

CANADA / JUDGMENT

Garousi v. Garousi

2024 BCSC 1685

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Supreme Court of British Columbia

DECIDED

16 September 2024

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2024 BCSC 1685 Garousi v. Garousi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Garousi v. Garousi,

2024 BCSC 1685

Date: 20240916

Docket: E66285

Registry: New Westminster

Between:

Vahid Garousi

Claimant

And

Shilan Garousi

Respondent

Before: The Honourable Mr. Justice Gibb-Carsley

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 Hearing:

New Westminster, B.C.

July 29, 2024

Place and Date of Judgment:

New Westminster, B.C.

September 16, 2024

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I. Introduction

- [1] This is an application by the claimant, Vahid Garousi, for a variance of child support and child and spousal support arrears he is currently ordered to pay his former spouse, the respondent, Shilan Garousi. The claimant currently resides in Belfast, Northern Ireland, United Kingdom, and the respondent resides in British Columbia. They have one child together who is 17 years old and attends university (the "Child").

- [2] At the application, Paul J. Reimer, appeared as amicus curiae for the Ministry of the Attorney General for the Province of British Columbia. He did so because this is an interjurisdictional support variation application to vary an order made in a different province of Canada. The original order the claimant seeks to vary was made on November 6, 2013, by the Court of King's Bench of Alberta (the "Alberta Order").
- [3] In this application, the claimant seeks to vary the Order as follows:
- a) reduce his child support payments from \$770 per month to \$100 per month;
 - b) vary the amount of unpaid support arrears under the current support order to zero, in other words to terminate the arrears as of July 1, 2013;
 - c) vary the Order to be effective as of July 1, 2013; and
 - d) to terminate his obligation to pay support for the Child retroactively to July 1, 2013.
- [4] The claimant also seeks a review of the Alberta Order as it relates to property division between the parties and to cancel parts of the Alberta Order that deal with the division of certain property. I have detailed with specificity the orders sought by the claimant in his current application at the outset of the reasons because, as I will describe below, the claimant has previously brought an application to this Court for the same relief.
- [5] The claimant brought a virtually identical application to this Court on April 6, 2023. The application was dismissed by the Honourable Justice Lamb on July 6, 2023 (the "July Order"). Justice Lamb provided reasons indexed as *Garousi v. Garousi*, 2023 BCSC 1143 (the "July Reasons"). The July Order has not been set aside on appeal or otherwise varied by the parties.
- [6] As I will explain in the reasons that follow, I dismiss the claimant's application. In short, I find that the claimant's application amounts to a collateral attack on the July Order. The claimant did not pursue an appeal of the July Order. Instead, his application is a disguised attempt for reconsideration on the same facts as his previous application before Lamb J. Further, except for the addition of the 2023 year, the claimant is seeking the same relief in this application that is now before the Court that he sought before Lamb J.
- [7] I accept that in family proceedings, even final orders can be revisited should material changes arise that necessitate a recalculation of support amounts or parenting arrangements. However, I have concluded that the application before me is simply a repackaging of the same information concerning the same issues that were before Lamb J. In my view, it ought to be dismissed because it is a collateral attack of the July Order.
- [8] In any event, as I will describe below, even if the application were not a collateral attack, the claimant has provided no basis to vary the Alberta Order or the July Order because he has failed to establish that there has been a material change in circumstances.

- [9] Further, while he seeks a termination to his support arrears and reduction of his ongoing child support, he has not paid child support voluntarily for 11 years and owes approximately \$257,000 in arrears to the respondent. Put simply, the claimant does not come to court seeking relief with clean hands, nor does the evidence support his claims. There are no new facts before the Court that demonstrate a material change in circumstances upon which to base a variation order.
- [10] In these reasons for judgment, I will provide a brief background of this matter and then address the reasons supporting my conclusion that the claimant's application ought to be dismissed.

II. Background

- [11] The background facts of this case were well set out by Lamb J. at paras. 13-23 in the July Reasons. I will not repeat them all here, but highlight the following general facts for context.

A. The Parties

- [12] The parties 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.
- [13] The Child is the only child of the marriage, as defined in s. 2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), was born in early November 2007.
- [14] When the marriage ended, the claimant and respondent entered into a separation agreement, dated November 2013, in which property was divided and issues of spousal and child support were resolved (the "Separation Agreement").
- [15] The terms of the Separation Agreement formed the basis of the Alberta Order.

B. The Previous Application and Decision of Justice Lamb

- [16] Justice Lamb articulated the issues brought before her by the claimant:
- [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?
- [17] Justice Lamb ordered:
- [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.
- [18] In the application now before the Court, the claimant seeks the same relief, with the addition of an adjustment to support based on what he says is a change to his 2023 income.

