

CANADA / JUDGMENT

Gonabady-Namadon v. Mohammadzadeh

2009 BCCA 448

COURT

British Columbia Court of Appeal

DECIDED

20 October 2009

BEFORE

The Honourable Madam Justice Newbury
The Honourable Mr. Justice Bauman
The Honourable Madam Justice Neilson
On appeal from: Supreme Court of British Columbia,
May 14 and June 5, 2008
(2008 BCSC 606, 2008 BCSC 706, Docket No.
E063711)

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2009 BCCA 448 Gonabady-Namadon v. Mohammadzadeh**COURT OF APPEAL FOR BRITISH COLUMBIA****Citation:**

Gonabady-Namadon v. Mohammadzadeh,
2009 BCCA 448
Date: 20091020
Docket: CA036179

Between:

Mojdeh Gonabady-Namadon,
also known as Mojdeh Gonabady,
also known as Mojdeh Gonabaday Namadon
Appellant
(Plaintiff)
And
Hossein Mohammadzadeh,
also known as Hossein Mohammad Zadeh,
also known as Hossein Mohammed-Zadeh
Respondent
(Defendant)

Before:

The Honourable Madam Justice Newbury
The Honourable Mr. Justice Bauman
The Honourable Madam Justice Neilson
On appeal from: Supreme Court of British Columbia, May 14 and June 5, 2008
(2008 BCSC 606, 2008 BCSC 706, Docket No. E063711)

Counsel for the Appellant:

H. Wiebach

Counsel for the Respondent:	Z. Jenab
Place and Date of Hearing:	Vancouver, British Columbia April 21, 2009
Place and Date of Judgment:	Vancouver, British Columbia October 20, 2009
Written Reasons by:	The Honourable Madam Justice Neilson
Concurred in by:	The Honourable Madam Justice Newbury The Honourable Mr. Justice Bauman
Reasons for Judgment of the Honourable Madam Justice Neilson:	INTRODUCTION [1] The appellant, Mojdeh Gonabady-Namadon ("Dr. Gonabady") appeals the order of the Supreme Court of British Columbia pronounced May 14, 2008, and amended by supplemental reasons on June 5, 2008, that dismissed her claim for spousal support, and awarded child support in the amount of \$3,281 per month based on an imputed annual income of \$250,000 to the respondent, Mr. Mohammadzadeh. The trial judge's reasons for judgment may be found at 2008 BCSC 606 and 2008 BCSC 706. [2] Dr. Gonabady says that the trial judge erred in two respects: 1. in concluding that Mr. Mohammadzadeh paid tax on the \$250,000 income imputed to him, and accordingly in failing to gross-up that income pursuant to ss. 19(1)(c) and 20 of the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"), for the purpose of calculating child support; and 2. in concluding that Dr. Gonabady was not entitled to spousal support. [3] If she is successful on the appeal, Dr. Gonabady also asks that the trial judge's award of 50% of special costs be increased to 75% of special costs. BACKGROUND [4] Dr. Gonabady and Mr. Mohammadzadeh met as university students in Iran, and married there in 1993. In 1994, Mr. Mohammadzadeh obtained a master's degree in chemical engineering. Two years later, Dr. Gonabady obtained a medical degree. [5] In 1993, Mr. Mohammadzadeh formed a partnership with Mr. Saied Goodarzi Malayeri to manufacture and sell glue. After only two years in operation, the production plant moved into a larger facility with rental warehouse space. In 1995, Mr. Mohammadzadeh and Mr. Malayeri purchased an office in downtown Tehran. In 1996, the business expanded again and they purchased land and began constructing an administrative building, a production plant, and several attached warehouses. They purchased more land the following year. In 1998, the partners purchased a three-storey building in downtown Tehran to serve as head office. By 1999, the construction of the expansion was complete. Significantly, the business was successful enough that the costs were completely paid within two years. [6] As the business prospered, the parties enjoyed an increasingly comfortable lifestyle. They moved to progressively larger apartments in more upscale neighbourhoods in Tehran; they bought a 3/4 acre plot of land outside of Tehran in 1995 and built a five bedroom home; and they both drove vehicles. They employed a full-time nanny as well as a gardener. They also made several trips to Dubai for lavish shopping sprees. [7] In Iran, a newly graduated doctor is required to work for several years in a rural setting before being eligible to open a private practice. Although Dr. Gonabady wanted a private practice, neither she nor Mr. Mohammadzadeh wished her to work in a rural region, and so she restricted herself to part-time work in another doctor's

clinic in Tehran.

