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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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No Prognostications Required

***Proust v. Proust*, 2025 CarswellBC 350 (S.C.) — Mayer J.**

Issues: British Columbia — Variation of Spousal Support Provisions of an Agreement

In *Proust v. Proust*, 2025 CarswellBC 350 (S.C.), the Supreme Court of British Columbia refused to let a payor off-the-hook for spousal support shortly after signing a comprehensive Separation Agreement. The application judge, Justice Mayer, upheld the husband/payor's $18,500 monthly obligation, finding no material change in circumstances where the husband's reduced income and the wife/recipient's modest earning potential had been contemplated when the deal was struck.

The decision is of particular interest for our purposes because it provides a helpful discussion on how to approach a request to "vary" a spousal support agreement that has *not* been incorporated into a court order.

The parties married in 1993 and had three children. During the marriage, the husband was self-employed and provided management services to publicly traded resource companies. The wife was primarily a stay-at-home parent, but she obtained her real estate licence in 2020 and began working as a realtor in Vancouver.

The parties separated in 2021 after nearly 30 years of marriage. While litigation followed, by July 2023, they had reached an agreement in principle on most financial issues — including that the husband would pay the wife $18,500 a month in indefinite spousal support, and that the husband's income exceeding $600,000 a year would constitute a material change in circumstances.

Although the decision does not specify the income figures used to arrive at the $18,500 monthly support amount obligation, that figure aligns roughly with the mid-range of the *Spousal Support Advisory Guidelines*, assuming an income of approximately $550,000 for the husband and $40,000 for the wife.

In October 2023, the parties and their counsel attended a settlement meeting to address the remaining issues and to try to finalize a binding agreement. In advance of the meeting, counsel exchanged a series of letters, including one in which the husband's lawyer advised that the husband's projected income had dropped significantly — to approximately $243,000 annually.

In November 2023, the husband advised the wife that, in light of his reduced income, he was only willing to pay $10,000 per month in spousal support, based on a revised projected annual income of $276,000 (while the decision does not set out how this figure was calculated, it appears to correspond with the high end of the *SSAGs* based on the husband's disclosed income, and the wife earning approximately $40,000). The husband also proposed lowering the material change threshold from $600,000 to $300,000. His lawyer subsequently sent a revised draft Separation Agreement incorporating these proposed changes.

The wife rejected the husband's attempt to reduce the agreed-upon spousal support from $18,500 per month. The husband ultimately relented, and in December 2023, the parties signed a comprehensive Separation Agreement that resolved all issues arising from the marriage and its breakdown on a final basis, including property division and spousal support. The Agreement required the husband to pay $18,500 per month in spousal support on an indefinite basis, subject to variation in the event of a material change in circumstances. It also confirmed that the following events would constitute a material change:

1. The husband retiring at any time after turning 65;

2. The husband earning more than $300,000 per year (a reduction from the $600,000 threshold initially contemplated); or

3. The wife earning more than $60,000 per year.

In June 2024, the husband stopped complying with the Separation Agreement and fell into significant arrears. While the decision does not specify why the husband stopped paying, it may have been because if his income had, in fact, declined to $276,000 annually, he would have been left with little to cover his own living expenses after making the agreed $18,500 monthly spousal support payments.

Following his default, the husband brought an application to reduce his spousal support obligations to $7,328 per month, based on his projected income of $276,000, an imputed income of $75,000 for the wife, and the mid-range of the *SSAGs*. He also sought to have the reduction applied retroactively to April 2024. In support of his application, he argued that two material changes in circumstances justified a variation: (a) a significant decline in his income; and (b) that the wife was now earning — or at least capable of earning — more than $60,000 per year.

The husband also argued that requiring him to continue paying $18,500 per month in spousal support, given his current income and expenses, would result in a "significantly unfair practical effect."

The wife opposed the application and argued that the husband had failed to establish any material change in circumstances. She asked that the husband's application be dismissed.

Justice Mayer began his analysis by noting that, because the Separation Agreement had *not* been incorporated into a court order, the variation provisions of the *Divorce Act* did not apply — as they only govern the variation of support *orders*, not support *agreements*. As a result, the husband's application had to be treated as a fresh application for spousal support under s. 15.2 of the *Divorce Act*. That provision requires the court to consider "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 during cohabitation; and (c) any order, agreement, or arrangement relating to support of either spouse."

