

CANADA / JUDGMENT

Garousi v. Garousi

2023 BCSC 1143

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1143 Garousi v. Garousi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Garousi v. Garousi,

2023 BCSC 1143

Date: 20230706

Docket: E66285

Registry: New Westminster

Between:

Vahid Garousi

Claimant

And

Shilan Garousi

Respondent

Before: The Honourable Justice Lamb

Reasons for Judgment

The Claimant, Appearing on own behalf:

V. Garousi

The Respondent, Appearing in Person:

S. Garousi

Counsel appearing as Amicus Curiae:

P.J. Reimer

Place and Date of Hearing:

New Westminster, B.C.

April 6, 2023

Place and Date of Judgment:

New Westminster, B.C.

July 6, 2023

Introduction

- [1] As part of a divorce order granted November 6, 2013 by the Court of Queen's Bench of Alberta (the "Order"), Dr. Vahid Garousi (the "claimant") was ordered to pay spousal and child support to Shilan Garousi (the "respondent"), effective July 1, 2013. Dr. Garousi has not paid any support in accordance with the Order since 2013.
- [2] On December 2, 2022, Dr. Garousi filed an interjurisdictional support variation application seeking to vary the Order to reduce support payments to zero, effective July 1, 2013, i.e., retroactively. Dr. Garousi also seeks to terminate his ongoing obligation to pay child support.
- [3] Ms. Garousi opposes the application to vary the Order. Ms. Garousi says there has been no material change in circumstance that would justify changing the Order.
- [4] The issues I must decide are as follows:
 - a) Should the child support and extraordinary expenses terms of the Order be varied retroactively?
 - b) Should the Order for child support and payment of extraordinary expenses be terminated?
 - c) Should the Order for spousal support be varied retroactively?
- [5] Dr. Garousi does not explicitly apply to reduce or eliminate the support arrears, but that would be the effect if his application is successful.
- [6] On this application, the Court had little guidance regarding the legal test to be applied as both parties represented themselves. Mr. Reimer appeared as amicus curiae to assist with the procedural context for the application and to advise that the legal standard for variation of the support orders is the same as if there was no interjurisdictional aspect to the proceeding. The Court is grateful for Mr. Reimer's helpful submissions.

- [7] As a self-represented litigant unfamiliar with Canadian family law, Dr. Garousi made various submissions regarding his perception of the fairness of the Order. Most of Dr. Garousi's submissions were irrelevant to the issues I must decide. In particular, I do not need to determine the fairness or reasonableness of the Order because Dr. Garousi did not apply to set aside the Order, only to vary the support provisions retroactively. Dr. Garousi is apparently unaware of his obligation under Canadian law to pay child support based on his income for as long as the parties' daughter remains a child of the marriage.
- [8] I will first set out the procedural history and the factual background. I will then confirm the jurisdiction of this Court to decide this application before turning to the issues to be decided.

Procedural history

- [9] Dr. Garousi currently resides in Northern Ireland, a designated jurisdiction as defined in s. 18 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). He filed this interjurisdictional support variation application pursuant to s. 19 of the Divorce Act on December 2, 2022. The application together with supporting materials and a requisition setting the hearing date were served on Ms. Garousi on December 7, 2022. Dr. Garousi deposed to the truth of the facts and information in the application, a "financial information" form and an "evidence to support variation of a support order" form. He deposed an affidavit on September 8, 2022 (providing copies of his 2022 pay stubs) and a further affidavit on October 14, 2022, which provided additional evidence regarding income since 2013.
- [10] Ms. Garousi filed a response and supporting materials (including a sworn affidavit) on March 29, 2023.
- [11] A hearing was conducted on April 6, 2023, with Dr. Garousi appearing by MS Teams from Northern Ireland, Ms. Garousi attending in person, and Mr. Reimer appearing by MS Teams as *amicus curiae*.
- [12] At the conclusion of the hearing, I requested additional affidavit evidence from Ms. Garousi regarding childcare expenses incurred. Ms. Garousi filed a further affidavit on May 4, 2023. Dr. Garousi responded by making an affidavit on May 31, 2023, which was essentially argument about the evidence in Ms. Garousi's affidavit.

