

CANADA / JUDGMENT

Audia v. Audia

2020 BCSC 1863

COURT

Supreme Court of British Columbia

DECIDED

30 November 2020

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2020 BCSC 1863 Audia v. Audia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Audia v. Audia,

2020 BCSC 1863

Date: 20201130

Docket: E113969

Registry: Vancouver

Between:

Kathleen Marie Audia

Claimant

And

Salvatore Audia

Respondent

Before: The Honourable Madam Justice Sharma

(In Chambers)

Reasons for Judgment

Counsel for the Claimant:

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K. Ciric

Counsel for the Respondent:

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T. Urquhart

Place and Date of Hearing:

Vancouver, B.C.

August 26 & 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 30, 2020

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I. INTRODUCTION

[1] There are two applications before me. Both concern an order entered December 11, 2013, which is labelled "Final Order" (the "2013 Order"). The recital refers to it being made by consent when this family law case came on for trial on December 11, 2013. In other words, the parties consented to a settlement within the first few days of trial.

[2] The claimant brings an application seeking to enforce provisions of the 2013 Order regarding the payment of spousal support, and related relief.

- [3] The respondent's position is that despite its wording, the 2013 Order is merely an interim order. Therefore, in his application, he seeks a final order fixing spousal support "in an amount deemed reasonable." Alternatively, he seeks to vary the 2013 Order's provisions regarding spousal support based on a material change of circumstance.
- [4] As set out below, I find the 2013 Order was a final order granted under the Family Law Act, R.S.B.C. 1996, c. 128 ("FLA") and therefore the respondent's application seeking to fix spousal support is dismissed. I also find the evidence does not establish a material change of circumstances sufficient to vary the order. Accordingly, I grant the claimant's application enforcing the award.
- [5] At issue in both applications are the provisions regarding spousal support contained in paras. 36 to 51 of the 2013 Order, which I summarize:
- a) The respondent agreed to pay permanent spousal support to the claimant (para. 37).
 - b) The claimant was imputed with income of \$30,000 for every year, consisting of disability income and investment income.
 - c) The valuation of the respondent's income and spousal support obligations was set out in paras. 36 to 48. The parties agreed to retain a professional valuator who would each year prepare "a report on the Guideline Income available to the respondent for the purpose of spousal support" (para. 43).
 - d) Upon receipt of the valuator's report, the parties would determine the amount of spousal support payable based on the claimant receiving 45% of the respondent's annual income (para. 47(a)), which would be implemented retroactively to January 1 of that year (para. 47(b)), with the respondent being credited with any support already paid in that calendar year (para. 47(c)). This process and formulation was to be done every year.
 - e) The respondent's income would include, but not be limited to (para. 39):
 - i. employment income;
 - ii. dividend income;
 - iii. monies received by way of capital dividend;
 - iv. capital gains income;
 - v. interest income;
 - vi. taxable benefits;
 - vii. disability income or benefits;
 - viii. RRSP income;

- ix. shareholder loans or other loans owing to the respondent from any corporation or partnership;
 - x. net corporate pre-tax income as available to the respondent "pursuant to any reports prepared by the valuator";
 - xi. any additional compensation received upon the sale of all or part of the business over and above the sale price; and
 - xii. any other form of remuneration received by the respondent.
- f) Certain assumptions would be taken into account when valuing the respondent's income (para. 46), including:
 - i. attributing any income in excess of \$160,000 from 2013 to his 2014 income and any income in excess of \$300,000 from 2014 to his 2015 income;
 - ii. excluding the repayment of any outstanding shareholders' loan balances from the valuation of his income, including any shareholders' loans drawn by the respondent over \$265,000; and
 - iii. considering whether the debt to equity ratio and current ratio are outside of industry norms.
 - g) The respondent's obligation to pay spousal support survives his death and binds his estate (para. 49(d)).
 - h) As security for spousal support, the respondent was obliged to make an irrevocable provision in his will of a minimum of \$1,000,000. He was also prevented from owning assets in joint tenancy (para. 49(d)).
 - i) The claimant's claim to retroactive spousal support was dismissed (para. 50).

