

CANADA / JUDGMENT

Peters v. Godley

2024 BCSC 1212

COURT

Supreme Court of British Columbia

DECIDED

5 July 2024

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2024 BCSC 1212 Peters v. Godley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peters v. Godley,

2024 BCSC 1212

Date: 20240705

Docket: E200555

Registry: Vancouver

Between:

Cynthia Eleanor Peters

Claimant

And

Mark Brian Godley

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page on July 24, 2024.

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Claimant:

J.A. Bennett

Counsel for the Respondent:

R.S. Tretiak, K.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 6, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2024

Introduction

- [1] This is an application by the claimant to determine the respondent's 2022 Federal Child Support Guidelines, SOR/97-175 [Guidelines] income for purposes of the 2023 annual review and adjustment of child and spousal support amounts.
- [2] For the reasons that follow, I am of the view that the parties are bound by the terms of the final consent order that (beginning in June 2023) provided for an annual review of support with retroactive adjustment to January 1 of that year. The final consent order also provides for a maximum cap on the respondent's Guidelines income applicable for the first review of the support payable. As a result of the review, I find that the cap applies and as such, the respondent's Guidelines income for support purposes is \$500,000, retroactive to January 1, 2022.

Background

- [3] The parties had a 14-year marriage before their separation and eventual divorce in April 2022. The claimant is presently 58 years old and during the relationship, she was at all times a stay-at-home parent and homemaker.
- [4] The respondent is presently 62 years old and he was at all times a physician. Unfortunately, the respondent experienced some health problems that impaired his ability to carry on his practice as an anesthesiologist. The respondent now operates a clinic that provides cosmetic procedures. In addition to that business, the respondent's other main source of income is disability insurance.
- [5] The parties have two children, V.C.G., born February X, 2006 and R.K.G., born May X, 2007. The children reside primarily with the claimant and they have some weekly and holiday parenting time with the respondent.
- [6] On April 19, 2022, the court made a Final Order that was by consent (the "Final Order"). The Final Order included the obligation for the respondent to pay the claimant child and spousal support for an indefinite duration.

- [7] The Final Order required the respondent to pay the claimant child and spousal support for October to December 2021, based on the respondent's agreed upon Guideline income of \$325,000 and the claimant's Guideline income of \$0.
- [8] For January to December 2022, the Final Order required the respondent to pay the claimant child and spousal support of \$5,109 and \$6,660, respectively, based on the respondent's agreed upon Guidelines income of \$400,000 per annum.
- [9] The Final Order provided for a review of support on the following terms:
28. BY CONSENT, beginning in June of 2023, and continuing each year thereafter, child and spousal support shall be reviewed annually and retroactively adjusted to January 1 of that year such that s. 3 child support will be in the amount set out in the Federal Child Support Guidelines for the Respondent's income for the number of children who continue to be "children of the marriage: as that term is defined by the Divorce Act, section 7 child support will be adjusted such that allocation of such expenses will be in proportion to the parties' respective guidelines income, and such that spousal support will be in the midrange of spousal support payable under the Spousal Support Advisory Guidelines taking into account the parties' respective Guidelines incomes at that time. For this review, and any subsequent review of child and spousal support:
- a) the Respondent's income in any given year will include any repayment of shareholders loan owed by Dr. Mark Godley Inc. to the Respondent but will not be grossed up to account for the fact that such income is non-taxable in the Respondent's hands.
 - b) the Respondent's Guidelines income will be capped at \$500,000 per annum such that in the event the Respondent's income is determined to exceed \$500,000 per annum, then his income for support purposes shall be deemed to be \$500,000 per annum and no more.
29. BY CONSENT, commencing on June 1, 2023 and not before and continuing for so long as child and/or spousal support is owing pursuant to the terms hereof, the parties shall exchange the following financial disclosure:
- a) their most recent personal and corporate income tax returns
 - b) most recent notice of assessment;
 - c) most recent annual statement of earnings; and
 - d) any other relevant information necessary to facilitate determination of each party's Guidelines income and the adjustment, if any, required to child support and spousal support so as to comply with para. 28 of this order.

[Underlining added.]

Analysis

[10] In her notice of application filed on February 27, 2024, the claimant seeks various orders under Part 1. However, at the hearing of the application, with respect to paragraph 4(b) of the application, the claimant's counsel advised that the claimant seeks to increase the monthly amount that she pay the respondent for her proportionate share of s. 7 expenses from \$576 to \$944. The claimant's counsel also advised that the claimant no longer seeks the relief in paragraph 9 of the application related to the overpayment of her share of s. 7 expenses.