Background

- [13] Dr. Garousi and Ms. Garousi were married under the laws of their religion in Vancouver, British Columbia on December 26, 2006. They were legally married in Calgary, Alberta on April 15, 2007. The parties' only child was born November 4, 2007 ("Daughter"). She is currently 15 years old and still a child of the marriage, as defined by the Divorce Act.

The Order

- [14] The parties signed a separation agreement in July 2013 (the "Separation Agreement"), and later that year were divorced by the Order.
- [15] Both parties were represented by counsel when they entered into the Separation Agreement, which settled all of the family law issues between the parties. The Order incorporated some of the terms of the Separation Agreement.
- [16] The Order includes the following terms:
- a) Ms. Garousi shall have sole custody of Daughter;
 - b) Dr. Garousi shall pay Ms. Garousi child support in the amount of \$958.00 per month, payable on the first day of each month, commencing July 1, 2013;
 - c) Dr. Garousi shall pay Ms. Garousi \$350.00 per month for extraordinary expenses, payable on the first day of each month, commencing July 1, 2013;
 - d) Dr. Garousi shall provide medical and dental coverage for Daughter for as long as she is a child of the marriage as defined by the Divorce Act;
 - e) Dr. Garousi shall pay Ms. Garousi \$600.00 per month for spousal support, payable on the first day of each month, commencing July 1, 2013 and ending June 30, 2021; and
 - f) Dr. Garousi shall pay Ms. Garousi a lump sum spousal support payment in the sum of \$40,000.00 on or before July 31, 2014.
- [17] The Order was premised on Dr. Garousi having Federal Child Support Guidelines, SOR/97-175 [Guidelines] income of \$105,000 and Ms. Garousi having Guidelines income of nil.
- [18] The Order provided that amounts owing under the Order would be paid to the Director of Maintenance Enforcement in Alberta.
- [19] The Order also provided that the parties would exchange copies of their income tax returns and notices of assessment annually, on or before June 30 of each year, as long as Daughter is a child of the marriage. The Separation Agreement provided that child support would be adjusted on June 1 of each year to accord with Dr. Garousi's obligation pursuant to the Guidelines, but the Order does not provide for an automatic annual adjustment. There is no evidence that Dr. Garousi provided any income tax documents to Ms. Garousi before he filed this application.
- [20] The Separation Agreement precludes any variation of spousal support regardless of any change in circumstances (at para. 6.3, page 7). The parties agreed that neither would apply to vary spousal support.
- [21] Dr. Garousi has not paid any child or spousal support to Ms. Garousi since the Order was entered. Dr. Garousi provided bank statements to support his assertion that he paid support between February 1 and November 1, 2013. His 2013 Canada Revenue Agency ("CRA") notice

of assessment indicates a deduction for support payments of \$11,000. However, Dr. Garousi has not paid any support to Ms. Garousi since November 1, 2013. According to the Family Maintenance Enforcement Program, Dr. Garousi currently owes Ms. Garousi more than \$250,000 in arrears.

- [22] Dr. Garousi has not continued to provide medical and dental benefit coverage for Daughter as required by the Order.
- [23] Dr. Garousi's allegations that Ms. Garousi "cheated" the legal system are not relevant to the issues I must decide. However, I note that Ms. Garousi provided evidence of the context for the Settlement Agreement, which gives a different perspective on the settlement the parties reached in 2013.