That said, Justice Mayer recognized that although the matter before him was technically an initial application for support under s. 15.2 of the *Divorce Act*, the Separation Agreement was nevertheless entitled to very significant weight. As the British Columbia Court of Appeal explained in *Hall v. Hall* (2021), 56 R.F.L. (8th) 144 (B.C. C.A.) — a case also involving a request to vary the spousal support provisions of an agreement that had not been incorporated into an order — such agreements do not lose their relevance simply because the statutory variation framework under s. 17 is unavailable:

> [34] **What is missing from the jurisprudence just described is discussion of a provision in a separation agreement that** settles all of the many points in issue between the parties in a way generally said to be final, but that also **contemplates alteration of spousal support in the instance of a material change in circumstances.**
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> [39] **Although the application seems to have some attributes of a review, I would not describe the application as a review:** the agreement does not provide overtly for a "review" of spousal support and, lacking both timing provisions and specifics of the factors to be considered, does not have the particularity required for a properly constructed review

> provision: see *Leskun [v. Leskun*, 2006 SCC 25]. In any case, characterizing the application as a review does not assist in unravelling the issues. **More importantly, I do not consider that the application engages a full *Miglin* analysis because Ms. Hall does not ask the court to make an order inconsistent with the agreement.**
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> [40] **The question is how to approach the phrase, developed in s. 17 jurisprudence, found in para. 4 of the agreement — "[s]ubject to a material change in circumstances".**
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> [41] It is clear, in my view, that **as the appeal concerns an application under s. 15.2 of the *Divorce Act*, the principles and objectives of that section are engaged.** In this I consider Justice Jenkins was correct in *Van Steinburg* to look to the objectives of the *Divorce Act* in interpreting the separation agreement before him. Although I would not describe the phrase "material change in circumstances" as a "threshold" quite as he did, I consider he was correct in looking beyond the phrase in the agreement to s. 15.2. **The court, on an application under s. 15.2, must consider the agreement as a whole, under the general approach to agreements settling family law disputes discussed in *Miglin*.** That approach requires a more comprehensive consideration of the agreement, well beyond a mere comparison of income levels at the time of the agreement and the time of the application. **Such an approach requires respect for the parties' agreement as a whole and the choices the parties made when settling all of the terms of the agreement.** . . . [emphasis added]

For further discussion of *Hall v. Hall*, see "A Little Bit about Initial Applications for Spousal Support; A Little Bit about Variations; A Little Bit about Reviews; and The Importance of a Clearly Drafted Review Provision" in the July 19, 2021 (2021-27) edition of *TWFL*.

After reviewing the evidence and the express terms of the Separation Agreement — including the clause stating that either party could apply to vary spousal support in the event of a material change in circumstances — Justice Mayer concluded that the parties intended to resolve the issue of spousal support on a final basis at first instance. He held that any future changes to support should be assessed using the same principles that apply when a court considers a variation of a spousal support order under s. 17 of the *Divorce Act*. As his Honour explained in his decision:

> [24] I find that when they concluded the Settlement Agreement the parties did not agree that an initial application could be brought for spousal support under s. 15.2 engaging a full *Miglin* analysis — but rather intended that an application to vary the terms of the Settlement Agreement, in the nature of a review application, could be brought on the occurrence of a material change in the financial circumstances of either party.

While we largely agree with this reasoning, one technical clarification is required: rather than stating that the parties intended a future application would be "in the nature of a review application" under s. 15.2, it would have been more accurate to say it would be "in the nature of a **variation application.**" As we've discussed before (see e.g. "A Review of Reviewing Reviews" in the May 27, 2024 (2024-20) edition of *TWFL*), when dealing with spousal support, there are significant differences between reviews and variations:

> • A **review** allows the court to revisit a support order after a fixed period of time or specified triggering event, *without* the need for a material change. Unless the original order or agreement limits the scope of the review, the court may conduct a fresh assessment of all relevant factors — including entitlement, needs, and means. See *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.); *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.) at para. 63; *Toth v. Toth* (2016), 73 R.F.L. (7th) 24 (B.C. C.A.) at para. 11; *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.) at para. 17; and *M.T. v. J.S.* (2023), 86 R.F.L. (8th) 281 (B.C. C.A.) at para. 45.
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> • A **variation**, by contrast, requires the applicant to demonstrate a material change in circumstances. Once that threshold is met, the court must determine what variation, if any, is justified — and should limit its intervention to addressing the specific change. See *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.).

