
CANADA / JUDGMENT

Hutchen v. Hutchen

2014 BCSC 729

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Supreme Court of British Columbia

DECIDED

28 April 2014

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2014 BCSC 729 Hutchen v. Hutchen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hutchen v. Hutchen,

2014 BCSC 729

Date: 20140428

Docket: 14-0173

Registry: Victoria

Between:

Manuella Hutchen

Claimant

And:

Phillippe Edward Hutchen

Respondent

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Claimant:

J.M.W. Cudmore

Counsel for the Respondent:

B.A. MacLeod

Place and Date of Hearing:

Victoria, B.C.

March 4, 2014

Place and Date of Judgment:

Victoria, B.C.

April 28, 2014

- [1] Ms. Hutchen, who now goes by the name Locche, seeks a final order for spousal support retroactive to August 2013.
- [2] Ms. Locche now lives in Washington State, U.S.A. Her current British Columbia connection is that her two children live in the province, and she has personal items in a storage locker in Victoria.
- [3] Mr. Hutchen is a heavy duty mechanic living in Alberta.
- [4] Mr. and Ms. Locche began to live together in July 1992, were married February 13, 1993, separated in July 2009, and were divorced on March 7, 2011.
- [5] They have two children, Jared and Christopher, neither of whom is a child of the marriage at this time.
- [6] All matters, other than a final spousal support order, have been previously dealt with, some by agreement between the parties, others by order of this court.
- [7] On March 7, 2011, the court ordered, with the consent of the parties, that Mr. Hutchen pay spousal support of \$1,500 per month "subject to review". There was also a child support order at the same time, and both were based on Mr. Hutchen's agreed Guidelines income of \$170,000.
- [8] There have been subsequent attempts to have the matter of spousal support finalized, with some uncertainty over whether the March 7, 2011, spousal support order was an interim or a final order. The parties agree that Gropper J. heard submissions on February 3, 2012, and directed that the March 7, 2011, spousal support order was interim in nature. No order has been filed to that effect.
- [9] At the beginning of the marriage, Mr. Hutchen worked in the concrete finishing industry, then moved to construction, then spent about seven years working as a diamond driller. This job required him to be away from home for weeks at a time, but allowed him to be home for weeks at a time. The parties disagree over how much time or effort Mr. Hutchens put into the home and family when he was not away in camp. Later in the marriage, Mr. Hutchen changed jobs again, to become a heavy duty mechanic, which did not require as much time away from home.

- [10] Ms. Locche had a Child and Youth Care Worker diploma when the parties married.
- [11] In 1992, the year of the marriage, Ms. Locche worked 40 hours a week for the Prince George Receiving Home Society, and earned \$9,701 according to her tax information. It is not clear whether that was for a full year's employment.
- [12] Ms. Locche went from that job to a job as a youth care worker for School District 57 in Prince George, where she worked 22.5 hours a week, for between \$15 and \$20 per hour. Her 1993 tax information shows \$9,425 in T4 earnings and \$6,233 in maternity benefits, indicating that her year's work was interrupted by the arrival of their first child.
- [13] Ms. Locche worked throughout the marriage, mostly in areas related to her training, often 20 to 25 hours per week. She also had a variety of shorter duration jobs not related to her training, such as weekend security work, work at Rona, or a stint at her own cleaning business.
- [14] Ms. Locche's income during the marriage ranged between the 1992 figure of \$9,701, up to a high in the \$18,000 range. Her longest job lasted almost six years, and was with the Fort St. John School District. She left that job in 2005 because an asthma condition made the physical demands too difficult.
- [15] Ms. Locche stopped working in January 2008, about 18 months before the parties separated.
- [16] Ms. Locche has sworn that during the marriage, once she was settled in a job, Mr. Hutchen would "beg me to quit," which she says explains many of her frequent job changes.
- [17] Mr. Hutchen denies this and says that family finances were usually precarious enough that Ms. Locche's contributions to the family income were necessary.
- [18] The evidence of both parties leads me to infer that during the marriage the incomes and other resources of both were shared in order to support the family.
- [19] Neither party came out of the marriage with significant family assets, which provides some support for Mr. Hutchen's denial that, from time to time, he suggested Ms. Locche stop working.
- [20] When the parties divided family assets, Ms. Locche received just over \$11,000 from the sale of a truck, and \$17,297 by spousal RRSP rollover. The family home sold for a price that did not cover all mortgage and adjustment costs.
- [21] There is some inconsistency in Ms. Locche's evidence, because in her affidavit filed February 25, 2014, she swore:

I worked for the majority of my marriage to the Respondent, I had to in order to support the family. The only time I ever quit a job was after 6 years of working for the school district. The school district implemented a physical education program for the children and I have severe asthma and because of this, I was unable to keep up with the requirements of the program.

