

CANADA / JUDGMENT

De Cotiis v. De Cotiis

2023 BCSC 1436

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1436 De Cotiis v. De Cotiis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Cotiis v. De Cotiis,

2023 BCSC 1436

Date: 20230817

Docket: E111973

Registry: Vancouver

Between:

Juanita May De Cotiis

Claimant

And

Donato I De Cotiis

Respondent

Before: The Honourable Justice Marzari

Reasons for Judgment

In Chambers

Counsel for Claimant:

M. Campbell

Counsel for Respondent:

J. M. Diakow

Place and Date of Hearing:

Abbotsford, BC

June 20-22, 2023

Place and Date of Judgment:

Abbotsford, B.C.

August 17, 2023

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INTRODUCTION

- [1] Before me are two cross-applications in this high conflict family matter, one brought by the claimant, Ms. Juanita De Cotiis, and one brought by the respondent, Mr. Donato De Cotiis.
- [2] This high conflict family claim has been ongoing since 2011, and the file has involved over 30 orders to date. Much of these orders relate to parenting issues, which are not before me today, and which I need not recount. The applications before me relate primarily to support, and require the determination of Mr. De Cotiis' past and present income.
- [3] In March 2019, Justice G.C. Weatherill, who was seized of this matter for many years, imputed to Mr. De Cotiis an income of \$169,629 (the "March 2019 Support Order"). Mr. De Cotiis says that his salary has been significantly less than that since separation, based on what his family-controlled company was prepared to pay him during this period. Mrs. De Cotiis says that his real income has been much greater. I must determine whether it is appropriate to impute to Mr. De Cotiis an income above his stated salary, and if so, I must also determine from what date that imputation ought to occur.
- [4] Mr. De Cotiis applies for variations to the March 2019 Support Order that would have the effect of substantially reducing his child and spousal support obligations from 2014 onward. Mr. De Cotiis also seeks an order cancelling or reducing child and spousal support arrears he has accumulated based on the variation that he seeks.
- [5] In addition, Mr. De Cotiis applies to vary or rescind his sentence for contempt of court issued by Weatherill J. in January of 2020. That order sentenced Mr. De Cotiis to 30 days of incarceration for contempt of court, suspended on conditions that include the payment of stipulated amounts of child support, spousal support, and payment toward the arrears of support (the "Sentencing Order"). There is no sunset clause to Mr. De Cotiis' suspended sentence.
- [6] In response, and in her own application, Mrs. De Cotiis seeks to vary the March 2019 Support Order to reflect a greater imputed income, of \$300,000 annually. She applies for an increase in support relative to the March 2019 Support Order, and an increased rate of payment of the arrears owed by the respondent. She says that at Mr. De Cotiis' current rate of arrears payments, it will take more than 25 years for her to recover the arrears owing under the March 2019 Support Order.

- [7] With respect to the Sentencing Order, Mrs. De Cotiis opposes lifting the suspended sentence, which she says is the only thing ensuring that she continues to receive the portion of the ordered support that she does. While Mrs. De Cotiis also attempted to re-set her May 22, 2019 application for contempt, she concedes that that application was largely addressed and superseded by Weatherill J.'s citation of Mr. De Cotiis for contempt on his own motion in May that year. Mrs. De Cotiis' 2019 contempt application is now moot.
- [8] Though both parties initially sought a review of Mr. De Cotiis' income back to 2014 in their applications, during submissions the parties largely conceded that their applications more properly apply to the respondent's income since the March 2019 Support Order.

BACKGROUND

- [9] I shall set out a brief history of the orders made by this court that are pertinent to the issues before me. I note that the bitterest disputes between the parties appear to have been primarily over parenting issues, which I need not canvas to make the determinations that are before me.
- [10] Mr. De Cotiis and Mrs. De Cotiis have two children:
- a) The eldest was born on June 13, 2002. It is accepted that she is no longer a child of the marriage. In March 2019 she was 16 years old;
 - b) The youngest was born on June 16, 2008. He was 10 years old in March 2019 and had just turned 15 at the time of this hearing.

Settlement Order 2012

- [11] The issue of support first came on for hearing in 2012. I understand that it was scheduled for trial, but that the parties reached a settlement before Justice L. Smith providing for parenting, property division, and support. The parties have produced a consent order reflecting this settlement, as settled in the order of Justice Wong made on January 8, 2013 (the "2012 Consent Order"). I understand that support was paid on the basis of this Consent Order up to 2014.
- [12] The 2012 Consent Order provided that Mr. De Cotiis' income was \$169,629 in 2011, but that he anticipated no income in 2012. It is undisputed that the source of this income was his family's closely-held business. That business is comprised of a large property development corporation and related businesses, that the parties refer to broadly as the Onni Group. The evidence before me discloses that the Onni Group includes Onni Property Management Services, and other corporate vehicles. There are also numerous trusts, at least some of which are controlled by other corporate vehicles. All of these appear to have been largely controlled by Mr. De Cotiis' late father, Mr. Innocenzo De Cotiis until 2020, and then by his successors, heirs and trustees, still under the umbrella of the Onni family. For simplicity, I refer to these companies and trusts collectively as "Onni".

- [13] The evidence establishes that Onni provided Mr. De Cotiis with a paid position and salary and other benefits, for much of his adult life, including company subsidized housing. Mr. De Cotiis says that his salary and benefits were not tied to his productivity per se, but rather to his family membership, and were controlled by Onni, and his father and brothers in particular.
- [14] In the 2012 Consent Order, Mrs. De Cotiis' income was accepted as \$5,884, with an anticipated income of \$5,000 in 2012. It was agreed that Mrs. De Cotiis would have sole custody of the children, and Mr. De Cotiis had parenting time on some weekdays and weekends. The parties agreed that Mr. De Cotiis would pay \$2,000 per month in child support from July 1, 2012 to June 30, 2014 by way of a lump sum of \$48,000 offset against Mr. De Cotiis' share of the division of property, with a review of child support obligations on or after July 1, 2014.
- [15] Mrs. De Cotiis accepted a lump sum of \$80,000 in spousal support for the period of July 1, 2012 to June 30, 2016, also as an offset against Mr. De Cotiis' share of property. This amounts to roughly \$1,670 per month. The parties agreed to a review of ongoing spousal support on or after July 1, 2016.
- [16] The 2012 Consent Order provides for the parties to share the proceeds of sale of the family home in North Vancouver. I understand from the materials before me that the family home was largely held by Onni, leaving little equity in the home for the parties after it was sold.
- [17] There were many disputes regarding parenting after the 2012 Consent Order, and three different authors prepared reports pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Justice Weatherill heard numerous applications and made numerous orders in relation to these issues.
- [18] No review of child support occurred in 2014, though the evidence indicates that Mr. De Cotiis unilaterally reduced his child support payments at that time to \$910/month. I understand that he made this reduction on the basis that he was successful in obtaining shared parenting of the children for some period of time. In February 2017, Mr. De Cotiis reduced his support payments again to \$455 per month. He ceased to pay all child support in or about October 2018.
- [19] No review of spousal support occurred in 2016, and Mr. De Cotiis made no spousal support payments beyond the partial lump sums arising from the property division. In May and September 2018, Mrs. De Cotiis filed applications seeking ongoing and retroactive child and spousal support.
- [20] In October 2018, Justice Weatherill made a series of orders for disclosure, including against Mr. De Cotiis' family members, and for interim support pending disclosure. There was no full review of child or spousal support until the March 2019 Support Order.