Given that the husband had expressed concerns about his income having fallen months *before* he signed the Separation Agreement, but signed it nevertheless, Justice Mayer rejected his claim that the decrease in his income constituted a material change in circumstances:

> [39] Although there is no evidence that in July 2023 the parties actually contemplated that [the husband's] income could drop to $276,000 in 2024, this was not the case by approximately October 2023. The exchanges of communication between the parties in October and November 2023 and the $300,000 material change threshold for [the husband's] income, proposed by [the husband] and included at Clause 48 b. of the Settlement Agreement, satisfies me that when the Settlement Agreement was made the parties actually contemplated that [the husband's] earnings in 2024 would be less than $300,000.
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> [40] [The husband's] actual dividend earnings in 2024 were approximately $24,000 less than $300,000, which I do not find to be material. Ultimately, I am not satisfied that [the husband] has proven the occurrence of a material change to his financial circumstances that was not contemplated at the time that the Settlement Agreement was made, justifying a variance to spousal support.

Furthermore, given how recently the Separation Agreement was signed — and the fact that the wife had not actually earned more than $60,000 — Justice Mayer also rejected the husband's claim that the wife's income, or earning potential, constituted a material change in circumstances.

As a result, Justice Mayer dismissed the husband's application in its entirety.

In the end, the husband may have made a bad deal — one that may have become increasingly difficult to live with as his income declined — but that did not make it a material change in circumstances. The court was clear: a foreseeable dip in earnings, especially one flagged before the agreement was signed, does not open the door to revisiting a deal struck with eyes wide open. Bad judgment isn't a legal basis for variation.

In the meantime, lawyers take notice: if you mean for a spousal support agreement to be variable (on a material change of circumstances) as opposed to just being a s. 15.2(4) factor to consider — just say so.

J.F.R. v. K.L.L. **R-E-D-U-X**

***D.F. v. R.W.F.*, 2025 CarswellOnt 2011 (C.A.) — Lauwers, Brown and Coroza JJ.A.**

Issues: Ontario — Parenting Order for an "Adult Child"

Hot on the heels of *J.F.R. v. K.L.L.* (2024), 1 R.F.L. (9th) 255 (Ont. C.A.) we get *D.F. v. R.W.F.*, 2025 CarswellOnt 2011 (C.A.).

You may recall (perhaps on account of the riveting writing) our comment on *J.F.R.* in the July 8, 2024 (2024-26) edition of *TWFL*. In *J.F.R.*, the Ontario Court of Appeal emphasized that the meaning of "capacity" is not static, and is situationally dependent, and that the court cannot presume incapacity for a person, including an adult child with a disability, without evidence thereof.

R.W.F. was the appeal of a final order denying the Father unsupervised parenting time with his adult child, who remained under parental charge on account of a disability. The parties separated in 2019 and had a son, A, who was 22-years-old and had Down Syndrome.

After the Father repeatedly breached temporary orders by failing to return A to the Mother's care, the Mother claimed sole decision-making and a restraining order.

The trial judge found that A met the definition of "child of the marriage" under s. 16.1 of the *Divorce Act*, but under *J.F.R. v. K.L.L.*, the court could not presume A's incapacity without evidence. The Father was denied unsupervised parenting time, and supervised visits were left entirely in the Mother's discretion. The court also declined to order a Voice of the Child report, finding it unnecessary given A's cognitive age.

This was the Father's appeal.

Given the holding in *J.F.R.*, the Father's first argument was that the trial judge erred by making a final order before first determining A's views or preferences.

The Court of Appeal did not give effect to this ground of appeal. They found that the requirement to ascertain A's views and preferences was met through the fresh evidence offered from a clinical psychologist and *amicus curiae* that had been appointed by a Case Management judge before trial. *Amicus* had been specifically appointed to assess A's ability to express his wishes regarding parenting arrangements. The psychologist reported that A's speech clarity was poor, and that while A expressed emotions about his father, his verbalizations were difficult to fully comprehend. The psychologist was also of the view that questioning A would likely cause him frustration or distress. Based on this evidence, the court held that A's capacity to express his preferences had been properly considered, and that the trial judge's order was appropriate.

