
CANADA / JUDGMENT

Stevens v. Stevens

2020 BCSC 1339

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1339 Stevens v. Stevens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Stevens,

2020 BCSC 1339

Date: 20200910

Docket: E39848

Registry: Penticton

Between:

Colleen Jane Stevens

Claimant

And

Dana Phillip Stevens

Respondent

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Claimant:

D.M. King

The Respondent on his own behalf:

D.P. Stevens

Place and Date of Trial:

Penticton, B.C.

September 3, 2020

Place and Date of Judgment:

Penticton, B.C.

September 10, 2020

- [1] This is my decision from a continuation of the trial in this matter, following an application by the claimant to reopen the trial for the purposes of determining spousal support. My original decision from the trial is reported at 2019 BCSC 596, and my reasons for granting the application to reopen the trial are reported at 2019 BCSC 2274.

Background

- [2] The parties commenced cohabitation in 1988 when the claimant moved in with the respondent at his property in Princeton, BC. They married some eight years later and separated on June 22, 2015. The relationship is therefore a long-term one, lasting approximately 27 years.
- [3] When the parties commenced their relationship, the claimant was working at a daycare at a local ski resort during the winters, and worked summers at a ranch owned by her parents. She obtained an Early Childhood Education certificate along the way.
- [4] For his part, the respondent had worked at the Weyerhaeuser mill in Princeton since he was 17 years of age, having only completed his education to a grade 10 level.
- [5] The parties are both very industrious hardworking people. The claimant set up a daycare at the family home that she operated for a time. She also pursued other ventures to earn additional income, including putting on Pampered Chef parties, operating a food truck, and various other and sundry self-employed initiatives.
- [6] In approximately 2005, the respondent became aware that Weyerhaeuser may be considering contracting out its road maintenance work. He approached Weyerhaeuser and it was agreed that he would continue to perform the same sort of work, but as an independent contractor. The parties incorporated a company, Hayes Canyon Road Maintenance Ltd. ("Hayes Canyon"), and purchased equipment from Weyerhaeuser in order to operate. The parties both worked for Hayes Canyon, which was the sole source of income from its inception until the parties separated, but for the minor side work that I alluded to earlier.

- [7] Approximately 15 months after separation in September 2016, Hayes Canyon lost its contract with Weyerhaeuser. One of the primary issues at the trial was whether the failure of Hayes Canyon was as a result of the actions of the respondent, and I concluded that it was not. However, well before Hayes Canyon lost the contract, the respondent ousted the claimant from the daily affairs of Hayes Canyon.
- [8] The claimant was subsequently able to obtain employment at the Copper Mountain Mine as a haul truck driver. After Hayes Canyon closed down, the respondent also got a job at the same Copper Mountain Mine, earning a similar income. I dismissed applications for spousal support because the parties were making similar incomes, and the only eventuality I was asked to consider was what would happen if the mine were to shut down. Spousal support was addressed in my trial decision in paragraphs 143 to 147.
- [9] Unfortunately, shortly after my reasons were released, the claimant was terminated from the Copper Mountain Mine as a result of a couple of safety infractions. On the first occasion, she pulled the emergency engine kill switch of a loaded haul truck, causing damage to the truck's auxiliary braking system. She received a letter of reprimand at that time. Less than a month later, she reported to the human resources department that she was feeling overwhelmed and asked to go on to a stress leave, but this request was not granted.
- [10] The claimant cited the recently concluded trial and ongoing harassment from the respondent but more significantly from the respondent's new partner, Lynn Borden, as the primary reason for her mental state at that time. While many of the specific allegations of harassment were denied, I made findings at the trial with regard to the respondent's conduct and the role and involvement of Ms. Borden.
- [11] A few days after her request was declined, she fell asleep at the wheel of a loaded haul truck at 1:45 AM, resulting in the truck contacting the shoulder berm and resulting in damage to the vehicle. Following this event, she was terminated.
- [12] The claimant promptly applied to reopen the trial on the issue of spousal support, which application was granted.

The reopened trial

- [13] At the reopening of the trial, the only witnesses were the parties. The claimant gave evidence about the events that gave rise to her termination that I have described above; her evidence in this regard was not challenged. The respondent says that she was not following company procedures, which is likely true; however, he does not suggest that she in any way deliberately orchestrated her own termination.
- [14] At issue is whether the claimant is entitled to spousal support, and if so, the quantum of that support.

