

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

<i>CHRYSTAL ARLYNN COTTYN</i>)	<i>T. D. McCaffrey</i>
)	<i>for the Appellant</i>
<i>(Petitioner) Respondent</i>)	
- and -)	<i>D. B. Dorion</i>
)	<i>for the Respondent</i>
)	
<i>ALLAN BRUCE ANDERSON</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Respondent) Appellant</i>)	<i>May 12, 2017</i>

PFUETZNER JA (for the Court):

[1] The respondent appeals an interim order granting summary judgment in favour of the petitioner, declaring the parties to have been in a common-law relationship and ordering costs for failing to answer undertakings. As part of his appeal, he seeks leave to raise new issues as to the interpretation of *The Family Property Act*, CCSM c F25, not argued before the motion judge (see *King v Chapman*, 2012 MBCA 112).

[2] In our view, the appeal should be allowed in part because the motion judge misdirected herself by going too far in resolving important factual issues as to the parties' relationship which turned on their credibility. The record here does not allow for these core issues in the case to be determined by affidavit evidence alone (see *Homestead Properties (Canada)*

Ltd v Sekhri et al, 2007 MBCA 61 at para 13; and *Garwood v Garwood Estate*, 2007 MBCA 160 at para 58). Given our decision that the only realistic option here is a trial, it is unnecessary to consider the new issues raised on appeal by the respondent.

[3] As to the issue of costs, we see no merit in the respondent's argument and would dismiss this ground of appeal.

[4] Accordingly, the appeal is allowed in part. As success is divided, the parties will bear their own costs in this Court.

Pfuetzner JA

Burnett JA

Mainella JA