The Court of Appeal was also asked to consider if the court below had erred by imposing a parenting order that was too restrictive and that, in the Father's view, effectively removed him from A's life.

Although the Father argued that the record before the trial judge did not support an order for supervised parenting time, the Court of Appeal disagreed. The trial judge's decision was supported by the record — including the Father's repeated breaches of court orders and his repeated failure to return A to the Mother despite clear orders requiring him to do so. The Father had been charged under s. 127 of the *Criminal Code* for failing to obey a court order and had been found in contempt of court for his conduct during prior family proceedings.

But wait one contumelious second! We know what you're thinking! You're thinking that this is the Court of Appeal approving of parenting changes as punishment for contempt!? And you're thinking of cases that specifically admonish using custody/parenting changes as punishment for contempt: *Chan v. Town* (2013), 34 R.F.L. (7th) 11 (Ont. C.A.); *Chin v. Chin*, 2010 CarswellOnt 2292 (S.C.J.); *D.D. v. H.D.* (2015), 62 R.F.L. (7th) 261 (Ont. C.A.); *Zafar v. Saiyid*, 2018 CarswellOnt 5621 (C.A.). And you would be right.

However, as we pointed out in our comment on *Palacios v. Palacios* (2024), 7 R.F.L. (9th) 188 (Ont. Div. Ct.), in the January 20, 2025 (2025-02) edition of *TWFL*, that "rule" seems to be, shall we say, "shifting."

First, the "rule" may not apply to changes in parenting time as opposed to changes in decision-making: *Leeming v. Leeming* (2016), 78 R.F.L. (7th) 120 (Ont. Div. Ct.).

Second, this rule is not necessarily enforced in other provinces where, for example, a change in primary care and control can (and has) been used as a sanction for contempt: *Morrison v. Charney* (2007), 36 R.F.L. (6th) 409 (Man. Q.B.). See *JLZ v. CMZ* (2021), 58 R.F.L. (8th) 313 (Alta. C.A.) for a good discussion as to the state of this rule across the country.

Finally, as a reminder, in *Palacios v. Palacios* (2024), 7 R.F.L. (9th) 188 (Ont. Div. Ct.), the Divisional Court held that while "in general" parenting arrangements should not be used as punishment for contempt, the court may make temporary parenting orders in the context of a motion for contempt not to vary a parenting order — but to "facilitate compliance" with the order. You say potato, we say po-tah-to.

In any case, the "rule" does seem to be relaxing, as it should where the contumelious conduct itself relates to parenting.

If that were not enough, the trial judge also cited specific incidents evidencing the Father's inability to prioritize A's best interests and well-being, including sending A to his Mother's house alone on a bus, and other incidents suggesting a lack of insight into A's needs.

This does not, to us, sound like someone for whom there was "no basis" for a supervision order — and it did not sound that way to the Court of Appeal either.

The next question for the Court of Appeal was whether there should be a review mechanism for changing the terms of the supervision order so as to possibly provide for unsupervised parenting time in the future?

Here, the Court of Appeal found that the court below had erred in not including a review mechanism. As A would never "age out" of the parenting order on account of his disability, absent a built-in review process, it would be difficult (if not impossible)

for the Father to show a material change in the future — because "the mere passage of time is not a material change": *Wiegers v. Gray* (2008), 47 R.F.L. (6th) 1 (Sask. C.A.); *Brown v. Lloyd*, 2015 CarswellOnt 790 (C.A.) (four years); *H.D. v. L.M.D.* (2016), 81 R.F.L. (7th) 357 (B.C. S.C.); *Coppin v. Arboine*, 2018 CarswellOnt 19895 (S.C.J.).

This outcome conflicted with the maximum contact principle in s. 16(6) of the *Divorce Act*. While parenting restrictions may be necessary, they should not be indefinite, without a stated opportunity for reconsideration.

Given the Father's prior non-compliance, the court thought that a structured review mechanism, rather than an automatic right to unsupervised parenting, was the way to go. The Court of Appeal remitted the matter to the trial judge to craft a review process, requiring that a review take place within 12 months. On the review (as with any review) the Father would not have to show a material change in circumstances.

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