The Parties' Guideline Income

- [11] On the review, the claimant submits that the respondent's Guidelines income in 2022 exceeds \$500,000 but because the parties agreed to a cap, on this review, the respondent's income should be \$500,000. The respondent denies that his income should be set at the cap amount of \$500,000. The respondent submits that his total 2022 income is \$36,328, as reported on his personal tax return.
- [12] The respondent submits that he has been selling assets to fund the support that he agreed to in the Final Order. The respondent also submits that the business is not profitable, including because the costs of operating the clinic are very high. The respondent also points out that his main source of income is disability insurance and that he is under stress due to, among other things, poor health and the unsustainable quantum of his support obligations. While the respondent may regret consenting to the Final Order, there is no application before me by the respondent asking to vary the Final Order.
- [13] The evidence on the review includes information from the respondent's accountant, Mr. Ishola. According to an email from Mr. Ishola to counsel for the claimant sent on October 14, 2023, the respondent's estimated income for 2022 totalled \$517,332.81. That total income was comprised of: (1) \$25,000 from salary declared in T1 return; (2) \$192,332.81 from disability payments; (3) \$300,000 income accrued but not yet paid out as indicated in the 2022 income statement and corporate tax return filed. The disability income is not taxable and hence, it is not reflected on the respondent's T1 return.
- [14] In my view, since the respondent is a shareholder, director or officer of the corporation operating the clinic, I am of the opinion that the annual income reported by the respondent on his T1 return for 2022 does not fairly reflect all of the money available for payment of child support. As a result, the court may consider the situations described in s. 17 of the Guidelines and determine the spouse's annual income which can include "all or part of the pre-tax income of the corporation for the most recent year": *Quinton v. Kehler*, 2020 BCCA 254 at para. 76 [Quinton].

- [15] In Quinton, after reviewing the cases applying the mechanism provided by s. 18 of the Guidelines for imputing income where income is earned through a corporation, Justice Willcock summarizes the principles that apply to a case like the one presently before me:
- [85] From these cases, I extract the following principles applicable to this case. First, the Guidelines should be interpreted in light of their stated objectives, including the ability to calculate child support in an objective manner that ensures consistent treatment of spouses and children who are in similar circumstances. Second, under a s. 18 approach, the corporate income method is likely to be the fairer method of determining income of an individual who wholly controls a corporation. This method allows a court to include all income available for child support an intact family would utilize. Third, where that approach is appropriate, pre-tax corporate earnings, not retained earnings or earnings after payment of taxes, are the starting point for an assessment of Guidelines income. Fourth, where a company is wholly owned by the payor, the onus is on the payor to provide evidence that his pre-tax corporate earnings are not available to him.
- [16] Quinton makes clear that the respondent has the onus to provide evidence that his pre-tax corporate earnings are not available to him. I find that the respondent has failed to do so. For example, he has not provided evidence to show that he must reinvest pre-tax corporate into the business to continue it as a viable business.
- [17] Upon being satisfied that the pre-tax income of the corporation is available to the respondent for child support purposes because the respondent has not established otherwise, I find the respondent's 2022 income, which also includes non-taxable disability payments and a modest salary paid by the corporation, exceeds \$500,000 and so the cap agreed to in the Final Order applies.
- [18] The evidence establishes that the claimant's total income in 2022 was \$1,000. I therefore determine that the claimant's 2022 Guidelines income is \$1,000.
- [19] Therefore, as a result of a review, I find the respondent's Guideline income for 2022 is \$500,000.

Pre-Judgment & Post-Judgement Interest and Costs

- [20] The claimant is entitled to pre-judgment and post-judgment interest on the support arrears payable as a result of this review: J.C.H. v. S.M.B.H., 2024 BCSC 54 at paras. 73-78; and the Court Order Interest Act, R.S.B.C. 1996, c. 79, ss. 1-2.
- [21] The claimant seeks special costs in respect of this review alleging the respondent has failed to abide by the Final Order. I disagree that special costs are appropriate to award in the present circumstances. While the parties agreed to a review and a cap on the respondent's income if it exceeded \$500,000 for the 2022 year, I do not agree that the respondent failed to abide by the order by failing to meet the onus on him or by submitting that his income was less than \$500,000 on the review. In my view, taking an unsuccessful or weak position, on a

review of Guideline income is not necessarily a basis for special costs. The respondent has not engaged in the kind of reprehensible conduct that is deserving of rebuke through an award of special costs.

[22] In my view, the claimant is entitled to the costs of the application under Appendix B of the Supreme Court Family Rules.

Disposition of Application

[23] The relief sought in paragraphs 1, 2, 3, 4(a) and (c), 5, 6, 7 and 8 of the February 27, 2024 notice of application is granted.

[24] The claimant is entitled to costs, but not special costs.

[25] The balance of the relief sought in the February 27, 2024 notice of application that was not otherwise withdrawn by the claimant at the hearing, is denied.

"E. McDonald J."

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