Alleged change in circumstances

- [24] Prior to December 2012, Dr. Garousi was a tenured professor at the University of Calgary. He is also a professional engineer. As noted above, the Order was premised on Dr. Garousi having Guidelines income of \$105,000. According to his CRA notice of assessment, Dr. Garousi's Line 150 income for 2013 was \$103,466 (based on his tax return filed July 16, 2014).
- [25] Dr. Garousi left Canada in December 2012 and moved to Turkey where he lived from 2013 to 2017. Dr. Garousi remained on a paid sabbatical from the University of Calgary in 2013, which was the source of the income reported on his Canadian income tax return. He was on an unpaid leave of absence from the University of Calgary from January 2014 to July 2014, when he resigned. Dr. Garousi worked at Atilim University in Turkey from January 2014 to January 2015. He worked at the Hacettepe University in Turkey from February 2015 to April 2017. Dr. Garousi married his current spouse in 2016. Dr. Garousi worked at Wageningen University in the Netherlands from 2017 until July 2019. He found an academic position in Northern Island, and he moved to the United Kingdom with his wife in the summer of 2019. He is currently employed as an engineering professor at Queen's University in Belfast, Northern Ireland.
- [26] According to his financial information form, Dr. Garousi expected his total annual income for 2022 to be approximately \$102,862.00. He provided a table of his after-tax earnings in Canadian dollars and the source country for those earnings since 2012:

2012 Canada \$106,630

2013 Canada \$103,466

2014 Turkey \$27,528

2015 Turkey \$30,049

2016 Turkey \$33,602

2017 Turkey & \$37,541

Netherlands

2018 Netherlands \$82,588

2019 Netherlands & UK \$71,538

2020 UK \$65,409

2021 UK \$67,426

2022 UK \$61,356 (projected)

[27] Dr. Garousi said these income figures were after-tax, but his CRA notices of assessment confirm that the income figures for 2012 and 2013 are before-tax earnings.

[28] Although Dr. Garousi submitted a few pay slips from his employment after 2013, I am not able to determine the equivalent of his Canadian income tax return line 15000 income for most years since 2014. The pay slips from the Netherlands and Turkey are not in English, which means that I am not able to confirm that his after-tax income is as recorded in his table. I am not able to determine what his annual before-tax income (i.e. the equivalent of Canadian income tax return line 15000 income) would be for those years. Dr. Garousi provided some currency exchange rates for Great British pounds ("GBP") to Canadian dollars and for Turkish lira to Canadian dollars that appear to be sourced from Google in January 2022. Even if such evidence was admissible, the exchange rate for 2022 would not assist in determining the Canadian dollar equivalent for Turkish lira for the years 2014 to 2017. No exchange rate information was provided for euros for 2017 to 2019.

[29] Based on the payslips provided, Dr. Garousi earned the following pensionable income from Queen's University of Belfast for the years 2019 to 2022:

August 2019 - December 2019 24,701.32 GBP plus 11,953 GBP in relocation expenses (non-taxable)

2020 56,166.96 GBP

2021 58,212 GBP

2022 60,773 GBP

[30] Dr. Garousi's 2022 pensionable income was \$103,921.83 based on the currency exchange rate included in Dr. Garousi's submission. This is very similar to his expected earnings (\$102,862.00 or 60,000 GBP) reported on his financial information form prepared January 17, 2022.

[31] Dr. Garousi and his wife have a child who is four years old. Dr. Garousi's wife has worked outside the home since 2020.

Jurisdiction

[32] I am satisfied that I have jurisdiction to vary the Order pursuant to the Divorce Act.

- [33] I find that the Order is made under the Divorce Act. The Order does not specifically reference that the spousal support and child support provisions were made pursuant to the Divorce Act; however, the Order granted a divorce and the Separation Agreement provided that the child support, extraordinary expenses and spousal support terms were made pursuant to the Divorce Act. Further, where no statute is designated, the Court reviewing the Order should assume it was made pursuant to the Divorce Act based on the principle of paramouncy: *Hodgson v. Hodgson*, 2014 BCSC 1372 at para. 18.
- [34] Section 5(1) of the Divorce Act gives the Superior Court of any province or territory the jurisdiction to vary an order made under the Divorce Act, regardless of where the order was made, provided:
- (a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
 - (b) both former spouses accept the jurisdiction of the court.
- [35] Ms. Garousi was habitually resident in British Columbia at the time the application was filed, which means this Court has jurisdiction to vary an order made under the Divorce Act.
- [36] As a result, I am satisfied that I have jurisdiction to decide this application.