The March 2019 Support Order

- [21] As noted above, Mr. De Cotiis ceased the payment of child or spousal support in 2018. In a Notice of Application filed May 3, 2018, the claimant brought an application seeking, among other things, an imputation of income to Mr. De Cotiis of \$169,629 (the same as his 2011 pre-separation income) and orders for child and spousal support based on this income retroactive to 2014 and 2016 respectively.
- [22] Mrs. De Cotiis also made a number of disclosure applications over the course of 2018 seeking to establish Mr. De Cotiis' sources of income and support.
- [23] When the matter came before Weatherill J. in March 2019, Mr. De Cotiis had not been responsive to many of the disclosure orders made against him, and his counsel had withdrawn.
- [24] Justice Weatherill imputed Mr. De Cotiis with an income of \$169,629 as sought by Mrs. De Cotiis, and made the following child support orders (which vary with the parenting orders at various times):
- a) Retroactive child support from July 1 2014 to October 31 2015 in the amount of \$2,009/month for both children;
 - b) Retroactive child support from November 1, 2015 to November 30, 2017 in the amount of \$2,351/month for both children;
 - c) Retroactive child support from December 1, 2017 to May 31, 2018 in the amount of \$2,391/month for both children;
 - d) Retroactive child support from June 1, 2018 to October 31, 2018 in the amount of \$1,509/month for the youngest child only; and
 - e) Retroactive child support from November 1, 2018 and on the first day of every month thereafter, the amount of \$1,509/month for the youngest child only, for so long as he is a child of the marriage, or further court order.
- [25] Justice Weatherill also made a series of retroactive spousal support orders in the range of \$3,100 to \$3,600 per month starting July 1, 2016 through to the end of 2018. He ordered that Mr. De Cotiis pay \$3,568 per month for spousal support on an ongoing basis, until further order of the court.
- [26] In total, Mr. De Cotiis was required to pay just over \$5,000 per month in child and spousal support on an ongoing basis. In November 2019, Justice Weatherill noted that Mr. De Cotiis' arrears (taking into account the amounts that had been paid) exceeded \$240,000.

- [27] The March 2019 Support Order was made on full notice, and on the merits of the evidence before the court after discovery processes and orders had been undertaken (taking into account the respondent's failure to comply with various disclosure and discovery orders). The Order addressed both retroactive support, and support going forward.
- [28] Further, while Mr. De Cotiis did not appear at the March 2019 hearing, and his counsel had withdrawn, this was not an ex parte order. It was made on almost a year's notice. Mr. De Cotiis' affidavit in support of the current variation application does not state that he was incapacitated in 2018, or unable to give instructions to his counsel in response to the support applications in 2018. Nor does he state that he was unable to appear in court for the March 2019 hearing to determine his support obligations. It is acknowledged that Mr. De Cotiis has been suffering from mental illness for many years, but he has not filed any medical evidence in relation to his failure to respond or appear to address his support obligations in 2018 and March 2019 that would be a basis for reopening the March 2019 Support Order.
- [29] Nothing about the March 2019 Support Order invites the respondent to come back before the Court, with evidence that he was capable of producing in 2018 and 2019, to re-open or re-argue the income that he was imputed at that hearing. Mr. De Cotiis has not established a bona fide reason for this Court to re-open or reconsider this entered order, or to consider evidence that the respondent could have presented to the Court, but did not, at that hearing.

Contempt Order

- [30] In a Notice of Application filed May 22, 2019, Mrs. De Cotiis sought a declaration that Mr. De Cotiis was in contempt of court. Justice Weatherill did not hear that application, but on his own motion, ordered Mr. De Cotiis to appear before him on May 30, 2019 to show cause why he should not be found in contempt.
- [31] On May 28, 2019, Mr. De Cotiis flew to California and enrolled in a treatment program. His counsel appeared before Weatherill J. on May 30, 2019 to explain Mr. De Cotiis' absence, and Mr. De Cotiis was given additional time to provide evidence of his need for treatment. Ultimately, Weatherill J. determined that Mr. De Cotiis' failure to abide by the Court's order to attend and show cause was deliberate and intentional, and he issued a warrant for Mr. De Cotiis' arrest.
- [32] Mr. De Cotiis finally did appear in court in November 2019, and Weatherill J. found him in contempt. With respect to the respondent's financial situation and arrangements, Weatherill J. found:
- [4] The respondent has had ongoing mental health issues. He was diagnosed with bipolar II disorder in approximately 2007 when he was 40 years old. He has been under the care of a psychiatrist, Dr. Kjernisted, for the past eight years, at least. While some of the difficulties the court has faced can fairly be ascribed to the respondent's mental health issues, the vast majority have been attributable to the respondent's stubbornness, feelings of righteousness, and refusal to accept the court's authority, all fueled by his overarching opinion that only he

knows what is in the best interests of the children.

- [5] Weighing in the background is the respondent's family, which is prominent in Vancouver and has substantial financial means, largely by way of its real estate development enterprises (the "O Group"). The respondent works in the family business in a modest capacity. The family's wealth is made available to him when it suits them. The family says that it does so at its discretion. However, the sophisticated and elaborate steps the family has taken to protect the respondent from judgment execution simply boggles the mind. The respondent has few, if any, assets in his name. His house is held in a blind trust that was settled by the respondent's father. The trustee is a numbered company owned by other family members. Funds that are provided to the respondent for his living expenses are advanced by way of loan agreements or a modest salary which he receives pursuant to formal employment contracts. The respondent's vehicle and cellphone are paid for by one of the companies of the O Group. The respondent's legal fees are also paid for by one of the companies of the O Group and recorded on the company's ledgers as loans to the respondent.
- [6] The respondent or, more accurately, his family has clearly spent vast sums of money on this litigation, yet the respondent has not met his child or spousal support obligations as ordered by the court. He had [sic] not made any support payments since September 2018. By my calculation, his current support arrears total \$241,745.
- [33] The respondent argued that he should not be found in contempt, especially on a matter relating to payment of support, because he was in need of mental health treatment in 2019, impecunious, and did not have the funds to pay support because his family was not prepared to extend him those funds.
- [34] Justice Weatherill recognized that contempt must be established beyond a reasonable doubt and, in the context of family cases, should be found sparingly and as a last resort where no other adequate remedies are available. Justice Weatherill went on to find as follows:
- [37] Although the respondent's mental health struggles may have been a factor that contributed to his behaviour, I am left with no reasonable doubt that he sent the email to Dr. England knowing full well what he was doing and with the intent to thwart the s. 211 report that had been ordered. I am also left with no reasonable doubt that the respondent had the financial means to pay the orders for costs, the Abby Petterson retainer, and the full Dr. England retainer and that he deliberately chose not to do so.
- [38] This is one of the rare cases where a civil litigant's conduct is such that the court is left with no choice other than a finding of contempt. No other remedies have been proposed that will adequately address the respondent's conduct. This is a case of last resort. I find that the respondent is in contempt of court.
- [35] On January 27, 2020, Weatherill J. sentenced Mr. De Cotiis to 30 days of incarceration in relation to his contempt, but suspended that sentence on the following conditions:

- a) The respondent shall appear in Court when required to do so by the Court;
- b) The respondent shall maintain his employment with Onni and shall report to the Court as soon as reasonably possible should that employment status change in any significant way;
- c) The respondent shall make monthly spousal support payments to the claimant in the sum of \$1,200 per month;
- d) The respondent shall make monthly child support payments in the sum of \$2,400 per month for support of the children;
- e) The respondent shall pay \$1,000 per month to the claimant toward the arrears of support as set out in the March 2019 Support Order, "until such time that the [March 2019 Support] Order is varied, or the arrears discharged.";
- f) The respondent shall forthwith advise the claimant through counsel of any increase in his wage or salary at Onni, "and the Claimant is at liberty to apply to vary the amounts of support set out in this order."; and
- g) The respondent shall pay previously ordered sums towards the s. 211 reports and the children's counselling.