III. Analysis

A. Collateral Attack on the Decision of the July Order

- [19] I have carefully reviewed the July Reasons. I find that the applicant's application before me is not a genuine application for variance but instead a disguised appeal of the July Order. In other words, it is a collateral attack on the July Order.
- [20] Indeed, during the hearing before me the claimant expressed that, "in his humble opinion", Lamb J. had "not taken into account all of the circumstances" and had not calculated the income correctly, for example by not correctly accounting for currency exchange rates. When I expressed concern that his application appeared to be an appeal of the July Order, the claimant responded that while he "was thinking of appealing" he had "new arguments now" and was "arguing it more clearly now". In my view, these comments provide some insight into the nature of the claimant's motivation in bringing this application.
- [21] The application before me amounts to a repackaged application that should have properly been brought as an appeal. The issues identified by Lamb J. in the application before her are identical to the issues raised by the applicant before me in this application, with the exception of the claimant's assertion that his income in 2023 has changed such that his future support payments should decrease.
- [22] Justice Lamb considered the income earned by the applicant from 2012 to 2022 and determined that it was not significantly different so as to amount to a material change in circumstances that could justify a variance in child support. In this regard, Lamb J. held:
- [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.

[23] The law of collateral attack was helpfully summarized by our Court of Appeal in *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261. At para. 1, Dickson J.A., writing for the Court, held:

As Justice Binnie explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the law seeks a finality to litigation. For this reason, litigants must put their best foot forward when first called upon to establish a claim. In subsequent proceedings, a litigant may not attack an order pronounced by a court of competent jurisdiction except as provided by law for that express purpose. In other words, generally speaking, litigants are entitled to only one "bite at the cherry" when they bring a claim: *Danyluk* at para. 18.

[24] Justice Dickson continued at para. 35:

Rooted in public policy, the collateral attack doctrine is intended to advance the interests of justice by avoiding duplicative or inconclusive litigation, potential inconsistent results and undue costs, and by preventing a party from avoiding the consequences of an unfavourable decision: *Krist* at para. 46; *Danyluk* at para. 18.

[25] The doctrine of collateral attack was explained by Justice Iacobucci in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 in the following manner:

71 The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *D. J. Lange, The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

72 The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

[26] The applicant could have appealed the July Order. Indeed, as I understand the procedural history of this matter, he initially appealed the July Order only to abandon that appeal. In my view, it is improper to now come before this Court and ask for the same relief on the same facts and issues that he sought before Lamb J from a different judge. I conclude that the

claimant's application amounts to a collateral attack and on that basis should be dismissed. Put simply, the claimant is re-arguing the application that was before Lamb J., in essence, arguing that she failed to correctly consider his circumstances.

- [27] Even if I am incorrect that his application for the variance to the support orders is not properly characterized as a collateral attack, I am satisfied that the claimant has failed to establish a material change in circumstances. He has put the same evidence, although reformatted, before the Court on this application as he did before Lamb J. To the extent that variances do exist, such as recalculations of the claimant's income, they are so insignificant as to be immaterial. As such, whether because it is a collateral attack or a failure to demonstrate a material change in circumstances, either path leads to a dismissal of the claimant's application.
- [28] In finding that the claimant's application amounts to a collateral attack, I am acutely aware that even "final" orders of parenting time and support orders in family law proceedings are never truly final orders. Circumstances of parents and children change over time and there is a flexibility ingrained in how family orders are addressed to allow for changes when material changes in circumstances arise. However, on the facts before me, I find the claimant has not presented a material change in circumstances that were not before Lamb J. that resulted in the July Order. I conclude that the claimant has attempted to repackage the same information in a different format in hopes of obtaining a different outcome.
- [29] As a final comment on the nature of the claimant's application, I note that he has not paid any child support for the Child since 2013 and is currently in arrears in excess of \$257,000. It strikes me as unsavoury that after agreeing to a settlement and the relief set out in the Alberta Order and clearly being obligated to pay support that the applicant has not honoured his obligations and yet now seeks a retroactive variation. The Supreme Court in *D.B.S. v. S.R.G.*, 2006 SCC 37, at paras. 105-109, held that the payor parent's blameworthy conduct is relevant when considering a retroactive adjustment to child support amounts. Justice Bastarache, writing for the Court at para 106, defines blameworthy conduct in this context as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support". Here, the claimant has glaringly failed to meet his obligations to his child and his former spouse. His blameworthy conduct and poor behaviour in meeting his obligations militate against a finding that he should be entitled to any retroactive adjustment of support amounts.
- [30] The words of Lamb J. continue to apply to the circumstances created by the claimant in the application now before the Court. Justice Lamb considered the claimant's conduct while he lived in Turkey:
- [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.