Analysis

- a) Should the child support and extraordinary expenses terms of the Order be varied retroactively?

Legal framework for retroactive variation

- [37] The statutory authority to vary child support retroactively is found in s. 17 of the Divorce Act, which provides in part as follows:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision of one, on application by either or both former spouses .

- [38] Section 17(4) of the Divorce Act sets out the factors to consider on an application to vary a child support order:

- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

- [39] In making a variation order respecting child support, I must do so in accordance with the applicable guidelines: Divorce Act, s. 17(6.1). The Guidelines provide, in relevant part, as follows:

Circumstances for variation

14 For the purposes of subsection 17(4) of the [Divorce Act], any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support;

[40] The Supreme Court of Canada recently provided guidance on how to decide whether to retroactively decrease child support and rescind arrears in *Colucci v. Colucci*, 2021 SCC 24. In *Colucci*, the Court outlined a framework designed to recognize the "core objective of safeguarding the child's right to a 'fair standard of support'" identified in s. 1 of the Guidelines and to balance this core objective with "the certainty and predictability provided by an existing court order against the need for flexibility in a system that ties support to fluctuating payor income" (at paras. 4, 46). Justice Martin for the Court confirmed that "any framework for decreased child support must account for the informational asymmetry between the parties and the resulting need for full and frank disclosure of the payor's income": *Colucci* at para. 47.

[41] The party seeking a retroactive decrease in child support bears the onus of showing a change in circumstances: *Colucci* at para. 60. Where a payor seeks a decrease based on a material change in income, the "decrease in income must be significant and have some degree of continuity, and it must be real and not one of choice" in order to constitute a material change: *Colucci* at para. 61. The payor must provide "sufficient reliable evidence" to allow the Court to determine if the threshold is met: *Colucci* at para. 62.

No material change with respect to child support

[42] I find that Dr. Garousi has failed to establish a material change with respect to child support. Child support payable by Dr. Garousi is based solely on his pre-tax income. His current income is not significantly different than his income at the time the Order was made. When the Order was made, child support of \$958.00 per month was set based on Dr. Garousi's Guidelines income of \$105,000. As of the time his affidavit was sworn in October 2022, Dr. Garousi's anticipated earnings for 2022 were \$102,962 CDN. His earnings in 2020 and 2021 were slightly less, but I do not find that the decrease is significant such that a retroactive change of child support is warranted. For example, the difference in monthly payments would be approximately \$54/month for 2020 and \$14/month for 2021. These adjustments are also not warranted given his return to close to the original Guidelines income in 2022, which indicates the reduction is not continuing.

- [43] Dr. Garousi says his income was significantly less when he was a professor in Turkey from 2014 to 2017 and somewhat less when he was a professor in the Netherlands from 2017 to 2019. However, Dr. Garousi has failed to prove a material change in income prior to December 2019. In particular, Dr. Garousi failed to meet the onus on him to provide sufficient reliable evidence of his earnings and the then-current exchange rate in order to establish his Canadian-equivalent earnings for those years. He also failed to provide sufficient reliable evidence to establish that his lower salary was not one of choice.
- [44] Dr. Garousi failed to prove what he earned prior to 2019 and the Canadian equivalent of his line 15000 income for the years 2014 to 2019. He failed to provide tax returns for the years 2014 to 2019. The paylips he attached to his affidavit were not in English, and he failed to provide admissible evidence of currency conversion rates.
- [45] Dr. Garousi claims that the "unfair actions" of Ms. Garousi during the divorce process caused "major damage" to his mental health and career. Dr. Garousi alleges that Ms. Garousi deployed "cruel" tactics during the "ultra-stressful divorce process" to "game" and "cheat" the legal system to make him suffer. He claims that he continues to take various mental health medication. Dr. Garousi provided no medical documentation to corroborate his claim that he was diagnosed with post-traumatic stress disorder or any other mental health condition or that he has been prescribed medication. Dr. Garousi did not provide evidence that he was unable to work for any period of time since 2013 due to a mental health condition or otherwise.
- [46] To explain his change of jobs, Dr. Garousi argued that he was forced to give up his career in Canada because Ms. Garousi created a "bitter/toxic environment" for him in Calgary, which caused him to move to Turkey. Dr. Garousi failed to provide sufficient reliable evidence to support this proposition, which means I have not factored this argument into my decision.