(the "Sentencing Order")

- [36] The eldest child was living with her paternal aunt since before the March 2019 Support Order and at the time of the Sentencing Order. Mr. De Cotiis argues that Mrs. De Cotiis was therefore only entitled to half of the child support payments (or \$1200 in child support), \$1200 in spousal support, and \$1000/month towards her arrears, pursuant to the Sentencing Order. This amounts to a total of \$3,400/month, including payments towards his arrears.
- [37] The record establishes that the amounts Mr. De Cotiis was ordered to pay on the contempt sentencing were based on his contempt counsel's submissions as to what he could afford at that time so as to avoid his being incarcerated. They started with a proposal of \$1300/month in total, which Weatherill J. rejected.
- [38] Ultimately, the Sentencing Order provides for only \$3400 in support and arrears payments per month to Mrs. De Cotiis, which is substantially less than the \$5,077 monthly amounts required pursuant to the March 2019 Support Order. Mr. De Cotiis argues that, in making this order, Weatherill J. was varying his support obligations to \$1200/child per month and \$1200 for spousal support.
- [39] I disagree with Mr. De Cotiis in this regard. On its face, Mr. De Cotiis' Sentencing Order does not vary the March 2019 Support Order; it imposes the terms of a suspended sentence. The March 2019 Support Order is based on Mr. De Cotiis' child and spousal support obligations under the Federal Child Support Guidelines, SOR/97-175 [Guidelines] and the Spousal Support Advisory Guidelines [SSAG]; the Sentencing Order is not. No variation to those obligations was sought at that hearing, and no variation was ordered. Furthermore, Mrs. De

Cotiis had no formal standing at the sentencing hearing, which she clearly would have been entitled to had a variation to her support been contemplated.

[40] I find that the Sentencing Order was a sentence for contempt only, setting out the conditions (including minimum support payments) that Mr. De Cotiis was required to comply with to avoid the full force of the suspended sentence falling upon him. I am satisfied that the sentence was based on the minimum amounts acceptable to the Court for this purpose based on Mr. De Cotiis' immediate access to funds at the time. They were not based on an application of the Guidelines or the SSAG.

[41] Mr. De Cotiis requested a sunset clause of one year on the Sentencing Order, which Weatherill J. refused. Justice Weatherill did, however, agree that the parties could "appear before [him] whenever [they] wish". In the filed order, this term was settled as follows:

Mr. De Cotiis is at liberty to appear before Justice Weatherill to re-evaluate the terms of this order.

[42] The terms of the Sentencing Order do not promise a variation of the Sentencing Order in the future. Nor does the Sentencing Order provide Mr. De Cotiis with an entitlement to reopen the March 2019 Support Order. Both parties are entitled to seek variations of the Sentencing Order: Mrs. De Cotiis to increase the amounts being paid pursuant to the Sentencing Order, and Mr. De Cotiis to seek to have Weatherill J. "re-evaluate" the terms of the Sentencing Order. There is also an acknowledgment that Mr. De Cotiis may apply to vary or discharge his arrears, but no indication that he would be successful in seeking such an order.

[43] Mr. De Cotiis did not appeal the March 2019 Support Order, including the imputation of income to him or the retroactive determination of his support owing. Nor did he appeal the contempt finding in November 2019, or the Sentencing Order.

Post-Contempt Payments and Events

[44] The respondent says he has been paying the minimum required payments to Mrs. De Cotiis (excluding support payments for the eldest child who does not live with Mrs. De Cotiis) pursuant to the Sentencing Order since January 2020.

[45] In October 2021, Mrs. De Cotiis enrolled with the Family Maintenance Enforcement Program ("FMEP") and that program has been collecting funds from Mr. De Cotiis since that date. Based on FMEP records, the funds collected on behalf of Mrs. De Cotiis since that date have generally kept up with the Sentencing Order requirements of \$3,400/month to Mrs. De Cotiis. In September 2022, FMEP began collecting \$4,300 per month, which is more than the Sentencing Order requires, but not the full amount required under the March 2019 Support Order.

- [46] At the time of enrolment in the FMEP program, the parties are agreed that Mr. De Cotiis' accumulated arrears based on the March 2019 Support Order were \$266,416. Although the March 2019 Support Order and the Sentencing Order provide for specific amounts to be paid toward child and spousal support each month, my understanding is that FMEP tends to allocate all payments towards arrears first (to reduce penalties), then child support and then spousal support.
- [47] As of June 21, 2023, the total arrears now owing are \$291,839 plus interest and penalties for a total of \$313,222.39. This amount represents a significant accumulation of arrears in the less than two years since the enrolment with FMEP in October 2021.

The Parties Circumstances since January 2020

- [48] Upon his return to Vancouver in late 2019/early 2020, Mr. De Cotiis once again began receiving a regular salary from Onni. His salary has been approximately \$136,000 per annum since that time, with the exception of one year where he earned a \$30,000 bonus.
- [49] Mr. De Cotiis' father, Innocenzo De Cotiis died in September 2020. When the respondent's father died, he left little in the form of an estate. Instead, his considerable assets were placed in a series of trusts, and a business succession plan to which the respondent says he was not privy. Mr. De Cotiis' employment was continued by an Onni company and his salary was maintained at \$135,000. Mr. De Cotiis says he has not received any funds from his father's estate, or any income or distributions from a trust related to his father's estate.
- [50] In the months prior to his father's death, Mr. De Cotiis lived in a self-contained suite in his father's condominium in downtown Vancouver. Since his father's death, he has been living in an apartment in Vancouver for which he is required to pay strata fees, property taxes, and utilities only. The parties' eldest child has been living with him since she graduated from high school, and has no contact with her mother.
- [51] Mrs. De Cotiis lives with the parties' youngest child. Until recently Mrs. De Cotiis lived in her parent's basement suite in Langley. She has primarily worked as a floral designer at a nursery earning approximately \$25,000 per year on average. She agrees that \$30,000 is an appropriate amount to impute to her for support purposes, as sought by Mr. De Cotiis.

ISSUES

- [52] The applications of the parties raise the following issues:
- Are the parties entitled to re-open or vary the retroactive orders for support between 2014 and 2019 made by Justice Weatherill in the March 2019 Support Order?
 - How far back are the parties entitled to seek a review and variation of Mr. De Cotiis' support obligations?
 - What is Mr. De Cotiis' income for support purposes?

- d) Is Mr. De Cotiis entitled to cancellation of his spousal support obligations?
- e) Is Mr. De Cotiis entitled to cancellation of spousal support arrears?
- f) Should the Court terminate Mr. De Cotiis' suspended sentence?

DISCUSSION

Re-opening Support orders of support July 2014 - March 2019

- [53] I will first address the application of both parties, that I vary the March 2019 Support Order, with respect to the retroactive support that Weatherill J. ordered for the years 2014 through March 2019. I have determined, and the parties have conceded, that they are not entitled to a re-opening of these aspects of the March 2019 Support Order at this time. Furthermore, I am not prepared to exercise my discretion to do so.
- [54] The March 2019 Support Order was made with substantial notice to Mr. De Cotiis of the sought income imputation of \$169,629, and was further based on ordered discovery and disclosure (notwithstanding Mr. De Cotiis' failure to comply with all of these orders). The application was served on Mr. De Cotiis when he still had counsel, and he had almost a full year to respond.
- [55] On the basis of the evidence available to Weatherill J. at that time, the Court imputed \$169,629 of income to Mr. De Cotiis. This amount is commensurate with Mr. De Cotiis' income from Onni before the divorce. It is conceded by Mr. De Cotiis, and Weatherill J. found, that Mr. De Cotiis' income has been not tied to his productivity for Onni for some time. Mr. De Cotiis' family, and Onni, determines the respondent's income, including his income for the purposes of child support, while providing other benefits to him such as paying his legal fees in this proceeding, providing housing to him, and funding his mental health treatments. I see no reason to re-open or interfere with Weatherill J.'s determination on the evidence before him that Mr. De Cotiis should be imputed with the same income he had been receiving prior to separation on the basis of the evidence before him.
- [56] I have also found that the Sentencing Order did not grant Mr. De Cotiis a right to re-open the March 2019 Support Order. Justice Weatherill acknowledged Mr. De Cotiis' previously stated intention to bring an application for that purpose in January 2020, and Weatherill noted that this stated intention was already months old and no application had yet been brought. He suggested that Mr. De Cotiis could bring whatever applications he liked, but nothing in his reasons or the Sentencing Order give rise to an entitlement to a re-opening of the March 2019 Support Order.