[8] In May 1997, their first child, Kasra, was born and Dr. Gonabady took three to four months of maternity leave. At that time, she travelled to Canada to visit family, and became convinced that Canada offered her greater opportunities to practice private medicine. After her maternity leave ended, Dr. Gonabady returned to work but only for one day a week. Since her daily earnings did not cover the costs of her travel to work this did not last. She found part-time employment planning an international medical conference to be held in Tehran in 1998.

[9] Mr. Mohammadzadeh eventually agreed with his wife's assessment of her prospects in Canada and agreed to immigrate to Canada. In 2001, Dr. Gonabady formally applied to immigrate. In February 2001, their second child, Anahita, was born in Iran, and in November 2001 the family moved to Canada.

[10] Also in 2001, Mr. Mohammadzadeh and Mr. Malayeri transformed their partnership into a company, Sanaye Chasb Sinaran Co. ("Sinaran"). They divided their shares equally between their families, with each partner, his wife, and one child holding approximately 16.5% of the shares. At trial, Dr. Gonabady testified that a recent capitalization had increased Mr. Mohammadzadeh's share to 40% and reduced hers to 5%.

[11] On arriving in Canada, the family lived with Dr. Gonabady's relatives for four months in North Vancouver before renting a penthouse suite in West Vancouver for \$3,200 per month. A full-time nanny was hired for the children and a van was purchased for the nanny's use. Mr. Mohammadzadeh developed a pattern of spending eight weeks in Iran and four weeks in Canada. He regularly deposited funds to the parties' joint account in Canada, initially in the range of \$7,000 - \$10,000 per month, but averaging \$12,000 - \$13,000 per month as time progressed.

[12] Dr. Gonabady commenced the studies required to qualify to practice medicine in Canada. She entered the University of British Columbia program for international medical candidates, and in January 2004 she was accepted into a pre-medical residency program. On June 30, 2004, she commenced her two-year residency program, working as a full-time medical trainee in a practice operated by Dr. B.

[13] In July 2003, the parties purchased an older home in the British Properties of West Vancouver for \$800,000. They financed the house with a \$250,000 down payment and a mortgage. They immediately spent \$50,000 in renovations. They retained the full-time nanny and a weekly gardener.

[14] In March 2005, the parties travelled to Mexico on holiday and purchased a time-share for \$35,000. They frequently travelled within and outside Canada, sometimes flying business class. The children attended a private school, and engaged in multiple extra-curricular activities. Mr. Mohammadzadeh leased a C-Class Mercedes Benz.

[15] Near the end of her two-year residency, Dr. Gonabady formed a partnership with her brother and Dr. B. They planned to purchase a strata title to the main floor of a commercial building in West Vancouver where they would build a medical clinic, a cosmetic laser centre, and a pharmacy. The brother was to own the pharmacy, while the two doctors would each hold a half interest in the medical clinic and cosmetic laser centre. Although Mr. Mohammadzadeh was wary of the venture, he agreed to obtain a loan of \$200,000, secured by a second mortgage on the matrimonial home. The three partners formed a company, Ramona Holdings Ltd. ("Ramona"), and in December 2005 Ramona purchased the strata unit for \$1.1 million.

[16] Simultaneously, the parties' marriage began to deteriorate, and Dr. Gonabady commenced matrimonial proceedings in January 2006. Mr. Mohammadzadeh left Canada and returned to Iran. He stopped depositing the usual \$12,000 - \$13,000 per

month into the family's joint account, and Dr. Gonabady drew on the \$80,000 remaining from Ramona's line of credit to finance the family's expenses in his absence. The parties did not communicate again until May 2006, when they attempted to reconcile. Their second and final separation followed in July 2006, just as Dr. Gonabady completed her medical residency.

[17] After the separation, Ramona faltered and failed. Dr. Gonabady had believed that Dr. B would transfer her patient base to the new medical clinic, but this never materialized. The parties decided to close the laser cosmetic centre. Dr. Gonabady's brother failed to make payments for the pharmacy's rent and other outstanding debts. Dr. Gonabady was practising alone with only one or two patients a day when the medical clinic opened in February 2007. Within three months, the clinic failed and the bank seized Ramona's assets. Dr. Gonabady realized about \$90,000 from the sale of the strata unit, but the proceeds were used to fund her legal fees in the shareholder's dispute that arose from Ramona's failure. She leased the medical clinic from the new owner of the strata unit until March 2008, when she leased other premises nearby. These needed renovation and were not large enough to allow a second practitioner to contribute to the practice.