[31] I echo the concerns of Lamb J. and, like Lamb J., while not purporting to know the claimant's exact motives in seeking to revisit the amounts of support, there is certainly an available inference that because the claimant has moved from the non-reciprocating jurisdiction of Turkey to the reciprocating jurisdiction of Northern Ireland, he is now motivated to revisit the Alberta Order. In my view, his past conduct and this potential veiled motivation for revisiting an order is another reason that the claimant's application to vary his support obligations should fail.

[32] I will now turn to the 2023 year, which was not before Lamb J.

B. Variation of the 2023 Support Payments

[33] The parties' 2023 income information was not before Lamb J. As such, I have considered whether the changes to the parties' 2023 incomes amount to a material change in circumstances thus requiring an adjustment to child support or the calculation of the parties' proportionate share of s. 7 expenses.

[34] In support of his application, the claimant provided that his income for 2023 while working as a professor in the United Kingdom was GBP58,056 which, according to the claimant, is the equivalent of CDN\$89,987. The claimant asserts that his income for 2022 was GBP57,916 which, according to the claimant, is the equivalent of CDN\$88,611. As such, even on his own evidence his income has increased since he was before Lamb J. and is of a similar amount in 2023 as in 2022.

[35] As a starting point regarding the claimant's presentation of his income for 2023, I question the currency conversion rates used by the claimant in converting his income from Pound Sterling to Canadian currency. The claimant provided open source graphs of currency exchange rates. However, it appears that he has not selected the average annual exchange rates, but instead chosen points in time when the rates favour his position by reducing his income in Canadian dollars. As such, I question the accuracy of his evidence regarding the currency conversion and the sources of that information. Further, I note that the after tax income calculated in Canadian dollars found by Lamb J. in the July Reasons at para. 26 appear different than the amounts now presented by the claimant. However, the difference may be related to an after tax calculation. In addition to my concerns with the claimant's calculations, the amounts presented to Lamb J. failed to persuade her that his income changes amounted to a material change in circumstances to warrant a variance of support amounts.

- [36] In the application now before the Court, the claimant used the conversion rates of 1.53 and 1.55 between the Pound Sterling and the Canadian dollar for 2022 and 2023, respectively. However, even based on his methodology of using open source searches to calculate annual exchange rates, suggest that the historical average of the conversion rate is significantly higher than the amount he has used for his calculations. I acknowledge the imprecision of this assessment, but am not persuaded that the methodology used by the claimant supports his claim that his change of income in 2023 amounts to a material change in circumstances allowing for a reduction in his child support payments.
- [37] More importantly, as I just referenced, the claimant's income between 2020 and 2022 on his materials is within a narrow band of income and failed to persuade Lamb J. that there was a material change of circumstances. Indeed, as presented in this application, the claimant's income in 2023 is greater than his 2022 income and I see no basis to conclude it amounts to a material change in circumstances. In other words, I find the claimant's income in 2023 is in a similar range to his previous years of income he presented when he was before Lamb J. To reiterate, his income has increased during that time. I find no material change to the claimant's income in the 2023 year that would merit a downward adjustment to his child support obligations.
- [38] In respect of the claimant's application to vary the proportion of s. 7 expenses, based on the respondent's F8 financial disclosure, her income has decreased since she appeared in 2022 before Lamb J. Accordingly, the proportionate share of s. 7 special and extraordinary expenses would change in the respondent's favour. However, the respondent did not file a cross application to adjust the proportionate share of s. 7 expenses. Further, given that certainty and consistency may be of greater importance to the parties in moving forward, I decline to adjust the proportionate share of s. 7 expenses from the claimant's share of 61% and the respondent share of 39% as set out in the July Order.

C. Claimant's Assertion that the Property Division in the Alberta Order Should be Varied

- [39] The claimant also seeks to vary the Alberta Order in respect of how it divided the family assets between the parties. He asserts that while he signed that document he did so under duress and did not agree to its terms. In my view, there is no merit to his argument.
- [40] Much of the reasoning that led me to find that the claimant's attempt to revisit the July Order is a collateral attack also applies to his attempt to set aside the property division agreed to by the parties in the Separation Agreement that was the foundation for the Alberta Order. On the evidence before me, there is no merit to the claimant's complaint that the property division he agreed to in the Separation Agreement, that is the basis of the Alberta Order, should be set aside or varied. In my opinion, it appears that the claimant simply has "buyer's remorse" eleven years after he entered into the Separation Agreement and agreed to the terms of the Alberta Order. He provides no basis to vary either.