II. BACKGROUND

- [6] The parties were married in September 1980. They had a traditional marriage; the claimant was the primary housekeeper and stayed home to raise their children. Although she had a part-time job for a while, she ceased working all together in 1997. The respondent had always been the family's breadwinner. The parties had two children, now both adults.
- [7] The parties separated in October 2011. The claimant was 55 years old and the respondent was 53 years old.
- [8] The claimant has suffered from a degenerative disc disease since birth, which causes chronic neck and left upper arm pain and which was exacerbated by two motor vehicle accidents. In addition, prior to separation, she was diagnosed with depression as a consequence of her chronic pain.
- [9] The respondent is a businessperson. He has operated and been employed by GNK Insurance Services Ltd. ("GNK") since about 1990. During the marriage, the parties owned a 50% share in GNK. Two other couples each owned a 25% share of that business.

- [10] In 2010, the parties formed a partnership with the other shareholders of GNK and another couple for the purpose of owning a building at 4190 Hastings Street (the "Partnership").
- [11] The claimant filed an amended notice of family claim in June 2012 (the original claim was filed in December 2011) seeking child support, special or extraordinary expenses, spousal support, and orders relating to property. She did not seek a divorce.
- [12] The respondent filed his response in February 2012 disputing some facts. He also filed a counterclaim seeking an order for divorce.
- [13] The parties were set to commence a seven-day trial on December 11, 2013 but instead entered into the 2013 Order. It is not disputed that the order for divorce was adjourned generally to ensure the proposed transactions in the 2013 Order did not lead to unfavourable tax consequences.
- [14] The divorce was granted by consent in June 2014.
- [15] The respondent paid \$11,000 per month in spousal support from December 2013 until March 2020. In April, 2020, the respondent unilaterally reduced the amount of support paid to \$4,000 per month. The claimant successfully obtained a court order in June 2020 to reinstate support to \$11,000 per month.

III. ISSUES

- [16] The claimant submits the respondent has breached the 2013 Order because he has not complied with the annual requirement to adjust the amount of spousal support payable based on his income for the past year. The respondent's delinquency regarding document production only exacerbated the situation.
- [17] The claimant seeks the following:
- a) spousal support arrears pursuant to the 2013 Order, totalling \$1,084,100 in pre-tax spousal support or \$566,536 in net spousal support as of August 1, 2020;
 - b) imposition of a \$5,000 fine pursuant to s. 230 of the FLA;
 - c) post-judgment interest on the spousal support arrears, totalling \$53,285.19 as of May 14, 2020;
 - d) monthly spousal support commencing June 1, 2020 at \$26,400, based on the respondent's 2018 income of \$704,000;
 - e) provision of post-dated cheques for 12 months of the periodic spousal support pursuant to ss. 170 and 230 of the FLA, and;
 - f) special costs.

- [18] Also, if necessary, the claimant seeks a correction to the 2013 Order pursuant to Supreme Court Family Rules R. 15-1(18) or the inherent jurisdiction of this Court to clarify that it is a final order made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and/or the FLA.
- [19] The respondent submits the 2013 Order is not a final order. As such, in his application filed on July 22, 2019, he seeks a final order under the Divorce Act for spousal support. As well, he seeks a "declaration that spousal support arrears be fixed at an amount deemed reasonable." If the 2013 Order is final, he seeks in the alternative an order varying the 2013 Order based on a material change in circumstances.

IV. NATURE OF THE 2013 ORDER

- [20] As a preliminary matter, I must first address the respondent's submission that the 2013 Order is not a final order.
- [21] In order to do this, I must first consider which statute the consent order was granted under, as the 2013 Order does not specify. If the order was granted under the Divorce Act, it is necessarily an interim order. However, if it was granted under the FLA, it may be either interim or final and, as such, I will have to determine if it is indeed final.
- [22] The respondent's position is that the 2013 Order cannot be considered a final order because it was entered before the divorce order was granted. He relies on *Yu v. Jordan*, 2012 BCCA 367, where the Court of Appeal held that an order for corollary relief granted under the Divorce Act remains interim "until the divorce order is granted" (para. 47).

A. Legal Principles

- [23] In *Yu*, Justice D. Smith cited *D.B.S. v. S.R.G.*, 2006 SCC 37 for the above principle. D.B.S. confirmed that federal authority to legislate with respect to child support only arises as ancillary to its jurisdiction over divorce. The same is true of spousal support, as D. Smith J. (as she then was) noted herself in *Chicoine v. Chicoine*, 2007 BCSC 735 at para. 48. Therefore, orders for corollary relief cannot be considered "final" until a divorce is granted.
- [24] Where the parties have pleaded both the Divorce Act and the FLA and the order does not specify the legislation under which the order is granted, the court must interpret the order and decide which statute governs. While this can be a difficult task, D. Smith J.A. provides the following helpful guidance in *Yu*:
- [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

- [25] If it remains unclear which act ought to apply, the Divorce Act will be presumed to govern because of federal paramountcy: Yu at para. 51.
- [26] However, I note that in D.B.S., the Supreme Court advised that "[i]n prospective cases, before an application for divorce is filed with the court, support should be sought under provincial law." Justice Bastarache, writing for the majority, goes on to note that "simply because courts have the constitutional authority to make such a retroactive award [for support] under the Divorce Act does not imply that they should regularly do so" (para. 93).