[18] The matrimonial home was sold, providing funds of approximately \$352,000 following payment of all mortgages. Those funds were held in trust pending trial. During the trial, \$70,000 was paid from that amount to Dr. Gonabady to allow her to finance renovations for her new office space.

[19] It was evident at trial that there was ongoing litigation in Iran between the parties over their Iranian assets, but its status was unclear.

REASONS FOR JUDGMENT

[20] The trial judge properly identified the central issue at trial as the determination of Mr. Mohammadzadeh's income and assets. She dealt at length with his failure to disclose these. She reviewed the three Form 89 financial statements sworn by Mr. Mohammadzadeh between 2006 and 2008, and noted that the most recent disclosed employment income from Sinaran of \$600 per month. She summarized the assets and liabilities disclosed in his financial statement:

[39] In those financial statements, he has disclosed certain assets: the cottage in Karaj, Iran; the time share in Cabo San Lucas; the parties' vehicles; the proceeds of sale of the Southborough home held in the wife's solicitor's trust account; and other miscellaneous bank accounts. While he acknowledged that he held a 40% interest in the common shares and assets of Sinaran, he noted those shares had an "unknown" value. Thus, excluding the proceeds of sale of the matrimonial home and the Sinaran shares, he swore that his assets had a total value of \$285,581.

[40] As against those assets, he swore that he had various debts: the loan for the wife's Mercedes totalling \$5,800; a few small VISA accounts; but most notably a number of outstanding loans due from friends and family which, together with accrued interest, total \$1,930,633.

- [41] Not surprisingly, on examination for discovery the wife's counsel focused particular attention on these debts and demanded particulars of same. The husband insisted that during the period 2002 to 2006, he was forced to liquidate various assets and obtain large loans in order to finance the very expensive West Vancouver lifestyle which his wife demanded.
- [21] The trial judge described Dr. Gonabady's repeated efforts to obtain documentary evidence of those loans prior to trial, and Mr. Mohammadzadeh's abject refusal to provide this. She observed that he also failed to produce any documentary evidence of the loans at trial, and "offered no coherent explanation for that failure". She noted that soon after the parties' first separation, Mr. Mohammadzadeh had e-mailed a friend and cousin, Mr. Shahidy, asking whether he should declare his Iranian assets in the divorce proceedings, and if he did not, whether Dr. Gonabady would be able to prove he had property in Iran. Ultimately, the trial judge concluded that the loans did not exist.
- [22] The trial judge was satisfied that Mr. Mohammadzadeh's non-disclosure went well beyond his failure to provide particulars of the \$1.9 million in loans. She reviewed a number of other matters in respect of which there was no disclosure or inadequate disclosure. These included details of the sale of a portion of his interest in the downtown office building in Tehran; his interest in the land and buildings from which Sinaran operates; particulars of a 2006 Toyota Land Cruiser that he owned in Iran; the value of his interest in Silver Season Inc., a company he and his partner incorporated to export raw materials to Iran, and any outstanding shareholder loans made by him to that company; details of his bank account in Iran; details of his loans to Sinaran; and details of his Iranian brokerage account. She noted that with respect to the Iranian brokerage account, a Farsi document indicated the total proceeds were \$610,964, but the translator at trial had pointed out that the English translation of this document had been altered in an apparent attempt to support Mr. Mohammadzadeh's evidence that half of the proceeds belonged to Mr. Malayeri.
- [23] The trial judge relied on the decision of Fraser J. in *Cunha v. da Cunha* (1994), 99 B.C.L.R. (2d) 93, [1994] B.C.J. No. 2573 (S.C.), which stands for the principle that once non-disclosure has been established, the onus shifts to the non-disclosing party to establish that full disclosure has finally been made. She concluded:
- [62] It seems clear to me that the defendant, either of his own volition or on the advice of Iranian counsel, has been very slow to produce any Sinaran documents in this litigation since he believes those documents will jeopardize his interests in the Iranian litigation. While there may be good tactical reasons for that position, it remains the case that this Court has been left in the impossible position of attempting to determine the overall income and assets of the defendant without a proper and complete evidentiary foundation.
- ...