Events since the trial

- [15] Following her termination from her position as a haul truck driver at the mine, the claimant received some employment insurance benefits. She applied for other similar jobs but without success. She then obtained some very helpful career assistance from Ms. Sharon Young of WorkBC. As a result of that assistance, the claimant applied for and was accepted into a program to become a care aid through a local community college.
- [16] The care aid program started in November 2019 and concluded in June 2020. Much of the coursework, at least prior to the Covid pandemic, was completed in Keremeos, with some coursework in Penticton. Part way through her program, the claimant was approached by a manager of the Keremeos facility where she was doing her schooling. The same manager was also responsible for the Ridgewood Care Facility located in Princeton, which is the community where the claimant resides. She encouraged the claimant to apply for a position at the Ridgewood Facility, which application was successful. The Ridgewood Care Facility is part of the Interior Health Authority. She started work there on June 30, 2020, on a casual on-call basis following completion of her program.

Legal framework

- [17] The claimant seeks spousal support pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). The relevant statutory provisions are as follows:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

- (4) 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.

...

- (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.

[18] The claimant says she is entitled to support based upon both compensatory and non-compensatory principles. The respondent disagrees. He says that they had a modern marriage, they had no children together, and says that the claimant suffered no economic disadvantage arising from the marriage. He says she is hardworking and will succeed in whatever she does, and she will be successful.

[19] For the reasons that follow, I conclude that the claimant is entitled to spousal support.

Discussion

[20] Spousal support may be payable based upon compensatory, non-compensatory or contractual principles.

[21] Compensatory support is intended to provide redress to a spouse who suffers an economic disadvantage arising from the breakup of the marriage. It recognizes the sacrifices made by a spouse whose non-financial contributions to the marriage resulted in a lower earning capacity and more limited economic opportunities.

[22] By contrast, non-compensatory support focusses more on the means and needs of the parties, albeit with reference to the standard of living enjoyed by the parties prior to separation.

[23] The leading case on compensatory support principles is the Supreme Court of Canada's decision in *Moge v. Moge*, [1992] S.C.J. No. 107, in which the Court stated the following at para. 84:

[84] Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), *supra*, and *Linton v. Linton*, *supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp. 174-75).

- [24] Contrary to the submissions of the respondent, I do not read Moge as being limited to circumstances of a traditional marriage where one spouse, generally the wife, stays home to raise children and care for the home while the other spouse, generally the husband, earns the family's income and in so doing advances his career. Subsequent cases that have considered Moge are not so limited either. In *W. v. W.*, 2005 BCSC 1010, Justice Martinson observed the following about the interpretation of Moge in British Columbia jurisprudence at paras. 11 and 12:
- [11] In British Columbia this comment in Moge has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims.
- [25] The Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, confirmed that compensatory support can provide redress either for a spouse who has been disadvantaged by the marriage, or if the payor spouse has derived an economic benefit.
- [26] In this case, the respondent continues to be able to make use of at least some of the considerable arsenal of skills he was able to build up and maintain during the relationship. By assuming the bookkeeper role in Hayes Canyon, the claimant assisted the respondent in the business. But it was the respondent who was selling his skills, not the claimant.
- [27] For her part, the claimant has had to start again. After her unsuccessful attempt to become a haul truck driver, she retrained as a care aid, receiving outstanding marks in her program which led to her being hired. She finds herself at the bottom of the seniority list, but she is hoping to work her way up to full time work.
- [28] It is seldom possible to know what a spouse would have done but for the marriage, especially when the marriage is a long one, nor is it particularly helpful to attempt to do so. It is not possible to determine what the claimant would have done for a career if it were not for the relationship, but I have no doubt that she would not have been two months into an entirely new career at 60 years of age.
- [29] I conclude that the claimant is entitled to support on compensatory grounds.

- [30] Non-compensatory support is founded in what the Court of Appeal described in *Namdarpour v. Vahman*, 2019 BCCA 153, as the 'social obligation' model of marriage, recognizing that married couples are financially interdependent. The purpose of non-compensatory support is to narrow the gap in the parties' financial circumstances, and focusses on the means and needs of each party. At para. 138, the Court of Appeal addressed what is meant by needs, and also what the legislation is referring to when using the terms self-sufficiency and economic hardship:
- [138] Meeting the "needs" of a spouse means more than merely providing for basic living expenses: Chutter at para. 55. A spouse's needs are informed by both the marital standard of living and the standard of living enjoyed by the other spouse after marriage breakdown: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-50; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at paras. 68-69; *Tedham v. Tedham*, 2005 BCCA 502 at para. 55. Similarly, the concepts of "self-sufficiency" and "economic hardship" set out in s. 15.2(6) of the Divorce Act, and s. 161 of the FLA, are relative concepts that require consideration of the standard of living enjoyed by the parties during the marriage and by the payor spouse after the marriage: *Hodgkinson* at para. 69; *Chutter* at para. 60. The appropriate quantum of spousal support will depend on the circumstances of each case.
- [31] It follows from the above that just because the claimant might earn enough to pay for her daily living expenses, it does not mean she is not entitled to support as the respondent argues. The court must seek to reduce the income disparity between the parties, and the parties should have roughly the same standard of living following separation after a long marriage (*Nicholl v. Nicholl*, 2020 BCCA 193, para. 49).
- [32] Although the claimant's retraining gives her a good entry level income, she earns less than the respondent, and that is likely to continue on an ongoing basis.