B. Analysis

- [27] Applying the preceding principles, I find the 2013 Order was a final order granted pursuant to the FLA. This is supported by the following factors, none of which is determinative on its own.
- [28] First, the order itself is styled as a "Final Order." The Court granting the order presumably understood the legal principles discussed above. Thus, styling the order as final would only be consistent with it being an order granted pursuant to the FLA and not the Divorce Act. Of course, styling it as a "Final Order" also indicates the order was intended to be final.
- [29] Second, the 2013 Order adjourned the parties' applications for a divorce order at para. 69. This further suggests the 2013 Order was granted under the FLA and not the Divorce Act. However, the significance of this factor is limited as the divorce order was only adjourned to allow the parties to make arrangements with the most favourable tax consequences.
- [30] Third, the content of the 2013 Order and its wording are more consistent with it being a final order. Most notably, the order establishes a permanent obligation for the respondent to pay spousal support and provides a mechanism for adjusting the amount payable every year.
- [31] Fourth, the parties entered the Order during the first two days of a trial that was set to address all outstanding issues. Had the trial proceeded, it would have resulted in final orders.
- [32] Fifth, in addition to spousal support and child support, the 2013 Order is a comprehensive settlement of property division, including division of the matrimonial home, businesses, debts, RRSP's, vehicles, and pension income. Property division is, of course, the sole prerogative of the FLA and so further supports the conclusion that the 2013 Order was granted pursuant to the FLA.
- [33] Sixth, the claimant explicitly relied on the FLA and sought to enforce what she termed the "Final Order" (in reference to the 2013 Order) in her November 27, 2018 application to get documents she was entitled to under the 2013 Order.

[34] Finally, I note that the 2013 Order, in dismissing the claim for child support, does not use the Divorce Act terminology of "child of the marriage" when referring to the parties' son. This is in contrast to Yu, where the reference to the "child of the marriage" was seen as a factor supporting the order being granted under the Divorce Act (at para. 54).

[35] For all those reasons, I find that the 2013 Order is a final order granted pursuant to the FLA.

V. VARIATION OF THE 2013 ORDER

A. Legal Principles

[36] It is important to emphasize that the respondent's application seeks (in the alternative) a variance of spousal support, not a review. The difference between a variation and a review of an order is explained in *Cotter v. Cotter*, 2015 BCSC 1730 at paras. 19-32, aff'd 2016 BCCA 254. As a variance, the "focus of the analysis is on the prior order and the circumstances in which it was made": *Cotter* at para. 24, citing *L.M.P. v. L.S.*, 2011 SCC 64 at para. 35.

[37] The parties agree that under either the Divorce Act (s. 17(4.1) or FLA (s. 167), the threshold to vary a final order is to demonstrate a material change in circumstances: Yu, at para. 50; *Cotter*, at para. 22.

[38] For a change of circumstances to be material, the change must be one that, "if known at the time of the original order, would have likely resulted in different terms": *L.M.P.* at para. 32, citing *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688. Additionally, the change must not merely be a temporary set of circumstances: *L.M.P.* at para. 35.

[39] In the case of consent orders, whether there has been a material change is assessed based on "what the parties actually contemplated at the time the order was entered by agreement," not on "what one party knew or reasonably foresaw": *Dedes v. Dedes*, 2015 BCCA 194 at para. 25 [emphasis in original], citing *L.M.P.*

[40] One of the functions of the threshold of a material change is to "prevent parties from re-litigating issues that were already considered and rejected," and so from effectively appealing the original order: *Dedes* at para. 25.

[41] The material change threshold is not raised when the order at issue is a consent order based on an agreement between the parties: *Morey v. Morey*, 2017 BCCA 439 at para. 26, citing *L.M.P.* at paras. 46 and 50.

B. Analysis

[42] The parties filed voluminous materials in support of their applications, including 14 affidavits. I have reviewed the material, but it would be unnecessary and inefficient to review all that evidence in detail. Instead, I provide my conclusions about that evidence.