- [66] In the end result, I find there is ample evidence of non-disclosure here. I do not accept the defendant's contention that his income is limited to the approximate \$600 per month salary he says he receives from Sinaran.
- [67] Very clearly the defendant has and continues to live a lifestyle and to spend money at a rate which is completely inconsistent with such limited earnings. It would be impossible for anyone with such limited earnings to deposit \$12,000-\$13,000 per month in the family's West Vancouver account, operate three vehicles in Canada (his own, the wife's and the nanny's), an expensive vehicle in Iran, a home in West Vancouver and two in Iran (now the cottage and his downtown apartment), private school for at least one child and regular international flights back and forth to Iran (often at a business class level).
- ...
- [70] Based on the cumulative non-disclosure in this case, but most particularly the failure to make proper disclosure concerning the defendant's alleged \$1.9 million debt, I infer that the defendant has retained undisclosed assets outside the jurisdiction which are at least equal to the remaining asset within the jurisdiction, that is the proceeds of the sale of the matrimonial home which remain in plaintiff's solicitor's trust account at Harper Grey Easton. I also infer that the defendant has access to a regular cash flow by way of income and that his source of funds is not limited to anything close to \$600 per month by way of a salary from Sinaran.
- [24] With respect to division of assets, the trial judge acknowledged that Dr. Gonabady had received the matrimonial home in Iran through an order of an Iranian court, and that she hoped to sell it and recover \$600,000. Given Mr. Mohammadzadeh's lack of disclosure, she awarded her the net proceeds of the sale of the matrimonial home in Canada totalling \$352,000, \$190,000 of which had already been released to her by court orders made during the action. Dr. Gonabady also received Mr. Mohammadzadeh's interest in the Cabo San Lucas property, valued at approximately \$35,000. Both kept their own cars and jewellery. Dr. Gonabady also received \$80,000 as her mehrieh, a sum of money payable to her by her husband under Islamic law in the event of separation.
- [25] The trial judge next dealt with imputation of Mr. Mohammadzadeh's income for the purpose of child support. She rejected his evidence that he earned only \$600 per month. She also rejected his counsel's alternative position that income should be imputed at \$150,000, representing the approximate annual amount that he had deposited in the joint account to support the family in Canada during the marriage. She imputed income of \$250,000 to him, stating:
- [74] In my view, in the context of the circumstances of this family's overall lifestyle and the lack of disclosure here, this figure still falls considerably short of what I believe to be defendant's actual earnings. Given the large advances of funds over the years (some \$1.9 million), the assets acquired, the large sums passing through the Iranian account, and the volume of stocks and gold sold, I infer that his actual income is more likely in the order of \$250,000 per

annum. If this is not the case and there is cogent documentation available to prove otherwise, I expect that that evidence will eventually be brought to the attention of this Court or an appellate Court.

[75] However, for the purposes of establishing the proper quantum of support, I adopt a Guideline Income figure of \$250,000 per annum.

[26] The trial judge next dealt with the imputation of Dr. Gonabady's income, as she was under the erroneous impression that the income of both parties should be used in setting child support. She observed that Dr. Gonabady's early history in private practice in British Columbia had been "something of a financial disaster", and found that the Ramona venture had been poorly planned and an "obvious overreach" for a newly qualified physician with limited financial experience. She accepted that Dr. Gonabady's earnings in the near future would be limited by her debt load, but expressed the view that this was largely due to her own ill-advised business decisions. She concluded that once Dr. Gonabady sold the matrimonial home in Iran and applied the proceeds to cancel her outstanding debt, she would be able to earn income in the range of \$12,000 - \$15,000 per month. She accordingly attributed income to Dr. Gonabady as follows:

- \$120,000 per annum from May 1, 2008 - August 31, 2008;
- \$138,000 per annum from September 1, 2008 - December 31, 2008; and
- \$156,000 per annum as of January 1, 2009.

[27] Finally, the trial judge considered Dr. Gonabady's claims for spousal support. She was critical of her business efforts, stating:

[83] The wife admitted that during the period leading up to her obtaining licensure, she was able to earn a handsome salary working as a locum or working shifts as a hospitalist (an employee doctor in the hospital). She suggested however that such a position was unacceptable to her since the shifts were incompatible with family life and did not offer the security of a steady dependable income.

[84] While this may be so, she nevertheless appears to have done little to consider other more economical and measured alternatives beyond establishing a sole private practice in West Vancouver -- that is the purchase of a share in an established practice or the sharing of space and costs with another colleague. Nor does there appear to have been any consideration of any more modest or less expensive locations in which to establish a private practice. In my view, the wife's decision to set out on this venture in a wealthy suburb, within shouting distance of her son's school, and I presume close by her home is perhaps a convenient venture but by no means the most economically reasonable choice.