- [57] I understand that Mr. De Cotiis has been trying to have this variation application heard now for more than a year. That still does not address the substantial delay in the application since March 2019, or even Mr. De Cotiis' return from treatment in November 2019. Justice Weatherill is no longer seized of these applications, and he refused to hear from the parties on this application when it came before him in 2022.
- [58] In support of his application before me, Mr. De Cotiis does not lead any fresh evidence, or evidence that was not fully available to him regarding his income and benefits in March 2019. He does not plead a material change in his circumstances in relation to the retroactive awards from 2014 to March 2019 that he could not have raised at the March 2019 hearing.
- [59] With respect to Mrs. De Cotiis' position, in March of 2019 Mrs. De Cotiis had the option to adjourn her application and seek further disclosure orders. She did not, and instead sought the imputation of income she had pled of just under \$170,000. Having sought an imputation of that amount, and been successful, I also consider that she is bound by the March 2019 Support Order with respect to the orders made for retroactive support up to that date, and it is not open to her to now seek a higher imputation of income to Mr. De Cotiis, prior to March 2019.
- [60] I turn then to a review of the support orders going forward from March 6, 2019, and the determination of Mr. De Cotiis' income for support purposes after that date.

Timeframe for the review of Child Support and Spousal Support

- [61] Both parties rely on *Colucci v. Colucci*, 2021 SCC 24, which provides for the review of past support orders, provided effective notice has been given by a party seeking to vary an ongoing support order. Effective notice requires disclosure of a material change in circumstances. *Colucci* also confirms that the guidance from *D.B.S. v. S.R.G.*, 2006 SCC 37 still applies for applications for retroactive variation of child support, namely that such variations "should generally extend no further than three years before the date of formal notice": *Colucci* at para. 39.
- [62] *Colucci* also states that "the payor cannot rely on their own late disclosure as a change in circumstances to ground a variation order": *Colucci* at para. 63.
- [63] Mr. De Cotiis argues that his move to California in May 2019 for 5-6 months during which he was receiving mental health treatment was a material change in circumstance. He argues that effective notice of this change was given by his counsel at the contempt hearing at the end of May 2019 that he did not attend.

- [64] In my view, the attendance of Mr. De Cotiis' counsel in May 2019 was not effective notice of a material change in his circumstances. At that time, counsel was not aware of how long Mr. De Cotiis would be away, and there was no evidence presented that this would affect Mr. De Cotiis' ability to receive income from Onni, which was not performance based. Mr. De Cotiis also says that he applied for disability coverage around this time, but this information was also not disclosed to the claimant until January 2020.
- [65] In fact, Mr. De Cotiis says he did not receive any disability payments. However, he did receive over \$250,000 from his brother to fund his treatment in California over those 6 months, an amount that Mrs. De Cotiis seeks to have counted towards his income available for child and spousal support in 2019.
- [66] It was not until the end of January 2020 that Mr. De Cotiis provided information in an affidavit (in relation to his contempt sentencing) that Mr. De Cotiis described a change in his income for the remainder of 2019 and going forward. Mr. De Cotiis did not file a Notice of Application formally seeking to vary his support obligations back to 2014, and to cancel his arrears, until January 17, 2022. That Notice of Application has not proceeded. Mr. De Cotiis' Notice of Application before me was not filed until September 14, 2022.
- [67] Mrs. De Cotiis filed her application in August 2022 seeking to retroactively impute Mr. De Cotiis with income of \$300,000 annually back to 2014.
- [68] Based on the discretion that resides in this Court to consider variation applications as described in Colucci, the date of effective notice by Mr. De Cotiis, the formal notices filed by both parties, and Weatherill J.'s March 2019 Support Order, in my view, the appropriate date to retroactively consider whether there was a material change in Mr. De Cotiis' income does not arise until January 2020. This is when Mr. De Cotiis first described his change in his financial circumstance. It is also in the 2-3-year range before he filed formal notice that he was seeking a variation of his support obligations.
- [69] Furthermore, although Mr. De Cotiis has averred that he only received \$28,381 in income in 2019, Weatherill J. imputed a higher income than that to him (even if one amortizes this income for the first months of 2019). Mr. De Cotiis went on to receive substantial health benefits well in excess of his imputed income for 2019. I have not been provided with the evidence necessary to assess how much of those funds were strictly medical, and how much was related to living costs. I am not convinced on the materials before me to revisit Mr. De Cotiis' imputed income of \$169,629 for the balance of 2019.
- [70] I find that the parties are entitled to attempt to establish a material change of circumstances for support purposes relating to Mr. De Cotiis' income dating back to January 1, 2020 only. Furthermore, if they are able to establish either a significant increase or decrease in Mr. De Cotiis' income since then, I agree that would be a material change in circumstance that warrants a variation from the \$169,629 imputed to Mr. De Cotiis in March 2019.

Party Positions

- [71] The parties differ significantly as to what they say Mr. De Cotiis' income has been since January 2020, and how that income is to be calculated.
- [72] Mr. De Cotiis says that I ought to use his declared employment income from line 15000 (formerly line 150) of his tax returns. He concedes that it would be appropriate to add some discretionary funds provided to him by his family as income, for example the amount of \$15,000 paid to him to bridge him from the end of his employment in 2019 until his disability benefits began. He argues that other funds received from his family or Onni trusts or companies should not be counted as part of his income, including funds to pay for his legal expenses, his housing, and his medical costs.
- [73] Mr. De Cotiis says that his reported line 15000 income for the relevant years is as follows:
- 2020: \$136,225
- 2021: \$136,091
- 2022: \$166,688 (including a \$30,000 bonus from 2021)
- 2023: \$136,668
- [74] The respondent submits that, based on s. 19 of the Guidelines, there is no reason or justification for imputing income to him above the levels set out above. Specifically, he says that there is no evidence that he could get other employment at a better salary. Indeed, he says that the evidence suggests that he is getting compensated beyond his abilities in his present employment.
- [75] He says that the Guidelines provisions relating to the use of available assets to produce income, and providing for income sources that are taxed at a lower rate than employment income are not applicable to him.
- [76] Mr. De Cotiis argues that his affidavit establishes that he is not receiving any trust income, and that he is unaware of any trust income or assets that he might be entitled to in the future.
- [77] He has requested this information, but the trustees (who are also his brothers) of the trust that appears to be related to his father's inherited business and wealth have declined to advise him or the Court (through his counsel) whether Mr. De Cotiis has trust entitlements or their extent. His counsel's inquiry to these trustees resulted in a response that they have been directed "not to make any disclosure concerning the identity of the beneficiaries, the assets which are held by the trust, or the administration of the trust assets, unless they are satisfied that such disclosure is necessary or appropriate." They advise that they "are not so satisfied in this case." Mr. De Cotiis therefore says that he does not know his entitlements to any trust income or trust assets.

