court*.

_____ J.