- [85] While the plaintiff has every right to attempt to create a "Cadillac" practice, the tempering effects of such a goal upon her income-earning ability cannot be for the defendant's account. In other words, Dr. Gonabady has the obligation to take all reasonable steps to become self sufficient as quickly as possible.
- [28] The trial judge found that Dr. Gonabady had not suffered any economic disadvantage in the marriage. To the contrary, Mr. Mohammadzadeh had significantly supported her career plan to practice medicine in Canada at considerable personal and financial cost. The trial judge concluded that Dr. Gonabady was not entitled to spousal support on a compensatory or non-compensatory basis.
- [29] Following this decision, the parties appeared before the trial judge again to correct her error in using Dr. Gonabady's imputed income in the calculation of child support. Dr. Gonabady also argued that in setting Mr. Mohammadzadeh's imputed income at \$250,000, the trial judge had failed to deal with the income tax considerations outlined in ss. 19(1)(c) and 20 of the Guidelines. Dr. Gonabady maintained that the \$250,000 should be grossed-up to \$414,000 to represent the gross income he would have to earn if he were taxed in Iran at the same rate as a British Columbia taxpayer in Canada.
- [30] The trial judge rejected this argument, and declined to vary Mr. Mohammadzadeh's imputed income. She accepted his evidence that he paid tax in Iran through Sinaran in accord with the Iranian Tax Code, despite the fact that he had not produced any documents verifying this, and she could not determine the precise amount paid on his behalf. She found that the dearth of evidence made it impossible for her to make any precise comparison between the tax liability of Iranian and Canadian citizens, but concluded that the figure of \$250,000 fairly reflected both Mr. Mohammadzadeh's tax liability and the highly variable currency fluctuations at play.
- [31] She corrected her earlier calculation for child support, and ordered child support payable in the amount of \$3,281 monthly based on Mr. Mohammadzadeh's Guideline income of \$250,000. This order was retroactive to April 12, 2007, but adjusted to account for support that he had paid since that date.

ANALYSIS

- [32] Dr. Gonabady seeks to increase the child support ordered by the trial judge, and to overturn the dismissal of her claim for spousal support. Support orders are discretionary orders and are entitled to a significant degree of deference. An appeal court should only intervene when there is a material error, a serious misapprehension of the evidence, on an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12.
1. Did the trial judge err by failing to gross-up Mr. Mohammadzadeh's imputed income of \$250,000 to account for income tax?

[33] Section 1 of the Guidelines sets out their objectives, one of which is to ensure consistent treatment of spouses and children in similar circumstances. Since Guideline income is based on the payor's annual gross income, one consideration in ensuring that consistency is adjustments for income tax when the payor is a non-resident of Canada and subject to a different tax regime. This is dealt with in ss. 19(1)(c) and 20 of the Guidelines, which read:

Imputing income

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:

...

- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

Non-resident

20.(1) Subject to subsection (2), where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

Non-resident taxed at higher rates

- (2) Where a spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those applicable in the province in which the other spouse ordinarily resides, the spouse's annual income is the amount that the court determines to be appropriate taking those rates into consideration.

[34] Thus, while the starting point in determining the Guideline income of a non-resident payor like Mr. Mohammadzadeh will be calculating his gross income in Canadian funds pursuant to s. 20(1), the court retains a discretion under ss. 19(1)(c) or 20(2) to adjust his Guideline income if he pays income tax at a significantly lower or higher rate than that in the Canadian province where the payee resides. The ultimate objective is to ensure consistency in the relationship between Guideline child support and the after-tax income available to payors.

[35] Dr. Gonabady argues that the evidence does not support the trial judge's finding that Sinaran remitted income tax to the Iranian government on Mr. Mohammadzadeh's behalf. Alternatively, she says that even if Sinaran did so, his evidence about the tax paid was given in the context of his purported income of \$600 per month. Dr. Gonabady argues that Mr. Mohammadzadeh's tax liability on annual income of \$7,200 cannot be logically related to the income of \$250,000 imputed by the trial judge. She says that the trial judge therefore erred in finding in her supplemental reasons that \$250,000 fairly reflected Mr. Mohammadzadeh's tax liability and the variable currency fluctuations at play. She should instead have addressed the tax considerations arising from his imputed income of \$250,000 by grossing it up at Canadian tax rates to \$414,000, and erred in failing to do so.