Material change of circumstances with respect to extraordinary expenses

- [47] On the other hand, I accept that there has been a material change with respect to extraordinary expenses, because Ms. Garousi now earns an income. Section 7(2) of the Guidelines provides that extraordinary expenses are allocated based on the ratio of the parents' income. When the Order was made, Ms. Garousi's Guidelines income was nil; she has earned more than nil in the years since 2013. This change of her Guidelines income amounts to a material change for the purposes of considering extraordinary expenses.

Retroactivity to date of effective notice is appropriate

- [48] For the reasons that follow, I would only consider reducing the amount of extraordinary expenses payable by Dr. Garousi retroactive to the date of effective notice of his intention to seek a reduction. In this case, the date of effective notice is the same as the date of formal notice: December 7, 2022, the date the notice of application was served on Ms. Garousi. Similarly, if I am wrong in finding that Dr. Garousi has failed to prove a material change of

circumstances with respect to child support payable, the period of retroactivity would date to December 7, 2022, which means any reduction in Dr. Garousi's income between 2014 and 2019 would be immaterial.

[49] At para. 80 of Colucci, the Supreme Court of Canada provided guidance on how far back a child support order should be reduced:

once the payor establishes a change in circumstances, a presumption arises in favour of varying support to the date of effective notice, up to three years before formal notice.

[50] In other words, a court exercising its discretion to reduce retroactively a child support order starts with the presumption that a reduction may be made to the date of "effective notice". Justice Martin elaborated that "effective notice" requires the payor to notify the recipient of their reduced income and to provide reasonable proof of the reduction: Colucci at paras. 87-88. The presumptive rule limits the period of retroactivity to no more than three years before the date of formal notice, i.e. the date on which the payor serves the recipient with an application for a reduction: Colucci at para. 91.

[51] In this case, Ms. Garousi received effective notice of Dr. Garousi's intention to reduce child support and payment of extraordinary expenses retroactively when she was served with the notice of application and supporting materials on December 7, 2022. The presumptive retroactive period would go back only to that date. Dr. Garousi indicated that he filed an application in 2019 in Alberta to reduce child support payable, but there is no evidence that he delivered the Alberta application or evidence of a change in income to Ms. Garousi prior to December 2022.

[52] The Court may adjust the presumptive date of retroactivity when it would be unfair not to do so: Colucci at para. 96. To provide guidance on how to balance the interests of the child, the payor parent and the recipient parent, Justice Martin at paras. 96-108 of Colucci modified the four factors from *D.B.S. v. S.R.G.*, 2006 SCC 37, to address a retroactive decrease application:

1. the reason for the payor parent's delay in seeking to reduce child support;
2. the conduct of the payor parent;
3. the circumstances of the child; and
4. hardship to the payor if the period of retroactivity is not lengthened beyond the presumptive date.

[53] Dr. Garousi has failed to convince me that it would be appropriate to deviate from the presumptive retroactivity date of December 7, 2022 in this case. I will review each of the modified D.B.S. factors briefly.