- [78] Although Mr. De Cotiis does not know the terms of any trusts to which he may be a beneficiary, it was disclosed that the children are beneficiaries of at least one trust that has existed at least since it provided housing to Mr. De Cotiis in Langley prior to Mr. De Cotiis' departure to California in 2019.
- [79] The respondent argues that even if he was entitled to receive a distribution from a trust established by his father, any such distribution would not be income for child support purposes. In *L.L.P. v. C.R.P.*, 2021 BCSC 772, Justice Tucker found that a family trust established for succession purposes while the parties' father was still alive, and which was converted into an inter vivos distribution, was not income for support purposes. The respondent draws a distinction between asset distributions and income streams in this regard.
- [80] In summary, Mr. De Cotiis seeks to have his income determined on the basis of his salary only, as declared on his income taxes, generally in the range of \$136,000-\$137,000.
- [81] The position of the claimant evolved over the course of the hearing. Her original position was that Mr. De Cotiis ought to be imputed an income of \$300,000 for each year. Although she initially sought further disclosure from Mr. De Cotiis with respect to his inheritance and assets held in trust, and the details of the trust providing his housing, by the time of the hearing she was resigned to the limitations of the information she could obtain without further cost and delay on the evidence available. She essentially submits that Mr. De Cotiis' incomplete disclosure should lead to an adverse inference against him that there are significant funds available to him, in excess of what is known to the court at this time.
- [82] Mrs. De Cotiis would have the court include in Mr. De Cotiis' income not only his salary, but also funds he has received to pay his legal fees in these proceedings, his medical benefits, and the provision of his housing. The claimant argues that some adjustment should also be made for vacations paid for by his family, as well as access to the family private jet.
- [83] She says the disclosure that has been provided establishes additional income of \$35,000-50,000 payments towards his legal fees going back to 2016 and through to 2022, giving rise to an average of approximately \$30,000 per year in the last seven years. Mrs. De Cotiis says this benefit should also be added to Mr. De Cotiis' imputed income.
- [84] She also says that there should be an imputation of \$55,000 per year in place of mortgage payments for his housing, based on a 3.5% mortgage on the value of this home, which she avers exceeds \$1.5 million.
- [85] Mrs. De Cotiis seeks a gross-up of 30 to 35% of these amounts because their provision to Mr. De Cotiis does not attract income tax. She argues that if Mr. De Cotiis' income was grossed up to reflect the amount that would be necessary to provide his non-taxed benefits to support his housing and lifestyle, his true income would be over \$500,000.

[86] Overall, she seeks that Mr. De Cotiis be imputed an annual income of \$225,000-\$250,000 as follows:

2020: \$225,000

2021: \$250,000

2022: \$250,000

2023: \$250,000

[87] The claimant says that it is open to me to infer that if Mr. De Cotiis was not being provided with housing, that Onni would pay him more in allowance or salary to cover his housing. She says that that is a factor that favours inclusion of housing in income as described in *Nielsen v. Nielsen*, 2007 BCCA 604 at para. 41. She also says that the provision of housing directly through Onni is tax advantaged in Mr. De Cotiis' hands, rather than paying him a salary to cover his housing.

[88] Further, Mrs. De Cotiis says that housing is often a substantial portion of a person's living expenses, and not having to pay the capital costs of his housing means that more of the respondent's income is available for the support of his child. Finally, she submits that the housing and employment income of the respondent essentially come from the same source: Onni. She says that this distinguishes the present case from *Nielsen*, where the free housing and employment income were unrelated: *Nielsen* at para. 43.

Legal Principles

[89] Pursuant to s. 19 of the Guidelines, the starting point for the determination of a party's income is their line 15000 income as set out in their T1 General Income Tax return, with required adjustments. Section 19 of the Guidelines confers a broad discretion on the court to impute income, and provides a broad, non-exhaustive list of circumstances where income may be imputed for support purposes. Where imputation of income is sought, the evidentiary burden lies with the spouse seeking to have income imputed: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36.

[90] Income for support purposes should reflect income that a parent has at their disposal for child support purposes. The starting point in determining the measure of income for calculating child support is the income set out at line 150 of a parent's tax return. From there, sections 17-20 of the Guidelines provide the Court with discretion to adjust this amount to reflect funds the payor parent has at their disposal for child support purposes: *Vincent v. Vincent*, 2012 BCCA 186 at para. 35. The tools provided to the Court through sections 17-20 of the Guidelines must be considered together with the objectives of the Guidelines.

[91] The objectives of the Guidelines are set out in s. 1 of the Guidelines:

1 The objectives of these Guidelines are

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[92] In *Brown v. Brown*, 2014 BCCA 152, the Court provided this guidance:

[23] Sections 17-20 of the Guidelines allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the Guidelines. It is important, however, in interpreting and applying those sections, that courts recognize the need for consistent and predictable results. Courts should interpret ss. 17-20 of the Guidelines with a view to advancing the objectives set out in s. 1.

[93] The objective of this approach is to ensure that a payor's Guidelines income reflects the money reasonably available for child support purposes: see *Richardson v. Richardson*, 2013 BCCA 378 at paras. 54-55.

[94] The relevant portions of s. 19 of the Guidelines in this case are as follows:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (h) the spouse derives a significant portion of income from sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[95] In the current case, these provisions of the Guidelines assist the court in meeting the objectives of the Guidelines. In this case, this means there should be a fair standard of support for the children of the marriage that ensures that they continue to benefit from the financial means of both spouses after separation. This means, in part, that there should not be a significant discrepancy between the standard of living of the youngest child, who lives with Mrs. De Cotiis, and the standard of living offered by Mr. De Cotiis.

Gifts vs Income

[96] The complexity in this case arises from the fact that Mr. De Cotiis derives much of his standard of living from what he describes as the discretion of his family and Onni. The Ontario Court of Appeal considered the distinction between income and gifts, including trust income, in *Bak v Dobell*, 2007 ONCA 304. At paras. 61-62, 75, the Court stated as follows:

61 When the Guidelines were enacted, the legislature is presumed to have been knowledgeable about the various sources of taxable and non-taxable income available to an individual, including the fact that neither gift nor trust income is taxable. It can be presumed from this knowledge that the legislature deliberately omitted both gifts and trust income from presumptive income.

62 The legislature, however, did list trust income as a s. 19(1) circumstance in which income could be imputed. It did not list gifts. Since the legislature did not include gifts within the ambit of imputed income, it can be presumed, in the normal course, that the legislature did not intend the receipt of gifts to be an "appropriate circumstance" in which to impute income. For this reason, usual gifts, such as those given to mark a special occasion, are not included as income.

75 In considering whether it is appropriate to include the receipt of unusual gifts in income, a court will consider a number of factors. Those factors will include the regularity of the gifts; the duration of their receipt; whether the gifts were part of the family's income during cohabitation that entrenched a particular lifestyle; the circumstances of the gifts that earmark them as exceptional; whether the gifts do more than provide a basic standard of living; the income generated by the gifts in proportion to the payor's entire income; whether they are paid to support an adult child through a crisis or period of disability; whether the gifts are likely to continue; and the true purpose and nature of the gifts.

[97] Ultimately, the Ontario Court of Appeal found that funds provided by the father of one of the spouses was not income, largely because the gifts were found to be more in the nature of providing financial bridging and support for an adult disabled child, as opposed to a more regular allowance.

[98] The BC Court of Appeal endorsed the *Bak* factors in *Nielsen* as to when the provision of family wealth should properly be included in income for support purposes, or treated as a gift that is not included in the party's income calculations. Although the Court of Appeal found in *Nielsen* that the cost of housing provided by the spouse's new housemate or partner should not be imputed to them, the Court recognized that the provision of housing may still be imputed towards income in appropriate circumstances.

[99] *Bak*, and the factors it lists, has also been considered a number of times since then by our court and by the Ontario Court of Appeal. These cases indicate that the determination of whether financial support from family sources is to be taken into account in a spouse's income is a fact specific exercise, that will turn on the specific circumstances of each case.

