

CANADA / JUDGMENT

Bachiu v. London

2015 BCSC 2027

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Supreme Court of British Columbia

DECIDED

5 November 2015

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2015 BCSC 2027 Bachiu v. London

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bachiu v. London,

2015 BCSC 2027

Date: 20151105

Docket: 73852

Registry: Nanaimo

Between:

Gary Bachiu

Applicant

And

Deborah Lynn London

Respondent

Before: The Honourable Armstrong

Reasons for Judgment

The Applicant, Gary Bachiu:

In Person

The Respondent, Deborah Lynn London:

In Person

Amicus Curiae:

P. Reimer

Place and Date of Hearing:

Nanaimo, B.C.

May 25, 2015

Place and Date of Judgment:

Nanaimo, B.C.

November 5, 2015

- [1] This is an application by Gary Bachiu (the applicant) under the Interjurisdictional Support Orders Act, S.B.C. 2002, c 29 [ISO] to terminate his spousal support obligation to Deborah London (the respondent). The parties have been separated for 9 years following an 11 year relationship.
- [2] On November 24, 2008 an order was made ("the Order") requiring the applicant to pay the respondent \$900 per month in spousal support. The Order permitted the parties to request a variation of spousal support in the event of a material change in circumstances whether foreseen or unforeseen. The parties were also entitled to a review of spousal support on or after November 1, 2012 "having regard to the health, income and employment of the parties."
- [3] When the order was made, the Court did not set out the Guidelines income of either party. However, on an interim order (the "Interim Order") made March 18, 2007, the Court imputed income to the applicant of \$60,000 per year and ordered support to the respondent of \$1,000 per month.
- [4] When the final order was made, the Court said: "Based on the financial statements of the parties filed in the Trial Record [Mr. Gary Bachiu] shall pay spousal support to [Ms. Deborah London] in the amount of \$900 per month "
- [5] The financial statements filed at that time were not included in the material presented in support of this application.
- [6] On December 15, 2014 this application came before Mr. Justice Baird who gave directions that the applicant provide additional information.
- [7] The hearing was held May 25, 2015. The respondent appeared on her own behalf and I was greatly assisted by Mr. Reimer, amicus curiae, who appeared by telephone conference.

Background

- [8] The applicant is 60 years of age and the respondent is 62.

- [9] The respondent asserts that the parties began cohabitating in Ontario in 1994 and separated in October 2005. Conversely, the applicant contends that the parties began living together in November 1996 and separated in 2006.
- [10] In his initial application from 2013, the applicant deposed that he earned \$55,000 per year. The applicant's line 150 income for 2013 was \$70,229. He collected unemployment insurance from April 8, 2013 until June 2013. He had in the past worked at the Ontario patient transfer office and was called back to that position in June 2013. He also provided income tax filings showing incomes of \$68,841 in 2012; \$70,824 in 2011; and \$66,111 in 2010. He provided revised material in April 2015 in which he deposed to an annual income of \$70,000 in 2014 and \$55,000 in 2015.
- [11] Part of the applicant's income comes from his pension acquired during his career as a pipefitter, from which he now receives \$37,300 per year.
- [12] The applicant produced a financial statement indicating monthly expenses of \$4,044 including income tax of \$471.21 per month.
- [13] He currently resides with Lorraine Carlisle and a 13-year-old child. Ms. Carlisle is employed and earned \$25,000 per year in 2013 and \$33,000 in 2014. She paid 55% of the household expenses in 2013 and 50% in 2014.
- [14] The applicant does not own real estate and deposes that his only financial asset is \$50 in a checking account. He provided information detailing his unsecured debts at \$24,205.
- [15] The respondent completed secondary school, worked in retail and then obtained a greenhouse technology diploma in 1986. Since 1994 she had been employed as a support worker, but has not worked since a series of health issues began.
- [16] Her 2013 line 150 income was \$17,776.81. This amount included \$8,283 in spousal support payments received by her.
- [17] She provided opinion evidence, albeit not in accordance with the Rules of Court, indicating, among other things, that she suffers from physical and emotional symptoms that prevent her from seeking gainful employment. Some of the limitations resulted from surgery to treat invasive melanoma near her left hip. She has chronic emotional frailty, anxiety, and reduced physical stamina.
- [18] Although this opinion evidence was not in the form normally accepted by the Court, both parties relied on similar types of evidence and, as a practical matter, these documents represent the best evidence available to assess the parties physical conditions.