- [54] Based on the evidence he provided and his submissions, Dr. Garousi's delay in applying to vary the Order apparently arises from his unfamiliarity with the process to seek variation. This explanation does not tip the balance in favour of a longer period of retroactivity.
- [55] Dr. Garousi's conduct since 2013 does not favour a longer period of retroactivity: he has failed to pay any child support since 2013, and he did not provide any updated income information to Ms. Garousi between 2013 and December 2022. Clearly Dr. Garousi's conduct has had "the effect of privileging [his] interests over the child's right to support": *Goulding v. Keck*, 2014 ABCA 138 at para. 44 (emphasis in original), as quoted in *Colucci* at para. 101. It is not necessary for me to decide whether or not it is a coincidence that Dr. Garousi first took steps to seek a reduction of child support in 2019, very shortly before moving to Northern Ireland, the first jurisdiction which constitutes a "designated jurisdiction" under s. 18 of the Divorce Act in which Dr. Garousi has worked and resided since leaving Canada.
- [56] In terms of Daughter's circumstances, since 2014, Ms. Garousi has been the only parent who has provided financial or any other type of support to Daughter. Ms. Garousi has worked to improve her own employment opportunities while providing primary care to Daughter. While Ms. Garousi has earned a reasonable income, I accept that if Daughter has avoided hardship, then it is only due to the hard work and frugality of Ms. Garousi.
- [57] Finally, I am not satisfied that Dr. Garousi has established hardship that might justify extending the period of retroactivity beyond December 7, 2022. I am not confident that Dr. Garousi has provided a complete picture of his financial situation, including his income, assets, and debts. For example, Dr. Garousi failed to provide the address of the house he owns or any documents to confirm the value of the home. Dr. Garousi denies owning any other assets or investments aside from his university pension. He says that the high cost of living in Northern Ireland makes it difficult to support his family now. He provided a monthly budget of income and expenses, but he only reluctantly acknowledged during the hearing that his wife works and earns income. Dr. Garousi says he has had to borrow money from family since 2013, but he provided no details of the amount of such loans or the amount or timing of any repayment. Dr. Garousi says he spent considerable funds on moving between countries; however, his income documents indicate that he was paid 11,953 GBP for relocation expenses by Belfast University in August 2019 as a non-taxable benefit. In short, I am not satisfied Dr. Garousi has provided a complete picture of his financial situation or that the available information establishes hardship that would justify extending the period of retroactivity beyond December 7, 2022.
- [58] In any event, I am not satisfied that any hardship to Dr. Garousi would outweigh the hardship to Ms. Garousi and Daughter if the period of retroactivity was extended. Dr. Garousi has not paid court-ordered child support and spousal support since 2013. He left Canada and lived in non-reciprocating jurisdictions before moving to Northern Ireland in 2019. While there is no evidence that Dr. Garousi filed this application as a result of enforcement proceedings in Northern Ireland, Dr. Garousi's conduct is not dissimilar to that of Mr. Colucci. Mr. Colucci applied to retroactively reduce his court-ordered support

obligation and eliminate arrears when he returned to Canada after living abroad and largely out of reach of enforcement mechanisms for years. As in Colucci, I am reluctant to give tacit approval to this kind of conduct, which is not in the best interest of the child: Colucci at para. 123.

- [59] In summary, it would not be unfair in this case to limit a retroactive variation to the presumptive date of December 7, 2022. As Dr. Garousi's income since December 7, 2022 is not materially different than his Guidelines income at the time the Order was made, there is no basis to retroactively change child support payable. The question remains, given I am satisfied that Ms. Garousi's change in income constitutes a material change in circumstances with respect to Dr. Garousi's obligation to pay extraordinary expenses, whether it would be appropriate to reduce the extraordinary expense provisions of the Order based on Ms. Garousi's income after January 1, 2023. I have chosen to consider January 1, 2023 rather than December 7, 2022 for convenience.