This statement by Ms. Locche tends to support Mr. Hutchen's denial that he requested Ms. Locche to quit one or more jobs.

- [22] Since the parties separated, Ms. Locche's income has been variable. Her 2009 tax information shows total income of \$4,947, of which \$2,027 was social assistance benefits.
- [23] In June 2010 Ms. Locche started working for Pacific Coast Resources on an on-call basis as a Community Resource Worker. By the end of 2010, she was working full-time for this employer, according to her answer to an interrogatory, although in her third affidavit sworn January 24, 2011, she swore that she was working casual hours, picking up extra shifts "such that I work for approximately 30 hours each week." Her 2010 tax information shows total income of \$24,484. Her pay was based on a \$15.54 hourly rate as a casual employee. Full time, full year, that would amount to a bit over \$32,000 per year in earnings.
- [24] Until August 2011 Ms. Locche continued working as a Community Support Worker for Pacific Coast Resources Society. After August 2011 she started working for the Sooke School District on a one year contract on a pilot program set to end in June 2012. Her pay there was based on annualized salary of \$26,961.
- [25] Ms. Locche's 2011 income tax information is not in the record.
- [26] Ms. Locche swears that she left the Sooke School District job on stress leave in April 2012, and started another job in August of that year. Her 2012 tax information shows \$13,494 in T4 earnings, \$5,193 in Employment Income benefits.
- [27] From September to November of 2012, Ms. Locche was enrolled in the Aldebaran Hypnotherapy School in Tacoma, Washington. She says that for two months while she attended this school she lived with her "friend" Matt Smith.
- [28] In November 2012 Ms. Locche returned to Victoria and worked for Centaine Support Services.
- [29] In June 2013 Ms. Locche moved to Washington State and began to live with Mr. Smith. At present, she has visitor status in the United States.
- [30] Ms. Locche describes her relationship with Mr. Smith in an affidavit, filed February 25, 2014, in this way:
 - 6. In response to paragraph 4 of the Respondent's affidavit, I was in a long distance relationship until only recently and we are still exploring our relationship to see how it will develop. I am very happy at the moment but I do not know for certain what the future holds as we are still in the early stages of our relationship.

7. Matt and I have consulted with an immigration attorney in Washington, as to the steps required for me to reside permanently here. An option available for us is to marry and consequently for me to obtain a spousal visa and become a permanent resident. Matt and I are certainly open to this possibility and it may be what the future holds for us. To be clear, however, Matt and I have not yet made the decision to marry.
8. Matt operates a company, he is a shellfish farmer, he drives a 1993 Honda Civic, has a 2002 truck for his work, and of course a fishing boat for his work. He lives a modest lifestyle; in 1980s style refurbished mobile home. He is currently in the process of building a home around \$130,000 and as of yet there is no completion date.
- [31] In an affidavit in response to interrogatories, Ms. Locche swears that Mr. Smith has told her he earns around \$90,000 per year.
- [32] Ms. Locche and Mr. Smith maintain separate finances.
- [33] While living in the United States with visitor status, Ms. Locche is not permitted to work. She recognizes that is a self-imposed impairment on her earning capacity, and proposes that her income be imputed at \$26,000 per year for spousal support calculations. Mr. Hutchen argues that a more appropriate amount to impute to Ms. Locche would be \$41,000 per year, a figure derived from \$20 per hour for full-time, full year work.
- [34] Mr. Hutchen's tax information shows 2010 earnings of \$145,596; 2011 income of \$155,326; and 2012 income of \$129,611.
- [35] Mr. Hutchen's pay stubs for 2013 support an income of \$150,000 for that year.

Law

- [36] Section 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), provides:

In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

- [37] The objectives of spousal support orders are set out in s. 15.2(6):

An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[38] The application also invokes the Family Law Act, S.B.C. 2011, c. 25, where the provisions of ss. 161 and 162 are so close to the above sections of the Divorce Act that any difference is immaterial.

[39] Ms. Locche submits that she has strong compensatory and non-compensatory basis for spousal support. *Moge v. Moge*, [1992] 3 S.C.R. 813, explained the compensatory approach to spousal support; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, dealt with the non-compensatory basis for spousal support.

[40] In support of her claim for compensatory support, Ms. Locche says that she bore most of the burden of raising the two children of her marriage to Mr. Hutchen, and, for a time, cared for a child from Mr. Hutchen's previous relationship. The child-rearing responsibilities lasted through most of the 17 year relationship, which is moderate to long by present standards. Ms. Locche points to the fact that, while Mr. Hutchen's job as a diamond driller took him away for extended periods, she was on her own as a de facto single parent.