Applicant's Position

- [19] In his application, the applicant said he "would like the court to review this application due to financial hardship, also have been paying support since January 2007 and feel I have fulfilled my obligations to pay support for the duration of agreement."
- [20] Under a heading titled "[a]pplicant's change in circumstances" he said "financial income has decreased and health issue has prevented me from working in a full-time position (ailing back note attached) also age is a factor." The health issues refer to recurrent back pain he has suffered since as early as 2012.
- [21] He also contends that the respondent receives Canada Pension Plan ("CPP") disability payments and as of February 2013 was entitled to receive ordinary CPP and pension. He also said she shares living expenses with another person.
- [22] The applicant recognizes that he is in arrears and commits to making monthly payments until those arrears are paid in full.

The Respondent's Position

- [23] The respondent's evidence attached to her affidavit reveals that she suffered from melanoma in 2006 and was treated surgically and with radiation and interferon. In 2007 she suffered a psychotic break and was hospitalized. She suffered from chronic emotional frailty and anxiety which have had negative implications for her mental health.
- [24] The respondent's line 150 incomes were \$10,829 for 2014; \$17,776 in 2013; \$15,102 in 2012; and \$19,794 in 2011. These amounts include her spousal support entitlement during those years; the applicant has not paid the court-ordered amount in each of those years.
- [25] The respondent has presented a Spartan budget for personal expenses of \$1,340 per month including rent of \$700 per month. The respondent owns a 15-year-old car and maintains a bank account with \$200 on deposit. She has debts of \$13,200, some of which is due to legal aid in Ontario and some to Canada Revenue.
- [26] She clarified that while she lives with friends in their home she does not share expenses or domestic responsibilities with anyone.
- [27] The respondent wishes to maintain spousal support on the basis that she is unemployable due to her health problems. She attached a medical certificate to her affidavit showing that she has physical limitations from surgery which make any type of full-time physical occupation difficult, and her emotional frailties make her unsuited to any setting where she would have interaction with others or pressure to complete tasks. She also addresses the difference between her standard of living and the standard of living of the applicant.

Analysis and Decision

[28] Section 12(3)(a) of the ISO provides that the law of BC is to be applied to this application. As such, the Court must consider the factors of the Family Law Act, S.B.C. 2011, c. 25 to determine the respondent's entitlement to support. When considering these factors, the Court must apply the conceptual framework provided by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. The factors are as follows:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[29] The amicus informed the Court that the most pressing question in analyzing these circumstances is whether the respondent had taken the requisite steps to become self-supporting or earn additional income and whether a review of the spousal support, having regard to the "health, income and employment of the parties" supports a change. A variation of spousal support is possible only if there has been an event of material change in circumstances whether foreseen or unforeseen".

[30] The order suggests two avenues open to the Court to consider a change in the applicant's support obligation. Firstly, support may be varied in the event of a material change in circumstances. Second, the order may be reviewed having regard to health, income, and employment of the parties.

[31] This question engages an analysis of her entitlement to non-compensatory and needs based support.

- [32] Non-compensatory support is based on a need for support, taking into account the economic consequences of the marriage breakdown and the disparity in the parties' standards of living following the separation (Bracklow at para. 43).
- [33] The Court of Appeal summarized the principles of non-compensatory spousal support in *Chutter v. Chutter*, 2008 BCCA 507. Chutter explains that where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support. Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and is grounded on the "social obligation model" of marriage (at para. 54).
- [34] Where an entitlement to spousal support has been shown, it is appropriate to take into account the relative standards of living of the spouses following the marriage breakdown: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 49.
- [35] In these proceedings Baird J. had ordered the applicant to provide medical evidence concerning his inability to work; there is not much to support that aspect of his claim. He acknowledged that the respondent's medical information seems convincing and notes that she continues to receive CPP disability payments. He points out that the respondent has had significant medical problems, including cancer and an advanced psychiatric condition.
- [36] The applicant suggested that the respondent's circumstances were improved because she now qualifies to receive Canada Pension payments. However, because she currently receives a Canada Pension Disability payment, she will not be able to receive her Canada Pension payment unless and until she has exhausted her disability payments.
- [37] There was no evidence as to whether the respondent had made application for a division of Canada Pension Plan credits between herself and the applicant. In my view, the potential for the respondent to receive a Canada Pension Plan pension is not a factor in this analysis because she cannot receive both.
- [38] The order provided for a review after considering the health, income and employment of the parties. I am of the view that this application, insofar as it seeks to terminate the respondent's entitlement to support, should be considered on the basis of the authorities cited above. It is important to consider whether the respondent remains entitled to support based on the compensatory, non-compensatory, and needs basis.
- [39] In *Morneau v. Morneau*, 2014 BCSC 2269, Cole J. considered the application of a respondent to terminate his obligation to pay spousal support after an eight year relationship. The respondent had a lengthy medical history. She also suffered from psychiatric problems. The claimant had a yearly income of approximately \$9,000 and expenses of approximately \$26,000 per year. The respondent had a yearly income of approximately \$71,000 and expenses of approximately \$78,000 per year. In determining entitlement, Cole J. found the continuing and significant need of the claimant entitled her to non-compensatory spousal support. Although he found that she was not unemployable, he considered that she was