Quantum of support

- [33] The determination of spousal support can be broken down into three time periods.
- [34] The first period when spousal support would need to be considered was prior to when the claimant was terminated from her haul truck driving job. The Court of Appeal in *Sandy v. Sandy*, 2018 BCCA 182, held that spouses may "move in and out of a support regime" as events unfold over time. In this case, no support was payable for as long as the claimant held her job at the mine because her income was equivalent to that of the respondent, even though the circumstances of the relationship was such that she could have been so entitled.
- [35] The second period in time to consider is between when the claimant lost her job at the mine and when she started working as a care aide at Interior Health. During this time, she received employment insurance benefits and the CERB, in addition to a token amount from her bed and breakfast operation.

[36] The third time period is after the claimant commenced work for Interior Health as a casual on-call care aide. Because there is no reason to expect that she will not continue in this position, nor any reason to anticipate any significant changes in the respondent's income, subject to my comments below, the award for prospective support will be determined under this third time period.

[37] I will address this period first.

July 1, 2020 and after

The claimant's income

[38] The claimant earns a base wage of \$25.33 per hour at her job with the Interior Health Authority, plus various premiums that may apply depending on the particulars of the shift. These premiums may apply depending on whether she works at nights, evenings, weekends or on statutory holidays, in addition to any hours that constitute overtime. It is a union position.

[39] The claimant says her income should be assumed to be \$50,000 for the purposes of determining prospective support.

[40] As a casual on-call employee, the claimant receives notifications of shifts that become available. She is entitled to request or "bid" for a shift. Shifts are allocated based upon seniority. Because she is one of the newer employees, she is at the bottom of the seniority list but she nonetheless has received a lot of shifts over the summer holidays and expressed her intention and her willingness to accept each and every shift she is able to obtain, with her long-term objective to be of sufficient seniority that she obtains a full-time shift with regular hours.

[41] The respondent argues that the claimant could do other work to top up her income, such as bookkeeping. It is somewhat ironic that he would suggest that she ought to do bookkeeping on the side, given that he spent a great deal of time at the trial trying to demonstrate her incompetence. That said, I am satisfied that the claimant will continue to take every single shift that is available to her as she builds up her hours as a care aid, and that although she will from time to time take on visitors to her bed-and-breakfast which she runs out of the house, this will likely have little effect on her income and that her care aid work will take all of her available time, especially since she is beholden to the vagaries of the shifts that become available.

[42] The claimant has earned \$10,294.67 from June 30 to August 20, 2020, representing \$201.84 per calendar day. Based on her counsel's calculations, this would prorate to an additional \$26,845 for the remainder of the year. If those amounts were sustainable, the claimant would earn approximately \$37,000 in the last six months of 2020, which, using a prorating approach, would equate to around \$74,000 per year. However, the claimant's evidence is that she expects there will be less shifts available to her moving forward because the more senior

people tend to take their holidays in the summer and therefore while she will continue to accept all available shifts, the amount of those available shifts will likely reduce.

- [43] In the circumstances, I accept the claimant's evidence that the available shifts will probably reduce in the fall. However, her initial earnings would suggest that \$50,000 is too conservative of an estimate, and I find that \$60,000 represents a more reasonable estimate of her prospective income.

The respondent's income

- [44] For his part, the respondent continues to work at the Copper Mountain Mine. His base rate is \$31.20 an hour and he also receives overtime and premiums, depending on the hours he has worked and the shifts he is working. The respondent tendered a letter from his employer confirming an annual base salary of \$64,900.60 plus scheduled overtime of \$4,867.36. He is also eligible for weekend premiums of \$936 annually, and a night shift premium \$1,314. Historically, however, the respondent has always earned more than the base salary amount, primarily due to overtime. His income during recent years has been as follows:

Year

Income

2017

\$72,888

2018

\$91,448

2019

\$117,479

2020

\$59,269 (Jan - Aug inclusive)

- [45] Mr. Stevens described his circumstances in terms of seniority as not dissimilar to those of the claimant. He applies for different positions from time to time that would see him earn more money, but they are generally awarded on a seniority basis. However, unlike the claimant, he has a permanent full time position.
- [46] I am satisfied that over time the various shift premiums and overtime hours have played and will continue to play a significant role in determining the respondent's income, which will likely continue to exceed the minimum levels that are set out in the letter from the human resources manager at the mine.