- [100] In *S.R. v. B.E.*, 2011 BCSC 1586, Justice Fisher imputed income to a spouse who did not work, but who regularly received funds from her father in Iran during the course of the marriage and after the marriage. Fisher J. also found that the spouse held a 25% share in her father's business in Iran of an undisclosed value, and was entitled to a modest salary, and rental proceeds from an apartment in her name in Iran. Justice Fisher inferred that at least some of the funds she regularly received derived from these sources of income. Justice Fisher applied the Bak factors and s. 19(1) of the Guidelines, and imputed an overall income slightly above the annual amounts she had been receiving from her father in Iran.
- [101] In *Flader v. Gutkin*, 2013 BCSC 414, Justice Baker declined to impute income based on funds provided to a spouse from their family to purchase a vehicle, renovate a home and pay medical expenses. The court found that these gifts were not income or wages in disguise, and were to support a son who was struggling with some disabilities to help him through a difficult time.
- [102] In *Korman v. Korman*, 2015 ONCA 578 at paras. 64-67 the Ontario Court of Appeal distinguished Bak on the basis that this was not a case where parents were providing support to a disabled adult child who would otherwise not be able to support themselves. The Court found that income should be imputed to Mr. Korman for monetary gifts provided by his parents. In that case, the Ontario Court of Appeal found that these gifts allowed Mr. Korman to maintain a certain lifestyle.
- [103] In *Shih v Shih*, 2015 BCSC 2108, Justice Warren considered the above cases and applied the Bak factors to a situation where a payor spouse received significant financial assistance from her parents during and after the marriage. Justice Warren found that the financial assistance permitted her to maintain a lifestyle that was not extravagant, but which nevertheless allowed her to contribute to savings and properties that freed up income to her and contributed to more than a basic standard of living. While declining to find that the gifts were "income in disguise," Warren J. nevertheless found that they had formed a pattern of a near annual nature, and for significant amounts. Justice Warren imputed an income based roughly on the average value of the financial assistance provided, averaged over 10 years, but declined to gross these funds up further: *Shih* at paras. 181-182.
- [104] In *Andreassen v. Andreassen*, 2016 BCSC 1196, Justice Armstrong considered the transfer of shares in a family company and share redemptions as part of a spouse's parents estate planning. Justice Armstrong found that while the inter vivos transfers themselves did not constitute income, any interest generated from those assets would, with the presumption that the assets would be prudently invested to generate such income.

Determination of Mr. De Cotiis' Income

- [105] I find that subsections (e)(f)(h) and (i) of s. 19(1) of the Guidelines are pertinent to the calculation of Mr. D's income beyond the salary he draws from Onni.

- [106] I find that Mr. De Cotiis has not provided Mrs. De Cotiis, or the Court, with clear and complete information of his income and income generating assets, which is a consideration pursuant to s. 19(1)(f). In this case, Mr. De Cotiis' evidence leaves open the possibility (indeed the probability) that he is entitled to some form of inheritance from his late father's significant holdings in the form of a trust. It is his obligation to provide complete information in this regard to Mrs. De Cotiis and the Court, and he has not fulfilled this obligation.
- [107] Because the undisclosed inheritance is controlled by trustees (two of Mr. De Cotiis' brothers) I must also consider s. 19(1)(i) which requires the court to consider whether Mr. De Cotiis "is or will be" entitled to income or other benefits from a trust. This is linked to s. 19(1)(e) which requires the court to consider whether Mr. De Cotiis is utilizing property he has to generate income--that is, if he has property in trust that could generate income to support his child but is not doing so.
- [108] Finally, s. 19(1)(h) is also a factor in considering Mr. De Cotiis' income, as it pertains to the tax-exempt sources of support he receives from Onni in forms other than direct T4 salary.
- [109] I turn first to the issue of Mr. De Cotiis' failure to provide the Court and Mrs. De Cotiis with reliable and complete information regarding his inheritance and potential trust holdings and income.

Failure to provide income information

- [110] The income available for the purposes of support payments in this case is complicated due to the fact that Mr. De Cotiis' income is controlled by his family through the Onni Group, and now through his brothers as trustees of a trust following upon the death of their father. Justice Weatherill, who was seized of this matter for many years, describes Mr. De Cotiis' family as being directly and indirectly involved in this protracted litigation. This has included paying Mr. De Cotiis' legal fees, and controlling the funds available to him to pay his support obligations to Mrs. De Cotiis.
- [111] Whether this is why the De Cotiis trustees have declined to provide information to Mr. De Cotiis and his counsel for the purposes of the applications before me, or whether they have loftier reasons, I cannot say. In any event, Mr. De Cotiis has not provided disclosure of all his potential sources of income, as is required.
- [112] I note that, in contrast to the evidence that Mr. De Cotiis provided before his father's death, he has not stated that he is not a beneficiary of a trust, only that he does not know the terms of any trust that he may be a beneficiary of, after his father's passing. The evidence both before and after his father's passing suggest that an inheritance was anticipated.

- [113] Having considered all of the evidence, Mr. De Cotiis' lack of disclosure, and in the absence of evidence to the contrary, I advised the respondent that I was inclined to make an inference on the evidence before me that he is a beneficiary of one or more trusts in his favour. I also advised the respondent that I am inclined to infer that there are income generating assets in those trusts, although there may be conditions on how and when such income is to be distributed.
- [114] In the alternative to making such an inference, I offered to make an order requiring the trustees to disclose this information, in which case I would be prepared to wait to make a determination of his income for support purposes instead of relying on an inference. The respondent did not ask that I make this order, or wait for this information to come available before determining Mr. De Cotiis' income. Nor is the claimant seeking such an order, preferring instead a more immediate remedy.
- [115] Having considered the evidence before me, and the findings that have been made to date, I infer from the evidence that Mr. De Cotiis is entitled to a substantial inheritance, that is currently held in trust for him. I further infer that the assets held in those trusts are capable of generating significant income.
- [116] Although lump sum capital gifts are generally not treated as income, where assets are available that are capable of earning income, this income may be considered in the imputation of income available for support purposes: Andreassen at paras. 91-92. Where assets are capable of earning income but are underutilized for this purpose, the Court may impute income for support purposes under the Guidelines.
- [117] While I accept that it would be inappropriate to impute income on the capital of any assets or beneficial interests held for Mr. De Cotiis' benefit, the interest or income that may be generated from even a portion of Onni's assets, is still likely substantial.
- [118] On the basis of all the evidence before me, I consider that a minimum of \$25,000 in interest per year from trust sources has been available to Mr. De Cotiis for support purposes since at least the beginning of 2021 after the passing of his father.

Housing and Other Benefits

- [119] In addition, on Mr. De Cotiis' own evidence, and without disclosure of the particulars of his inheritance structure through trusts, the evidence before me establishes that Mr. De Cotiis has access to significant financial benefits through Onni, including the provision of housing and for the payment of his legal fees. For the following reasons, I find that these funds ought to be considered in the calculation of his income. Furthermore, I consider that the housing benefit in particular should be grossed up to address its tax-advantaged delivery to Mr. De Cotiis.

- [120] I have come to this conclusion on the basis of my factual findings, and with the guidance of the factors listed in Bak. Overall, I consider the facts of this case to be more in line with those in Shih, S.R. and Korman, than in Bak, Nielsen, Andreassen and Flader.
- [121] First, I find that the provision of housing to Mr. De Cotiis, has been made to the respondent on a regular and consistent basis through Onni, in one form or another, since before the parties were separated and divorced, and has largely continued since the parties' separation.
- [122] During the marriage, the housing provided by Onni supported a family lifestyle that Mr. De Cotiis generally continues to enjoy through Onni.
- [123] There was a brief period upon his return from California and before his father passed, when Mr. De Cotiis lived in a suite provided by his father. Before that, and since then, he has had his housing provided, and not been personally responsible for any of the capital costs of this housing.
- [124] In addition, I find that these benefits amount to a significant proportion of Mr. De Cotiis' income and contribute significantly to maintaining his standard of living, and they are likely to continue.
- [125] The provision of housing through Onni also frees up funds that Mr. De Cotiis would otherwise have to pay towards his capital housing costs.
- [126] I consider that the claimant's proposed pre-tax value of \$55,000 per year for this benefit is a reasonable one. I have no evidence of the current assessed value of the three-bedroom condominium in Vancouver, but Mrs. De Cotiis suggests a value of \$1.5 million and an interest rate of 3.5% for a mortgage. Mr. De Cotiis objects to any income being imputed on this basis, but he does not suggest a different assessment of the condominium's value, and I consider that the above figures are likely on the generous side to Mr. De Cotiis.
- [127] I also agree that this is a benefit provided to Mr. De Cotiis on a tax-free basis that allows his taxable salary to be spent on other things, and should be grossed up to account for the value of this benefit on an after-tax basis. In my view, there has been a notable lack of disclosure regarding the source and nature of this benefit to Mr. De Cotiis, and I am left to infer a value in the absence of proper disclosure. Considering all of the above, I find that the after-tax value of this benefit to be in the range of \$70-\$75,000 since 2021 when the Quebec Street condo was bought.
- [128] Payment of Mr. De Cotiis' legal fees has also been consistently covered by Onni. The average value of this tax-free and interest-free benefit is approximately \$30,000 per year based on what has been disclosed, with some years significantly higher. The payment of these legal fees have often been made as interest free loans, to be recovered by setoff from Mr. De Cotiis' entitlements following the death of his father, which has now occurred. These funds also free up substantial funds to Mr. De Cotiis that would otherwise have to come from his salary.