- [43] The respondent bases his position that there was a material change on a number of circumstances. I am not satisfied the evidence establishes on a balance of probabilities that any of these circumstances amount to a material change, whether individually or collectively.
- [44] Those circumstances, followed by my brief analysis of why it does not amount to a material change, are as follows:
- a) Carrying costs associated with a loan that he applied for in order to finance the compensation payment to the claimant (para. 24 of the 2013 Order);
 - i. The 2013 Order itself refers to the respondent seeking financing to pay the compensation. In other words, it was explicitly in the parties' (and the court's) contemplation when the 2013 Order was entered.
 - ii. The respondent complained the terms were onerous. However, if the financing he ultimately obtained was not what he expected, the 2013 Order also addressed that the businesses could have been sold.
 - iii. Moreover, the evidence suggests the terms were not too dissimilar to other loans the respondent entered into, belying his position that they were unexpected terms.
 - b) One of GNK's shareholder's (Bob King) retired about one year after the 2013 Order and the respondent's decision to purchase those shares upon Mr. King's retirement;
 - i. I do not accept on the evidence that this event was not contemplated by the respondent. The respondent admitted at his examination for discovery that he was aware his business partners were both concerned about retiring. He also agreed that Mr. King told the respondent during the parties' marriage that he wanted to retire.
 - ii. In terms of the purchase of Mr. King's shares, I saw nothing in the record to suggest it was mandatory for the respondent to purchase those shares. While it may have been reasonable that the respondent chose to do so (apparently to maintain his ownership stake in the company), that was a business decision and as such, would presumably have been to his ultimate benefit financially.
 - c) The alleged inability to sell shares in GNK to finance spousal support payments; and
 - i. The respondent has failed to make out this claim; in fact, he did sell some shares in December 2018 for over \$750,000.
 - ii. In any event, I agree with the claimant that there was little to no evidence to substantiate the claim beyond the respondent's asserted belief.
 - d) Accumulated tax arrears owing to the Canada Revenue Agency.
 - i. I agree with the claimant that the respondent has not provided sufficient evidence explaining the accumulation of the CRA debt.

ii. More to the point, based on the respondent's evidence, it is more probable than not that the CRA debt arises from personal choices he made about arranging his financial affairs, and specifically, decisions to prioritize paying off a loan early.

[45] The incidents relied upon by the respondent have a common theme: they all relate to financial consequences arising from business or personal decisions the respondent made in the years after the 2013 Order. In *Jordan v. Jordan*, 2011 BCCA 518, the Court of Appeal upheld the chambers judge's decision where among other things, a decline in income brought about by personal decisions regarding a business did not amount to a material change (paras. 44-48). The reasons for the respondent's fluctuation in income arise from similar considerations, but notably, he also experienced significant increases in his income since 2013.

[46] The respondent is a sophisticated business person. He has been represented by counsel and had access to a number of professionals to advise and guide him regarding financial matters throughout this litigation. I am satisfied that the 2013 Order is detailed and was robustly negotiated. The claimant emphasized this point, noting that compromises were made to achieve the settlement. She points out as an example that she abandoned her claim to retroactive spousal support.

[47] The fact that the 2013 Order was a consent settlement does not alter the legal threshold to establish a material change. However, it is appropriate to recognize that it represents "an integrated whole": *Shackleton v. Shackleton*, 1999 BCCA 704 at para. 14.

[48] For all those reasons, I am not satisfied that the respondent has adduced evidence that establishes a material change in circumstances.

VI. ENFORCEMENT OF THE 2013 ORDER

[49] The claimant seeks an order requiring immediate payment of outstanding spousal support arrears.

[50] At paras. 40-41 of the 2013 Order, the parties agreed that starting in December 2013, the respondent would pay monthly spousal support of \$11,000. This was based on the respondent's 2014 income, which based on the evidence, was known to be unusually low because of certain restrictions on GNK's ability to declare dividends. The respondent would continue to pay \$11,000 monthly support pending further agreement or court order following receipt of "the Income Report from the Valuator."

[51] Paragraphs 36-48 of the 2013 Order stipulate how the respondent's income will be calculated (see above at para. 5). In simple terms, the claimant is to receive 45% of the respondent's guideline income as determined by the income report.