Allocation of extraordinary expenses from January 1, 2023

- [60] I find there should be a retroactive reduction of extraordinary expenses paid by Dr. Garousi from January 1, 2023 to present such that extraordinary expenses are shared proportionately based on the parties' incomes. The available evidence does not allow me to determine what extraordinary expenses have been incurred since January 1, 2023 and whether \$350 remains a reasonable monthly amount payable for extraordinary expenses.
- [61] Based on the evidence provided, Dr. Garousi's 2022 Guidelines income was \$103,922 and Ms. Garousi's 2022 Guidelines income was \$65,710. As a result, I would vary the Order to provide that Dr. Garousi shall pay 61% of extraordinary expenses, retroactive to January 1, 2023: Guidelines, s. 7(2).
- [62] If the parties cannot agree on extraordinary expenses incurred since January 1, 2023 and any consequent reduction in extraordinary expenses payable by Dr. Garousi, then Dr. Garousi has leave to appear before me to argue his obligation should be reduced from \$350 per month for that period. Ms. Garousi has leave to file a further affidavit to establish extraordinary expenses since January 1, 2023, and Dr. Garousi has leave to respond. If Ms. Garousi seeks to vary the Order retroactively to increase the amount of extraordinary expenses Dr. Garousi is required to pay, Ms. Garousi must file her own application to vary.
- b) Should the Order for child support and payment of extraordinary expenses be terminated?
- [63] Dr. Garousi seeks an order terminating child support and the payment of extraordinary expenses. I am satisfied that Dr. Garousi remains obligated to pay child support and extraordinary expenses. There is no reason to terminate the provisions of the Order requiring him to pay.
- [64] At para. 62 of *Sadana v. Sadana*, 2021 BCSC 111, Justice Kent provided a useful summary of key principles of law that apply equally to this case:

I start this section of the judgment by setting out certain uncontroversial general principles of law governing child support. It is hoped that this attempt at "plain English" will guide the parties both in the next steps in this litigation and more generally in their approach to child support issues on the future.

a) General Principles of Child Support

Various Supreme Court of Canada cases have articulated certain fundamental principles of law applicable to all child support matters:

- a parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to provide financial support for the child automatically arises at birth;
- parents have a joint and ongoing legal obligation to provide financial support for their children in a way that is commensurate to their income;
- this obligation and the children's concomitant right to support exists independently of any statute or court order;
- child support is the right of the child, not of the parent seeking support on the child's behalf;
- support payments are based on earning capacity and not just on what a parent actually earns - as a result, parents have a legal obligation to earn as much as they reasonably are capable of earning so that the children receive an appropriate level of support;
- a parent does not fulfil his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly; and
- both parents must put their child's interests ahead of their own in negotiating and litigating child support.

[65] The amount of child support payable for a child under the age of majority is determined in accordance with the Guidelines. Daughter lives exclusively with Ms. Garousi, thus only Dr. Garousi is obligated to pay child support. Child support payable is based solely on his income. As outlined above, based on his current income, the child support payable by Dr. Garousi pursuant to the Order appears to be consistent with the Guidelines.

[66] Dr. Garousi argues that he should not have to pay child support because he is prevented from seeing Daughter. Dr. Garousi deposes that Ms. Garousi has prevented him from having parenting time with Daughter. I do not accept his evidence on this point. I prefer Ms. Garousi's evidence that Dr. Garousi has declined to exercise any parenting time: this evidence is more consistent with Dr. Garousi's failure to support his daughter. In any event, Daughter remains entitled to receive child support whether or not Dr. Garousi has parenting time with her.

[67] In short, Dr. Garousi remains obligated to pay child support for as long as Daughter is a child of the marriage, as defined in the Divorce Act.