- [129] These benefits are provided through Onni's trust arrangements, and supplement Mr. De Cotiis' salary. To the extent that there are discretionary elements to his salary and his benefits, they are nevertheless consistently provided by Onni to support a lifestyle for Mr. De Cotiis more consistent with what the parties enjoyed prior to separation. I find that these benefits are relevant to the calculation of Mr. De Cotiis' income.
- [130] The loans provided for Mr. De Cotiis' legal expenses are interest-free and tax-free, and he has been told they can be repaid as a set-off to his inheritance. I find that the provision of both housing and legal fees are part of a package of salary and benefits provided to Mr. De Cotiis through Onni, and its related family trusts.
- [131] No doubt, Mr. De Cotiis also benefits from other aspects of his family's largesse, including the occasional use of the family jet, for example. He likely also receives funds and benefits that are more in the nature of a one-time gift. The evidence discloses that he also receives funds for his medical care and expenses, which under the Bak factors, are reasonably excluded from his income. I would not include any of these latter benefits or gifts in his income on the basis of the evidence before me.

Calculation of Income

- [132] I am satisfied that Mrs. De Cotiis has met her evidentiary burden that income beyond Mr. De Cotiis' salary should be imputed to him in 2020, 2021, 2022 and 2023. I have accepted the claimant's position that an amount should be imputed for the income-tax free provision of the capital costs of his housing in the range of \$70,000-\$75,000 starting in 2021. I have also found it appropriate to impute income to Mr. De Cotiis for his undisclosed trust income in the amount of \$25,000.
- [133] While many families assist each other with their litigation expenses, the involvement of Mr. De Cotiis' family business in this litigation goes well beyond the occasional gift from a parent to assist with these costs. Although these have been structured as interest-free loans against his ultimate inheritance, I would impute a portion of these interest-free and tax-free benefits provided to Mr. De Cotiis as well.
- [134] Taking all of the above into account, and starting in 2021, I impute an additional \$100,000 in after tax income to Mr. De Cotiis in relation to his tax-free housing benefit, his inferred trust income, and for a portion of the interest free loans he receives for his litigation costs.
- [135] For 2020, Mr. De Cotiis has not convinced me that he experienced a material change in circumstance that would justify decreasing the roughly \$170,000 imputed to him by Justice Weatherill in 2019. Mr. De Cotiis has not provided the level of disclosure required to assess the value of the suite he had in his father's condominium that year, including who or what entity owned that condominium, and what the value of the provided suite was. Overall, I find that Mr. De Cotiis has not met his burden to show a material decrease in his financial circumstances in 2020.

[136] Nor has Mrs. De Cotiis established, on the evidence, that I should impute more than the \$169,629 imputed to Mr. De Cotiis in 2019 for 2020. This amount already reflects an additional \$33,400 above Mr. De Cotiis' salaried income in 2020, prior to the purchase of the Quebec Street condo, and his father's passing. It is a reasonable inference that Mr. De Cotiis received substantial support for his legal costs in 2020, which included the retainer of a second law firm, Peck and Company, in addition to the services of his regular law firm, Rosberg Sawatzky LLP, for the purposes of the contempt sentencing in 2020. Mr. De Cotiis was also provided with free accommodation with his father, most likely in an Onni owned condominium given his father's lack of estate later that year.

[137] Overall, I have not been convinced that either party has established that there ought to be a change in Mr. De Cotiis' imputed 2019 income of \$169,629 in 2020.

[138] That results in the following total imputed income to Mr. De Cotiis:

- a) 2020: \$169,629 (imputed without change from 2019)
- b) 2021: \$136,091 + \$100,000 (imputed) = \$236,091
- c) 2022: \$166,668 + \$100,000 (imputed) = \$266,668

[139] This is a summary trial application seeking final determinations for support purposes. I therefore consider it appropriate to also impute an income to Mr. De Cotiis' for 2023 and going forward. The parties need finality, and Mr. De Cotiis' income continues to be subject to opaque and undisclosed sources, making annual assessments based on tax returns impractical. Considering all of the above, for 2023, and going forward, I impute to Mr. De Cotiis the rough average of his 2021 and 2022 at \$250,000.

Child Support

[140] Mr. De Cotiis was not successful in having the Court set his income on the basis of his salary alone. Therefore, the reductions in child support that he seeks are not supported.

[141] Mrs. De Cotiis has sought child support on the basis of an imputed income that differs somewhat from what I have found.

[142] Neither party suggests that I should depart from the Guidelines for the purposes of child support, although Mrs. De Cotiis does also point to the means and needs test that is sometimes employed for incomes above \$150,000 for a payor spouse.

[143] I am satisfied that the application of the Guidelines to the imputed income of Mr. De Cotiis is appropriate. I therefore set his child support obligations, based on an imputed income for Mrs. De Cotiis of \$30,000 per year in each year since 2019, as follows:

Year

Income

Child Support Amount

2020

169,629

\$1,509/month

2021

236,091

\$2,028/month

2022

266,668

\$2,266/month

2023

250,000

\$2,136/month

[144] My understanding is that the youngest child's special expenses are currently covered by a trust, known as the Brockton Trust, to which he is a beneficiary, and neither parent is therefore required to contribute to special expenses.

Spousal Support

[145] The factors to be considered in granting an order for ongoing spousal support are set out in s. 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and include:

- a) The length of time the spouses co-habited;
- b) The functions performed by each spouse during co-habitation; and
- c) Any order, agreement or arrangement relating to support of either spouse.

[146] The objectives of an order for spousal support are set out in s. 15.2(6) of the Divorce Act as follows:

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.

[147] Mrs. De Cotiis' entitlement to spousal support has already been determined by the consent order, and that entitlement was continued in 2019 by Weatherill J.

[148] Mr. De Cotiis seeks to reduce his spousal support obligations retroactively to be consistent with his T1 income, and an imputed income of \$30,000/year to Mrs. De Cotiis. The respondent accepts that mid-range spousal support has been found to be appropriate to date, but submits that spousal support ought to be granted at the low end if it is not terminated altogether.

[149] His primary position is that Mrs. De Cotiis' entitlement to prospective spousal support is nil at this time. He says that the \$176,000 in spousal support paid to date for 12 years should be sufficient to meet his spousal support obligations. He says that Mrs. De Cotiis ought to have been able to become self sufficient by now.

[150] His alternative position is that spousal support ought to end in 2025 when 14 years have elapsed, commensurate with the length of the parties' marriage, or in 2026 when the youngest child has graduated high school.

[151] The claimant accepts an imputation of income to her of \$30,000 since 2019.

[152] With respect to termination of spousal support, Mrs. De Cotiis says that these legal proceedings have prevented her from becoming self-sufficient, and that she has paid more in legal fees than she has received in spousal support. She would accept an end date of July 1, 2025 for the termination of spousal support, which is 14 years after separation.

[153] The claimant also seeks retroactive variation and payment of spousal support from October 1, 2019 through to the present, with prospective support continuing until July 1, 2025, based on Mr. De Cotiis' imputed income of between \$225,000 and \$250,000, and in accordance with the mid-range support in the SSAG.