- [52] The respondent has only ever paid \$11,000 per month, notwithstanding increases in his income. Specifically, the income reports for the years 2013-2015 prepared by the valuator revealed that the respondent's guideline income increased as follows: \$656,000 in 2013, \$684,000 in 2014, and \$722,000 in 2015. The same professionals produced reports indicating the respondent's income was \$684,000 in 2016 and \$669,000 in 2017.
- [53] After taking into account the \$11,000 paid each month, the claimant submits the respondent has significantly underpaid spousal support according to the terms of the 2013 Order. She submits he owes a total of \$566,536, which is the net spousal support owing.
- [54] I did not understand the respondent to disagree with the accuracy of those calculations.
- [55] Although he did not explicitly seek an order cancelling or reducing spousal support arrears, he does state in his application that it would be grossly unfair not to cancel or reduce the spousal support. In his response to the claimant's application, he denies he has failed to comply or made efforts to comply with the 2013 Order.
- [56] Notwithstanding these omissions in the respondent's application and response to the claimant's application, I have considered whether he has adduced evidence that could meet the test for reducing or cancelling arrears under s. 174 of the FLA. It is important to emphasize that this issue is distinct from the issue of variation, that is, whether there has been a material change in circumstances.
- [57] Where a party seeks to cancel or reduce arrears, the onus is particularly heavy: *G.F.W. v. J.L.R.*, 2012 BCCA 245 at para. 12. The Court of Appeal commented on the applicable test in *Dring v. Gheyle*, 2018 BCCA 435 at para. 94:

An application to cancel arrears brings into play different considerations. It is governed by different framework. The leading authority in this province is Justice Martinson's decision in *Earle v. Earle*, 1999 BCSC 283, which as noted in *MacCarthy*, has been cited over 250 times. In *MacCarthy* this Court summarized the test for cancelling arrears:

54 The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

- [58] The respondent specifically relies on the grounds identified in his application as response to the claimant's application. His application sought to fix spousal support pursuant to ss. 15.2(4) and (6) of the Divorce Act. Given my conclusion that the 2013 Order is a final order under the FLA, those submissions are not relevant.

- [59] He also relies on his submissions, in the alternative, regarding a material change of circumstances. As noted above, I am not satisfied that the respondent has established on a balance of probabilities that there has been a material change justifying any variation of the calculation of spousal support. Those submissions are equally unpersuasive in support of his position on this issue. Indeed, given the test is stricter, his submissions on this ground are weaker.
- [60] The only relevant statutory provision is s. 174 of the FLA, which empowers the court to cancel or reduce spousal support arrears, but only if satisfied that it would be "grossly unfair" not to do so. The three factors the court considers are the payor's efforts to comply with the order respecting support, the reasons why the payor cannot pay the arrears, and any other circumstances considered relevant by the court.
- [61] In his response to the claimant's application, the respondent simply denies there is any basis for the allegations that he has breached or not made efforts to comply with the 2013 Order, adding that "from the outset," it has been "impossible" for the respondent to comply with the continuing obligations created thereunder. He similarly asserts there is no basis for the claimant's allegations that he delayed or frustrated production of the income reports.
- [62] With respect, the respondent has approached the issue as if there was an onus on the claimant to demonstrate that failing to cancel or reduce spousal support arrears would be grossly unfair. However, the onus to establish "gross unfairness" under s. 174 is on the respondent. I am not satisfied that he can meet the test for gross unfairness.
- [63] The evidence reveals the respondent chose to prioritize a number of other financial obligations over increasing his spousal support payments in line with his increased income, including: paying off a loan early, contributing to his own RRSP, and making the business decision to buy shares from a retiring shareholder. Any difficulties created by those decisions do not amount to gross unfairness. Nor do they constitute justifiable reasons for not fully meeting his spousal support obligations. However, they are very likely responsible for the cash flow challenges he now faces.
- [64] With regard to his assertion of financial difficulties, the respondent attached to his July 22, 2019 affidavit a pro-forma cash flow chart prepared by his accountant. The document constitutes hearsay and is of little assistance without the accountant's explanation. Similarly, he includes some information about his CRA debt, but does not provide a complete explanation.
- [65] I reiterate Justice Martinson's observations in *Earle v. Earle*, 1999 BCSC 283 at paras. 25-33 about the quality of evidence required to meet the test to cancel or reduce arrears and find those comments apt to the record in this case. Specifically, she remarked on the need for "reliable, accurate and complete information" that cannot be hearsay (at paras. 28 and 30).