- [41] As a starting point, the terms of the Separation Agreement are now terms of a court order. Court orders must be treated as binding and conclusive unless set aside on appeal or lawfully quashed.
- [42] In respect to the Separation Agreement that is the basis of the Alberta Order, the claimant's change of heart regarding its terms does not provide him with an opportunity to undo the agreement. To do so would inject uncertainty into agreements and court orders, increase time and expense to the parties, and unnecessarily burden an already busy legal system when parties regret entering agreements at some later date, absent some legitimate purpose for seeking to set aside an agreement.
- [43] The argument that the claimant did not agree to the terms of the Separation Agreement or the Alberta Order is untenable. Put sharply, the claimant may now regret entering into the Separation Agreement (and the Alberta Order) regarding the property division, however, in my view there is no basis to conclude that either should be revisited.

IV. Disposition

- [44] For the reasons set out above, I order that the claimant's application is dismissed. For clarity, I make the following orders:
- a) the claimant's application to vary child support from April 1, 2024, onward from \$770 to \$100 per month is dismissed;
 - b) the claimant's application to vary the amount of unpaid support arrears to zero, as of July 1, 2013, is dismissed;
 - c) The claimant's application to set aside the November 6, 2013 Order of the King's Bench of Alberta in respect of property division between the claimant and respondent is dismissed; and
 - d) The claimant's application to reapportion the s. 7 extraordinary expenses from the proportion set by the Honourable Justice Lamb in her order of July 6, 2023, being 61% payable by the claimant and 39% payable by the respondent is dismissed.
- [45] I understand there were difficulties and delays in having the July Order signed by the claimant. As such, I will dispense with the claimant's signature on the order. I kindly request that counsel for the amicus curiae draft the order and arrange for its review and signature by the respondent. I also request that the amicus arrange for entering the order and that he arrange for an entered copy of the order to be provided to the parties.

V. Costs

- [46] The respondent has been entirely successful in defending this application. The general rule in family law proceedings is that costs follow substantial success as set out in Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules]; *Gold v. Gold* (1993), 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19; *Fotheringham v. Fotheringham*, 2001 BCSC

1321 at para. 45, leave to appeal ref'd, 2002 BCCA 454; *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16; and *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 345 at para. 13.

- [47] The respondent has enjoyed substantial success in this application because she has completely resisted the claimant's application. Given the claimant's failure to pay amounts he has been obligated to pay in the past and to avoid the respondent from having to incur additional costs in resolving a costs award, I exercise my discretion to set the amount of costs in a lump sum amount of \$2,000 payable by the claimant to the respondent, within 30 days of the order being entered, pursuant to Rule 16-1(1)(d) of the Rules.

VI. Conclusion

- [48] During the application, the respondent sought an order that the claimant be prohibited from making further applications to vary the support amounts or to set aside aspects of the Alberta Order. As I understand from the respondent's submissions, these applications are both time consuming and expensive for her, especially given that the claimant has paid so little in support despite his court obligations to do so. I acknowledge the respondent's concerns.
- [49] As I have concluded in these reasons, the claimant's application largely amounts to an improper and collateral attack on the July Order. If the claimant was dissatisfied with Lamb J.'s decision, he could have, and should have, pursued an appeal. He did not, and instead repackaged his application and sought a decision before the same Court.
- [50] While I acknowledge the respondent's concerns, I decline to make an order against the claimant preventing him from reapplying to the court on issues regarding his family law proceeding. The standard to meet to prohibit an individual of the right to avail themselves of the judicial system and be declared a vexatious litigant is high. As held by our Court of Appeal in *Wang v. The Owners, Strata Plan LMS 2970*, 2022 BCCA 56:
- [17] An order declaring a person to be a vexatious litigant is not to be made lightly. It is "an extraordinary remedy that alters a person's right to access the courts": *Hokhold v. Gerbrandt*, 2017 BCCA 216 at para. 21 (Chambers).
- (See also: *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594 at para. 25.)
- [51] I do not find the threshold for declaring the claimant a vexatious litigant is met in these circumstances, although his failure to pay his arrears and costs awards already ordered by the court is profoundly troubling. I expect that should the claimant again unsuccessfully apply for relief on what are settled issues, he could be subject to increased cost sanctions such as special costs or penalties for failing to comply with orders of the court.
- [52] I thank the parties and counsel for the amicus curiae for their submissions on the application.

"Gibb-Carsley J."

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Prepared on 25 October 2026 · Esheria