[154] I find that an imputation of \$30,000 per year income for the claimant is reasonable as agreed by the parties.

[155] I have found that the parties are entitled to a review and variation of Mr. De Cotiis' support obligations going back to January 2020. I consider that the claimant should be prepared for a termination date of spousal support, and I agree with the claimant that July 1, 2025 is an appropriate date.

[156] I am not prepared to order the immediate termination of spousal support. The lack of payment of spousal support between 2016 and 2020 has no doubt had an impact on Mrs. De Cotiis' ability to become self-sufficient. The ongoing legal battles between the parties, and Mr. De Cotiis' contemptuous conduct in that regard, could not have helped. The amounts paid by Mr. De Cotiis to date are far below what he was ordered to pay in 2019 retroactively back to 2016, and his ongoing payments to FMEP are still addressing those arrears for both child and spousal support. Based on the FMEP figures and his substantial arrears, I am not sure that any of Mr. De Cotiis' payments since January 2020 have contributed to his obligations since that date.

[157] Furthermore, there is a substantial and ongoing gap in wealth between Mr. De Cotiis and Mrs. De Cotiis post-separation, due in large part to the respondent's family support, his trust entitlements, and the fact that property division did not result in a significant division of wealth between the parties.

[158] In these circumstances, I consider that the full 14 years of available spousal support should be allowed to the claimant, as she seeks, though I would set this amount at the low level of support 10 years after separation, starting in 2021.

[159] Based on the income that I have imputed to Mr. De Cotiis for this period, the amounts that ought to have been paid in spousal support are as follows:

2020: \$3,568 per month

2021: \$4,244 per month

2022: \$4,982 per month

2023: \$4,575 per month to date.

[160] Considering the objectives of the Divorce Act, I find that the claimant is entitled to ongoing spousal support at the rate of \$4,575 per month from the date of these reasons until July 1, 2025.

Arrears

[161] The respondent applies to vary his spousal support arrears, but this portion of his application was made on the basis of success in decreasing his support obligations based on his line 15000 income. He has not convinced me that this is appropriate.

[162] Instead, the claimant has been successful in seeking a greater imputation of income to the respondent over the last three years.

[163] The evidence before me does not satisfy me that Mr. De Cotiis is unable to pay his arrears, perhaps as a set off from his trust or other entitlements. Accordingly, I find that the respondent has not made out hardship. I make this finding based on a holistic and relative assessment: Colucci at para. 108.

- [164] It would have been difficult for the respondent to make out hardship in any event, since the bulk of arrears are a result of payments he was legally ordered to pay in accordance with his Guideline income since 2014. His conduct weighs against any reduction in his arrears: Colucci at para. 103.
- [165] Based on my order with respect to variation of child support and spousal support to January 2020, the respondent's arrears are now over \$366,000 calculated as \$313,222 in arrears (including penalties) owing at June 21, 2023 calculated by FMEP, plus approximately \$53,500 to the end of August 2023 (representing the difference between my ordered support levels and the March 2019 Support Order relied upon by FMEP, and assuming that the \$3400 per month paid for the last three years were all credited towards arrears by FMEP). I expect that the FMEP will be able to provide a more precise accounting in this respect.

Variation of Contempt Sentencing Order

- [166] As noted early on in these reasons, Mr. De Cotiis seeks an order that the "sword of Damacles" of a suspended sentence cease to hang over his head. Similar to the submissions made before Weatherill J., he has argued that a suspended sentence ought not to be indefinite, that the length of the sentence be measured, and he points to his right to a review on the terms of the Sentencing Order itself.
- [167] Mrs. De Cotiis responds to this portion of the respondent's application by arguing that it was not until this "sword" existed that the respondent paid close to his required support obligations.
- [168] The evidence establishes that Mr. De Cotiis has voluntarily paid his full support obligations only for the briefest times. After 2012, his child and spousal support obligations were satisfied by way of partial lump sums offset against property division. No spousal support was then paid until Weatherill J. made this a condition of the suspended sentence. Child support was paid after 2014, but at a much-reduced level until 2018. Mr. De Cotiis owed hundreds of thousands of dollars in arrears of his support obligations by November 2019. I understand Mrs. De Cotiis' concern that Mr. De Cotiis will cease voluntary payments if the suspended sentence is lifted.
- [169] More fundamentally, I am not satisfied that Mr. De Cotiis has fully purged his contempt. Mr. De Cotiis continues to provide information and evidence that tends to obscure rather than clarify his assets and income for support purposes, and his support arrears are growing, not shrinking. Nor has Mr. De Cotiis presented a reasonable alternative proposal as to how he will address his arrears and come into compliance with the Court's orders.

- [170] In the hearings relating to the November 2019 and January 2020 orders, Weatherill J. demanded a reasonable response as to how the respondent was going to address his contempt, including arrears and support obligations. The proposal provided was less than the respondent's court ordered obligations. Although he has complied, for the most part, with the suspended sentence, he has nevertheless remained in contravention of his support obligations since the March 2019 Support Order was made.
- [171] In January of 2020, the respondent had limited income. He had just returned from his treatment in California and had only been recently reinstated on the Onni payroll. At that time, his father was still alive, and he had no inheritance.
- [172] At present, however, I have found that he is likely the beneficiary of a trust. His trustees do not think that it is in his best interests for him or the Court to know what resources are available to him, but I have found that he has access to substantial resources.
- [173] Justice Weatherill refused to set a limit on the term of the suspended sentence. Justice Weatherill also refused to hear Mr. De Cotiis parties on this application in the last year.
- [174] Nevertheless, the Sentencing Order does contemplate opportunities for the parties to argue for greater or lesser amounts to be paid as a condition of the suspended sentence, including for arrears payments to be adjusted if varied or discharged.
- [175] It is clear that the Sentencing Order has not helped the respondent to fully come into compliance with his obligations: his arrears are growing and at the present rate of payment it would take almost 30 years to pay what is currently owing.
- [176] In consideration of all of the above, I am prepared to vary the Sentencing Order to lift the sentence, provided all of the following conditions are fulfilled:
- a) Payment of prospective child support on a lump sum basis of \$98,256 based on the Guideline support requirements from September 1, 2023 until the parties' youngest child attains the age of 19;
 - b) An undertaking is provided by Mr. De Cotiis, and/or the trustees of any trusts to which the youngest child is a beneficiary, which provides that:
 - (1) The youngest child will be covered by his father's medical and benefits plan, with that information being shared with the claimant;
 - (2) The youngest child's counselling and other medical or dental costs not covered by benefits will be paid by Mr. De Cotiis, or from funds in trust for the youngest child, upon depletion of the Brockton fund; and
 - (3) The youngest child will receive full payment of his tuition, living expenses, and travel expenses should he wish to attend post-secondary education or training from available trust funds for this purpose.

- c) Payment of prospective spousal support on a lump sum basis in the amount of \$100,000; and
- d) Payment of arrears on a lump sum basis, in the amount of \$366,000.

[177] If the respondent does not wish to have his sentence lifted on the above basis, he can apply with a proposal as to how he plans to bring himself into compliance with the totality of the court's orders made in relation to him, including the payment of support that was previously ordered but not paid. Any such application must be accompanied by full disclosure of any and all assets and income available to him, including any trust entitlements and share holdings pursuant to which he may receive discretionary or non-discretionary trust assets or income.

[178] I will seize myself of the termination of Mr. De Cotiis' sentence on the above basis, and any further applications he may make in this regard.

ANCILLARY ORDERS

[179] There are a number of ancillary orders to be made on these applications.

[180] The disclosure orders sought by the claimant were not pursued. Accordingly, I adjourn them.

[181] I do not seize myself of this file generally. I seize myself only of Mr. De Cotiis' suspended sentence conditions.

[182] The claimant seeks the right to make submissions on costs after judgment. I grant her that right. The parties are directed to communicate with the Registry within 30 days of receiving these reasons to make arrangements to appear before me for this purpose.

"Marzari J."

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