[41] In *Moge*, L'Heureux-Dubé J. said at para. 42 (Quicklaw):

The second observation I wish to make is that, in determining spousal support it is important not to lose sight of the fact that the support provisions of the Act are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown." [Emphasis in original.]

And, at para. 45 (Quicklaw):

But in many if not most cases, the absence of accumulated assets may require that one spouse pay support to the other in order to effect an equitable distribution of resources. This is precisely the case here, as the parties are not wealthy; for the most part, all they appear to possess are their respective incomes.

[42] With respect to the consequences to a spouse who bears a disproportionate share of child-rearing or homemaking responsibilities, L'Heureux-Dubé J. said at para. 70 (Quicklaw):

Hence, while the union survives, such division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the

balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.

The curtailment of outside employment obviously has a significant impact on future earning capacity.

[43] The relationship between roles taken on during the marriage and their economic consequences were discussed in para. 82 (Quicklaw):

Conversely, the parties may decide or circumstances may require that both spouses work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to childcare responsibilities, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and thereby incurs economic loss.

[44] Ms. Locche worked outside the home fairly steadily throughout the marriage until approximately 18 months before separation, although it appears that much of her work was less than full time. This may reflect either a need or a desire to be available to the children when they were not in school. It could also reflect a reality that her job, at least for the six years she worked for the Fort St. John School District, had its hours tied to the school day. Much of Ms. Locche's work was in her chosen field of Child and Youth Care work, or in closely related areas.

[45] I am prepared to accept that Ms. Locche was the primary care giver for her children while they were growing up, as well as for Mr. Hutchen's son from an earlier relationship, for some part of the marriage. That leads me to conclude that there was at least some element of necessity that contributed to Ms. Locche working less than full time through much of her marriage to Mr. Hutchen. That in turn leads me to find that Ms. Locche has shown an evidentiary basis for a claim for spousal support rooted in the compensatory model developed in *Moge*.

[46] On the other hand, Ms. Locche's career path was established before she entered her relationship with Mr. Hutchen, and she continued to pursue that career throughout the marriage, with some detours when the pressures of a child care career required her to step aside into work involving less stress.

[47] The evidence does not show that Ms. Locche's career was foregone in favour of the marriage, and her argument that she should be considered for spousal support on a compensatory basis because she bore the brunt of the child care responsibilities while Mr. Hutchen was working away from home, while true, goes only so far in establishing that Ms. Locche's career prospects, or her chance to acquire seniority or benefits in her career, were sacrificed to her role in the marriage. Logic and common sense dictate that Ms. Locche's career opportunities were subordinated to child rearing and homemaking throughout much of the marriage, and I so find.

- [48] While there is evidence that she has changed jobs frequently, and that some of those changes were so she could accompany Mr. Hutchen when he moved to better his employment prospects, I do not consider the evidence that Ms. Locche left one or more jobs because Mr. Hutchen asked her to, or told her he did not like her working, is persuasive.
- [49] I conclude that Ms. Locche's claim to spousal support on a compensatory basis, while established, is not as strong as her counsel advocates, primarily because she continued to work throughout the marriage, and there was no marriage-related reason why she had to work outside her career.
- [50] Ms. Locche also frames her claim to spousal support on non-compensatory grounds. She points to her income-earning capacity, as demonstrated during and after the marriage, and argues that she has sustained economic disadvantage as a result of the breakdown of the marriage, and the loss of access to Mr. Hutchen's much higher earnings.
- [51] Bracklow confirmed the non-compensatory basis for a spousal support award. At para. 41, the court said:

"[E]conomic hardship ... arising from the breakdown of the marriage" is capable of encompassing not only health or career disadvantages arising from the marriage breakdown properly the subject of compensation (perhaps more directly covered in s. 15.2(6)(a): see *Payne on Divorce*, supra, at pp. 251-53), but the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it. Looking only at compensation, one merely asks what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage. But even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense.

And at para. 49:

In summary, the statutes and the case law suggest three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in *Moge* (at p. 870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.

[52] Chutter v. Chutter, 2008 BCCA 507 (B.C.C.A.), dealt with both compensatory and non-compensatory basis for spousal support. After noting that in Moge the Supreme Court of Canada had noted the relevance of the parties' standards of living to compensatory support, the court approved passages from W. v. W., 2005 BCSC 1010, interpreting Moge to mean that in long marriages, spousal support should strive to achieve a rough equivalency of standards of living of the former spouses (para. 53). The court in Chutter went on to deal with non-compensatory spousal support and in doing so, at para. 57, noted its earlier decision in Yemchuk v. Yemchuk, 2005 BCCA 406, where the court stated:

[I]n the context of a long-term marriage involving a sharing of resources, I am satisfied that it should take into account the relative standards of living of the spouses following the marriage breakdown.