- [47] The respondent explained that the reason his income was higher in 2019 than in previous years or in 2020 was because he obtained a temporary position working in the tailings pond area while another employee was off work on an extended leave. He returned to his previous duties when that employee returned, which was around Christmas or early in the new year of 2020. I am satisfied that the earnings in 2019 were a function of the temporary position, but will not likely reoccur, and that the increased rate of pay in that position has had little to no impact on his 2020 income.
- [48] As such, I do not accept that it is reasonable to consider the anomalous 2019 year in determining ongoing income expectations. Periods of overtime or other positions are sporadic and unpredictable. Indeed, in 2020, the respondent had received something in excess of \$5,000 in overtime during the first three or four months of the year, which was in evidence based upon the materials that were exchanged between the parties when this continuation was first to be heard, but he has received no overtime since then. I am satisfied that overtime work comes in fits and starts, and while historically he will earn well above the base amount, his income in 2017, 2018 and 2020 forms a more reliable basis for calculation.
- [49] I conclude that a prorating of his 2020 income to date, which would result in an annual income of approximately \$89,000, would appear consistent with prior income but for the temporary higher position, and that \$90,000 is an appropriate income for the respondent for spousal support purposes.

Conclusion

- [50] Both parties, who are relatively low on their respective seniority lists, will continue to accumulate the hours that will afford them a higher seniority over time. The primary difference at this point between the two is that the respondent has a guaranteed position with a minimum number of hours, whereas the claimant presently does not.
- [51] While the claimant will continue to derive a modest income from her bed-and-breakfast operation, I am satisfied that this will be nominal because she will only be in a position to accept clients when she is not working.
- [52] Based upon the DivorceMate software calculations, with the claimant's income determined to be \$60,000 and the respondent's income \$90,000, the range under the Spousal Support Advisory Guidelines would be as follows: low \$938, mid \$1,094 and high \$1,250.
- [53] In the circumstances, I conclude that spousal support is payable in the amount of \$1,100 per month, payable for an indefinite period commencing June 1, 2020, and payable on the first day of each month thereafter.

May 1, 2019 to June 30, 2020

- [54] The appropriate level of support during this time period requires consideration of what the parties were actually able to earn during that period.
- [55] The claimant's income was extremely low as she had been laid off from work and then spent some seven or eight months in her schooling program that has led to her care aide position. The evidence is that her earnings during this 14-month period included employment insurance benefits of \$20,460, bed-and-breakfast revenues of \$3,200 and CERB benefits of \$8,000.
- [56] The respondent's income from the mine during this period included the extra income he was able to derive in the temporary position at the tailings pond.
- [57] The claimant proposes support for this period be calculated at the midrange using the DivorceMate software, with the respondent's income of \$117,479, representing his actual income for 2019, and the claimant's income of \$52,292, which is also her actual income for 2019, the vast majority of which was her employment income prior to termination from the mine.
- [58] I accept that the approach, in general terms, is reasonable. However, it would have the effect of causing the respondent's temporary increase in income to affect a longer period than may be appropriate. Using DivorceMate calculations using the claimant's income as proposed by her counsel, but reducing the respondent's income during the period to \$110,000 to reflect the fact that this increase in income was temporary and did not include much during the first part of 2020, the range for support would be: low \$1,803, mid \$2,104 and high \$2,388.
- [59] I conclude that an appropriate amount for spousal support commencing May 1, 2019 and ending June 30, 2020 is \$2,000 per month.
- [60] At the claimant's suggestion, this amount is not payable forthwith, but will be adjusted as part of the calculations that are required to determine the claimant's buyout of the respondent's interest in the former family home, as directed following the trial at paragraph 148 of the reasons for judgment.

Costs

- [61] In my decision at the trial, I gave the parties liberty to address the issue of costs. I made the same order following the application to reopen the trial.
- [62] In the circumstances, either party is at liberty to address the issue of costs with regard to the trial, the application to reopen, and the continuation of the trial; either party may contact Supreme Court Scheduling within 14 days of the date of these reasons to make such arrangements.

"Wilson J."

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