- [36] When a non-resident payor's tax rate is significantly different than Canadian tax rates, the usual practice under ss. 19(1)(c) and 20 of the Guidelines is to convert his or her gross foreign income to Canadian dollars at a fair exchange rate, then look to the evidence of the applicable foreign tax rate to calculate his net income, and then determine what gross income would be required to yield the same net income at Canadian tax rates. Finally, it may be necessary to examine the "bundle of services" that both governments provide in exchange for the tax dollars paid. These matters are often the subject of expert evidence: Patrick v. Patrick, [1999] B.C.J. No. 1245 (S.C.) at paras. 12-19, Ward v. Ward, 2001 BCSC 847, 19 R.F.L. (5th) 232 at paras. 34-40, Watson v. Watson, 2006 BCSC 256, [2006] B.C.J. No. 329 at paras. 22-29.
- [37] The trial judge did not follow that process here. Nor could she. She had rejected Mr. Mohammadzadeh's testimony as to his foreign income. He failed to produce Sinaran's record of taxes remitted on his behalf. There was no reliable evidence of Iranian tax rates, nor of any related "bundle of services".
- [38] As a result, the trial judge imputed the necessarily arbitrary amount of \$250,000 as Guideline income, as she was entitled to do, effectively determining Mr. Mohammadzadeh's annual income under s. 20.(1) of the Guidelines. When Dr. Gonabady's counsel later raised the issue of grossing up that income to reflect tax consequences pursuant to ss. 19(1)(c) or 20(2), the trial judge concluded that the \$250,000 fairly attributed an amount representing Mr. Mohammadzadeh's tax liability relying on his evidence that Sinaran had paid income tax on his behalf.
- [39] While I appreciate the difficulties faced by the trial judge given the limits of the evidence before her, I am persuaded that this conclusion was clearly wrong. In effect, she accepted that Mr. Mohammadzadeh's tax liability on his stated income of \$7,200 a year in Iran equated with the tax liability on his imputed income of \$250,000, which had been determined as if he were a resident in Canada. This cannot be correct. Under this approach, even if Mr. Mohammadzadeh's Iranian income had been taxed at 100%, he would retain net income of \$242,800. The Canadian tax rates applied to gross income of \$250,000, on the other hand, would produce net income of about \$157,740 on the calculations provided by counsel.
- [40] That Canadian tax calculation also demonstrates that the trial judge's imputation of income failed to account adequately for tax liability and, as a result, significantly underestimated Mr. Mohammadzadeh's gross income. It was undisputed that, during the last years of the marriage, Mr. Mohammadzadeh was paying \$12,000 - \$13,000 a month for the family's expenses in Canada, a net income of about \$150,000 annually. The tax calculation above indicates that that income would produce gross income close to \$250,000 at Canadian tax rates. However, Mr. Mohammadzadeh was also paying for his own comfortable lifestyle in Iran, as well as travel to and from Canada. Thus, if the trial judge intended the \$250,000 to represent his gross income, it was clearly based on an unrealistically low estimate of the net family income during the marriage.

- [41] This must be corrected to arrive properly at Mr. Mohammadzadeh's Guideline income, but his failure to disclose fully his financial circumstances again presents problems. The imputation of \$250,000 by the trial judge was necessarily arbitrary. Adjusting it upward to account for his Iranian expenses is no less so. Nevertheless, some increase is justified. I would impute gross income of \$350,000 to Mr. Mohammadzadeh. If he were taxed as a Canadian resident, this would yield a net income in the range of \$215,000 which, in my view, more fairly reflects the funds available to him based on the evidence of the family's expenses at trial.
- [42] A Guideline income of \$350,000 produces monthly child support payments of \$4,501.
- [43] Mr. Mohammadzadeh asked for an opportunity to lead evidence and make further submissions pursuant to s. 4 of the Guidelines if his Guideline income was increased, in an attempt to reduce that amount. I would not accede to that request. Those steps should have been taken at trial. Moreover, his persistent non-disclosure strongly suggests such a process would have little utility.
- [44] I would accordingly allow the appeal with respect to child support, set Mr. Mohammadzadeh's Guideline income at \$350,000, and order monthly child support payments of \$4,501 retroactive to May 14, 2008, the date of the trial judge's order.
2. Did the trial judge err in concluding that Dr. Gonabady was not entitled to spousal support?
- [45] Subsections 15.2(4) and (6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), set out the factors and objectives that govern an award of spousal support:

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

...