[53] In this case, the relative standards of living must be considered unacceptably unequal, given the differential in earning capacity between the former spouses.

[54] Ms. Locche has therefore made out a claim for non-compensatory spousal support.

[55] For the purposes of determining quantum, I accept Mr. Hutchen's income as \$150,000. Ms. Locche's is not so easily fixed. She suggests \$26,000, apparently based loosely on her more recent income in British Columbia. Mr. Hutchen suggests I should impute to her an income of \$41,000, based on her ability to earn between \$18 and \$23 per hour, and assuming full-time, full year employment. I note that \$20 per hour full-time, full year employment would yield an income of \$41,500.

[56] Ms. Locche proposes an imputed income, which is much closer to her historical earnings as demonstrated by the tax and other information available. While it might understate her earning capacity, it does not do so by much. Mr. Hutchen proposes an imputed income ignores what I take to be the reality facing Ms. Locche -- and that is that full-time employment is hard to find, and the nature of her field of endeavour is such that the length of her employment is often subject to the vagaries of public funding.

[57] Sample without-child calculations, using the Spousal Support Advisory Guidelines, using imputed income of \$26,000 for Ms. Locche, and \$150,000 for Mr. Hutchen, show a range for spousal support between a low of \$2,635 and a high of \$3,513, with a mid-point of \$3,074.

[58] Ms. Locche argues for the upper end of the range, largely though not entirely, based on her assertion there is a strong compensatory basis for support.

[59] Mr. Hutchen denies any compensatory basis for support and says if there is such a basis, it has been satisfied by the spousal support he has paid since 2011.

[60] The parties do not agree on the impact Ms. Locche's new relationship should have on either entitlement or quantum of spousal support.

- [61] While remarriage may not have much impact on compensatory support, it may have considerable impact on non-compensatory or needs-based support. Remarriage of a recipient spouse may not immediately shift a burden of support to the recipient's new partner, but it can begin a process of transfer of the obligation to support the recipient spouse: *Kelly v. Kelly*, 2007 BCSC 227.
- [62] I use the term "remarriage" to include any arrangement having the indicia of a long-term emotional and financial commitment between two people.
- [63] Ms. Locche's new relationship is in its early stages, and she does not know whether it will develop into a long-term marriage-like relationship or marriage. If it develops into a long-term relationship, then the burden of providing needs-based support may be preparing to shift the weight from Mr. Hutchen to Mr. Smith but it would not significantly affect the compensatory based support, which is still a factor. It is too soon to conclude that Ms. Locche has exhausted the compensatory support to which she is entitled. In saying that, I disagree with Mr. Hutchen's submission to the contrary, which he based on the reasoning in *Kelly*, at paras. 29 and 30. In *Kelly*, the court found that over nine years of spousal support was sufficient to compensate the recipient for "the limited degree that compensatory concerns played in the making of the initial order," whereas here the spousal support has been paid for three years. *Kelly* involved a 12 year marriage, in the context of a 17 year relationship, a similar total length as in this case, with a shorter period of marriage.
- [64] Using the Spousal Support Advisory Guidelines as a reference, and recognizing that they are advisory only, I order Mr. Hutchen to pay spousal support of \$3,100 per month commencing May 1, 2014.
- [65] Ms. Locche's application for retroactive spousal support is dismissed on the basis that, although there may have been effective notice to Mr. Hutchen that his spousal support obligation might increase in the early fall of 2013, when this application was first brought, I can see no satisfactory way in which he could have accurately or confidently ascertained the level at which his support obligation would be set. The extent to which compensatory considerations influenced the range of support would be pegged, along with uncertainty over the level at which Ms. Locche's income would be imputed makes it reasonable for Mr. Hutchen to have awaited the decision of the court before increasing his spousal support payment.
- [66] The uncertainty over Ms. Locche's domestic arrangements call for a review. Given the length of her present relationship, it is reasonable to set a review for two years from May 1, 2014.
- [67] That review should be confined to two aspects: first, whether Ms. Locche's entitlement to compensatory support has been exhausted; second, the extent to which Ms. Locche continues to need non-compensatory support, including but not restricted to, the state of her emotional and economic relationship to Mr. Smith or any other partner.
- [68] Ms. Locche shall have her costs of this application.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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