- [68] Similarly, Dr. Garousi remains obligated to pay his proportionate share of extraordinary expenses in accordance with the parties' incomes: Guidelines, s. 7(2). Going forward, the parties may agree to the annual ratio to apply to extraordinary expenses after exchanging financial information by June 30 each year, as required by the Order. If they are not able to agree, then either party may apply to vary the Order if there is a material change.
- c) Should the Order for spousal support be varied retroactively?
- [69] Section 17(4.1) of the Divorce Act provides that the Court must find a change in the condition, means, needs or other circumstances of either former spouse has occurred before varying a spousal support order. Before a spousal support order will be varied, there must be a "material" change in circumstances, i.e., a change that, if known at the time, likely would have resulted in different terms to the order: *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 32-33, quoting from *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688, 1994 CanLII 28.
- [70] Dr. Garousi argues that spousal support should be retroactively varied because his income dropped after 2014 and because the Settlement Agreement was unfair. For the reasons that follow, I am not satisfied that Dr. Garousi has established a change in circumstances that if known at the time of the original order would likely have resulted in different terms. Further, as indicated in paragraph 7 above, I will not consider the fairness of the Settlement Agreement in the context of this application to vary spousal support retroactively.
- [71] At paragraph 6.3 of the Separation Agreement, the parties acknowledged that their financial circumstances might change in the future and that no such change would give either of them the right to vary the spousal support provisions in the Separation Agreement. The parties agreed that none of the following events would give rise to a claim for variation of the spousal support provisions:
- a) temporary or permanent illness or disability, mental or physical of either party, regardless of whether the illness arose before, during or after separation;
 - b) temporary or permanent loss of employment of either party;
 - c) increase or decrease in financial obligations of any nature and kind;
 - d) inflation;
 - e) economic depression;
 - f) increase or decrease in income of either party;
 - g) windfall or inheritance of either party;
 - h) remarriage, cohabitation or separation to, with or from any third party; and
 - i) subsequent separation or divorce.

[72] In other words, when the parties entered the Separation Agreement, they were aware the potential changes listed in paragraph 6.3 of the Separation Agreement might happen in the future, and they agreed that these potential changes would not justify variation of the spousal support terms. I accept that the list of potential changes is evidence of what the parties actually contemplated at the time they entered the Settlement Agreement: *Dedes v. Dedes*, 2015 BCCA 194 at para. 25. Further, as the majority of the Supreme Court of Canada said at para. 39 in *L.M.P.*, whether or not there has been a "material" change of circumstances since the order was made (identified by the Court as "the Willick question") may be revealed within the agreement itself:

Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the Willick question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the Willick inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the Divorce Act when the order was made.

[73] In this case, I am satisfied that the parties intended that any increase in Ms. Garousi's income or decrease in Dr. Garousi's income would not constitute a material change for the purposes of s. 17(4.1) of the Divorce Act. The fact that Ms. Garousi's income increased and Dr. Garousi's income may have decreased for a period of time (which is not proven) would not be a material change of circumstance that would justify varying spousal support.

[74] Other terms in the Separation Agreement demonstrated that the parties intended their agreement on spousal support to be final:

- a) The parties acknowledged that they considered and recognized the objectives of a spousal support order;
- b) They agreed not to apply to vary the spousal support provisions of the Separation Agreement; and
- c) They covenanted and agreed "that the within agreement as to spousal maintenance is intended to be complete and final by both parties".

[75] The Supreme Court of Canada has recognized that domestic contracts, including settlement agreements reached between separating spouses, "should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement": *Anderson v. Anderson*, 2023 SCC 13 at para. 33. I have found no compelling reason to discount the Separation Agreement.

Conclusion

[76] As a result, I make the following orders:

- a) Dr. Garousi's application to vary child support retroactively is dismissed;
- b) Dr. Garousi's application to terminate child support and payment of extraordinary expenses is dismissed;
- c) Dr. Garousi's application to vary extraordinary expenses retroactively from July 1, 2013 to December 31, 2022 is dismissed;
- d) Dr. Garousi's application to vary extraordinary expenses retroactively from January 1, 2023 is granted in part: extraordinary expenses from January 1, 2023 to present shall be shared, with 61% payable by Dr. Garousi and 39% payable by Ms. Garousi; and
- e) Dr. Garousi's application to vary spousal support retroactively is dismissed.

[77] Ms. Garousi has been substantially successful on this application. She is entitled to costs in the amount of \$2000 payable forthwith.

"Lamb J."

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