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [46] Here, the trial judge based her refusal to order spousal support largely on her view that Dr. Gonabady had not suffered any economic disadvantage as a result of the marriage. She found that Mr. Mohammadzadeh had given her significant personal and financial support, that allowed her to establish a medical career. The trial judge noted that a substantial part of the equity in the matrimonial home had been spent on the Ramona venture. She found that any present economic hardship or lack of self-sufficiency was due primarily to Dr. Gonabady's unwise career choices, and was not to the account of Mr. Mohammadzadeh.
- [47] Dr. Gonabady argues that in focusing on the economic advantage of establishing her career, the trial judge erred in failing to consider the other factors set out in ss. 15.2(4) and (6). She says she has experienced economic hardship arising from the breakdown of the marriage in that, while her professional income approximates the funds provided by Mr. Mohammadzadeh during the marriage, it falls well short of their joint income during the union, and is insufficient to replicate the lifestyle that she and the children enjoyed before separation. While she acknowledges that she received most of the Canadian family assets, as well as the property in Iran, she says that most of these funds were directed to discharge the debts owed by Ramona. By contrast, there is no evidence that Mr. Mohammadzadeh's lifestyle in Iran has been impaired by the separation.
- [48] Dr. Gonabady maintains that the mere fact that a person formerly enjoyed intra-spousal entitlement to support and is now without it can create economic hardship, citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 41. As well, she relies on *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 53 B.C.L.R. (4th) 52, and *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254, to argue that the issues of hardship and self-sufficiency are necessarily linked to the pre-separation standard of living. She points out that the homemakers in those cases were found to be entitled to a standard of living equivalent to that they enjoyed during the marriage. She says that to deny that in her case would effectively penalize her for having diligently pursued a professional career. She argues that she is entitled to a "top-up" to her professional income by way of spousal support, to allow her to maintain an equivalent lifestyle to that of Mr. Mohammadzadeh.

- [49] As to quantum, Dr. Gonabady seeks support in the range of the mid-point of calculations based on the Spousal Support Advisory Guidelines [the "SSAG"], based on Mr. Mohammadzadeh's grossed-up income and her income of \$156,000 as found by the trial judge.
- [50] In response, Mr. Mohammadzadeh says that the trial judge correctly found there was no economic disadvantage or economic hardship arising from the marriage or its breakdown. He denies she has experienced a change in her lifestyle, her income, or her economic prospects. He says that at 40 years of age, with her medical career before her, she has attained an appropriate level of economic self-sufficiency and the trial judge properly found he had no obligation to pay spousal support.
- [51] The law is clear that in considering an award of spousal support a trial judge is obliged to consider all of the factors listed in the Divorce Act. No one factor is paramount: *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 52. I am persuaded that, in deciding Dr. Gonabady was not entitled to spousal support, the trial judge limited her analysis and failed to consider all the relevant factors and objectives.
- [52] First, she did not fully address the relevance and allocation of family assets and debts, which clearly have a bearing on the means and needs of the parties. While Dr. Gonabady received over \$1,000,000 of family assets, comprised of the property in Iran, the proceeds of sale of the matrimonial home, and her mehrieh, most of those funds were directed to family expenses and discharging Ramona's debts. While the trial judge noted that Ramona had been financed with equity from the matrimonial home, she did not address whether Ramona was a family asset. Clearly it was. Had it been successful, Mr. Mohammadzadeh would have been entitled to share in its profit. When it failed, its debts were family debts, and he had an obligation to share that liability. The fact that Ramona was an ill-advised venture instigated by Dr. Gonabady did not alter this. I am satisfied that allocation of the family debt arising from Ramona entirely to Dr. Gonabady was an economic hardship that the trial judge failed to recognize.
- [53] Nor did the trial judge consider whether Mr. Mohammadzadeh's interest in Sinaran was a family asset. This was perhaps because it was the subject of Iranian litigation, but her inability to do so was also linked to his non-disclosure. The failure to value and allocate this asset precluded an accurate assessment of Mr. Mohammadzadeh's financial means in the context of his obligation to pay spousal support. The trial judge recognized this, stating:
- [63] I reject the defendant's submission that the wife knows all there is to know about Sinaran. I accept the wife's testimony that even during the marriage the defendant was unwilling to divulge any of the financial information concerning the company's activities or finances to her. In my view, it is disingenuous for him to argue that she will discover whatever information she requires in the course of the Iranian litigation and that accordingly it is not a matter for this Court's attention. There is no evidence before the Court concerning the applicable rules of discovery in Iran (both documentary discovery and examination for

discovery), if any. Nor is there any reason to believe the Iranian action (which concerns the plaintiff's corporate claims) will address the same issues as in the case at bar which is aimed , at least in part, at uncovering the value of the Sinaran's assets and the income producing potential of that company, so as to establish the husband's own liability for maintenance.