- [66] However, even more compelling on the facts before me are the terms of the 2013 Order. The parties specifically agreed not only on a mechanism for determining the respondent's guideline income each year, but on the retention of experts to analyze the financial documents to do so. They agreed on a precise list of financial documents the respondent is required to give to the claimant for the purpose of income calculation. They further agreed to a number of stated assumptions and factors to guide the valuator's consideration of the respondent's income.
- [67] From these income reports, the parties agreed to calculate the amount of spousal support payable, with the claimant receiving 45% of the respondent's annual income. Clause 47(b) of the 2013 Order then states that the "parties shall implement" the revised spousal support amounts by agreement or court order.
- [68] In light of those specific provisions, it would be incumbent on the respondent to demonstrate any errors or deficiencies in those reports, or some other manner in which they did not comply with the 2013 Order. He has not attempted to do so.
- [69] The respondent's obligation was to make efforts to meet his spousal support obligations. In terms of providing a reason why he has not paid the amounts owing, he appears to maintain that he is compliant with the 2013 Order. In his July 22, 2019 affidavit he states that until agreement or court order, his payment of \$11,000 is compliant. Accordingly, apart from his assertion of financial hardship, he provides no explanation for not agreeing to pay the amounts dictated by the income reports.
- [70] Although the respondent blames the claimant for the delay in these applications coming to court, I am not satisfied she is to blame. Instead, I find on the evidence the respondent bears most of the responsibility for the pre-COVID delay in having these applications set down for hearing.
- [71] Accordingly, the respondent has failed to adduce evidence to establish gross unfairness by the claimant's insistence on being paid the spousal support mandated by the income reports produced by the parties' valuator.
- [72] For all those reasons, I grant an order requiring the respondent to pay the outstanding amounts of spousal support pursuant to the 2013 Order as set out in para. 1 of the claimant's June 9, 2020 application, with one change: that the amount be updated current to August 2020. The total after-tax spousal support, net of amounts already paid by the respondent, owing up to August 1, 2020 is \$566,536.
- [73] The most recent valuator's report available at the hearing set the respondent's guideline income for 2018 as \$704,000. That is the amount upon which monthly spousal support is payable until there is an updated report. I therefore grant an order consistent with the 2013 Order that commencing September 1, 2020, and on the first day of each month thereafter, the respondent shall pay periodic spousal support based on guideline income of \$704,000 in the amount of \$26,400.

VII. OTHER ORDERS SOUGHT

- [74] The claimant sought a number of other orders.
- [75] Pursuant to ss. 170 and 230 of the FLA, the claimant asked that I order the respondent to provide post-dated cheques for the periodic spousal support stipulated above, for a period of 12 months, starting on December 1, 2020. Given there was a dispute between the parties about the timeliness of some payments, this order is reasonable and I grant it.
- [76] The claimant also sought payment of post-judgment interest on the accrued spousal support, which she submits would amount to \$53,285.19 up to May 14, 2020. She submits it is appropriate to award post-judgement interest for unpaid arrears, relying on *Harrison v. Harrison*, 2016 BCSC 708, at para. 37. That case is distinguishable because it was an application for a number of orders in the context of a contempt hearing related to a parent not returning children on time and failing to pay child support and special expenses.
- [77] The respondent is correct that the 2013 Order contemplated the parties would implement updated spousal support payments by agreement or further court order. Regardless of my conclusions about his failure to agree to the updated amounts, I am not satisfied that post-judgment interest is appropriate in these circumstances.
- [78] The claimant also seeks payment of an amount up to \$5,000 for the failure to comply with both the respondent's disclosure obligations (s. 213(2)(d)(ii)) and the 2013 Order (s. 230). The claimant was successful in her November 2018 application regarding disclosure, and my understanding is costs were awarded to her. In those circumstances, it is not appropriate to issue a fine which would capture at least some of the same conduct.
- [79] Although I have rejected the respondent's position on both his application and his response, I am not satisfied that his position regarding the finality of the 2013 Order was devoid of merit and for that reason, I do not find that he breached the 2013 Order. I note the updated spousal support payments were not technically due until the parties agreed or there was a further court order. Thus, by continuing to pay \$11,000 it could be argued he was compliant with the 2013 Order.
- [80] However, I add for his benefit, that it is unlikely in the future, given my comments here, that he could purport to be in compliance simply by failing to agree to the updated amounts and paying only the last amount ordered by the court.
- [81] The clear and laudable intent of the 2013 Order is to keep the parties out of court. They have chosen to engage independent professionals to determine the respondent's guideline income and there is no good reason for the respondent not to update the support payments each year as dictated by the income report.

VIII. COSTS

- [82] The claimant is entitled to her costs on both applications.

[83] She seeks special costs. This is not one of the extraordinary cases where the respondent demonstrated reprehensible conduct. As a result, special costs are not warranted.

"Sharma J."

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