likely to face difficulties when seeking employment. In addition, Cole J. considered that her standard of living was lower than the respondent's standard of living, due largely to her medical issues.

[40] While the goal of a transition to self-sufficiency is laudable, the Court must consider the realities of the situation. The evidence shows the respondent's ill health has prevented her from obtaining sufficient employment to become independent. I have taken account of

- (a) the respondent's needs;
- (b) the reduction in the respondent's standard of living as a result of the separation;
- (c) the applicant's higher standard of living; and
- (d) the applicant's current partner's ability to share household expenses with her (she earns \$33,000 per year).

I have considered there is a significant disparity in incomes between the parties and a commensurate disparity in standards of living. The respondent is not able to achieve any level of self-sufficiency due to her physical limitations in the foreseeable future.

[41] I am satisfied that the parties pre-separation standard of living was supported by the applicants income as a pipefitter which in all of circumstances, was likely in the order of \$60,000 per year.

[42] There is a paucity of evidence to inform the Court about the conditions or circumstances of the parties at the time of separation. I cannot reach any conclusion that there has been a material change in circumstances or that the health of the applicant has deteriorated or the respondents health improved. The applicant is employed and earning an income in 2015 that is not significantly less than his previous year's income. There is no indication that his prospects for continued employment have diminished. On the other hand, the respondent is not employable at this time.

[43] In my view the respondent's circumstances indicate that she is in considerable need. In *Walburger v. Lindsay*, 2015 BCSC 341 Fitzpatrick J. addressed useful parameters in a needs based review. She said:

In *Allaire v. Allaire* (2003), 2003 CanLII 26263 (ON CA), 170 O.A.C. 72, 35 R.F.L. (5th) 256, the Court held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:

- [21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [44] I find the respondent has a continuing need for support. Although duration of this marriage was approximately 11 years, I am not satisfied that there should be any variation of the amount payable.
- [45] The question then is whether there should be a limitation on the duration of that support.
- [46] I accept that the party's relationship and cohabitation lasted approximately 11 years. There may be some differences in the duration of their time together but it is not significant in the determination of issues in this application.
- [47] While the Spousal Support Advisory Guidelines are of limited value where illness or disability contribute to need, the applicable formula recommends that support should be payable for five years (low end of the range) to 11 years (high end of the range) from the date of separation. Support has been paid for nine years thus far.
- [48] The original order, dated November 24, 2008, did not specify the Guidelines income of the parties in coming to the support amount of \$900 per month. The respondent provided DivorceMate calculations which suggest spousal support from the low of \$868 per month, \$1,013 in the mid-range, and \$1,158 in the high range were appropriate.
- [49] In *Campbell v. Campbell*, 2009 BCSC 1330, the petitioner had a variety of health concerns after a 23 year marriage and needed financial support. The respondent's ability to pay her, however, had been considerably compromised since their divorce: he had declared bankruptcy as a result of his alcoholism and suffered a stroke which rendered him unable to work. Hinkson J. (as he then was) determined that the appropriate response was to provide spousal support indefinitely.
- [50] In these circumstances, I find spousal support should likewise continue. This order, however, is to be subject to review upon the respondent becoming 65 and qualifying for her full CPP and Old Age Security pensions.

"The Honourable Mr. Justice Armstrong"

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Prepared on 29 October 2026 · Esheria