[64] At para. 91 of the defendant's closing submission it is noted: "Even if it were true that the Defendant had misled the Court, assets and liabilities have no bearing on his obligation to pay support".

[65] With respect, I disagree entirely. A complete disclosure of the payor spouse's assets and liabilities (particularly the particulars of the payor spouse's corporate alter ego) will shed light on any number of issues related to his liability to pay spousal support--including the veracity of any assertions of limited income; the deliberate retainer of earnings within the company; acquisitions or sales inconsistent with limited profits etc.

Mr. Mohammadzadeh's non-disclosure cannot provide a basis for permitting him to avoid his obligation to pay spousal support.

[54] With respect to duration, this was a 13 year marriage.

[55] As to financial obligations arising from child care, both parties enjoyed the benefit of domestic help employed throughout the marriage. This was one of the factors that permitted Dr. Gonabady to pursue her career. Nevertheless, child care responsibilities did have some impact on her advancement and options. She reduced her employment activities in Iran after her first child was born. Since qualifying to practice in Canada, she has been unable to pursue lucrative work as a hospitalist, since the associated shift work is incompatible with her family obligations. She has retained the primary child care responsibilities since Mr. Mohammadzadeh returned to Iran.

[56] The trial judge correctly identified the financial and personal support Dr. Gonabady received from Mr. Mohammadzadeh in pursuing her career as an economic advantage arising from the marriage. As well, she properly found that any financial consequences attached to the manner in which she chose to practise medicine after the separation were to Dr. Gonabady's account alone.

[57] With respect to Dr. Gonabady's argument that she should receive spousal support to replicate her marital lifestyle, the standard of living enjoyed during a marriage is a relevant factor for consideration. The longer a marriage endures, the greater the presumptive claim to equal standards on dissolution: Moge at para. 84. However, it is only one factor to consider, and is clearly related to what is reasonable given the means available. Here again, reliable evidence as to Mr. Mohammadzadeh's means is missing, and that gap has been dealt with by imputing income, now at a level beyond that set by the trial judge.

- [58] This is not a case, however, like Hodgkinson and Tedham. In those cases, the wives did not pursue employment during their marriages, but remained at home to care for their families. At separation, they were left with limited employment prospects and earning capacity, particularly when compared with those of their former husbands.
- [59] I am satisfied that this more comprehensive analysis of the factors set out ss. 15.2(4) and (6) reveals that the trial judge erred in finding that Dr. Gonabady was not entitled to spousal support. I would therefore allow the appeal from that aspect of her order, and would award spousal support on the following terms.
- [60] With respect to quantum, DivorceMate software calculations using the SSAG, and based on gross income of \$350,000 for Mr. Mohammadzadeh and \$156,000 for Dr. Gonabady, provide a range of spousal support with a low of \$2,302, a mid-point of \$3,364, and a high of \$4,425, with a recommended duration of 6.5 to 13 years.
- [61] In my view, given Dr. Gonabady's professional income and future prospects, her circumstances do not merit the long-term support at the high end of the range that she seeks. Instead, I would award spousal support of \$2,300 monthly for 6 years, and would make that order retroactive to May 14, 2008, the date of the trial judge's order.
3. Should the trial judge's award of costs be varied?
- [62] At trial, Dr. Gonabady asked for special costs, based on Mr. Mohammadzadeh's failure to provide disclosure of his financial affairs. The trial judge awarded her 50% of special costs on the basis that Dr. Gonabady had not enjoyed complete success, in that she did not recover spousal support or sole custody of the children. Dr. Gonabady now argues that her success in obtaining spousal support on the appeal should merit an increase in the award of special costs.
- [63] The basis for the award of special costs was Mr. Mohammadzadeh's lack of disclosure. I am not persuaded in all the circumstances that the trial judge's order for costs should be varied.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Bauman"

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