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

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Contents

- **No Soup Appeal for You!**
- What We No Longer Permit, We No Longer Promote
- *Miglin* Claims: Onus, Onus, Who has the Onus?

We hope everyone was able to get some time off over the holidays - to do what, we don't exactly know. We wish everyone good health, happiness and prosperity in 2021, and we would like to thank the many people that took time last year to send us cases that might have escaped our attention and that offered their comments, compliments and constructive criticism. It is all very much appreciated.

No Soup Appeal for You!

Abu-Saud v. Abu-Saud, [2020 CarswellOnt 18493](#) (C.A.) - Strathy C.J.O., Huscroft and Roberts JJ.A.

Provincial courts of appeal have been making it clear that a party that does not comply with court orders does not have an automatic right to an audience before the Court.

In this case, the wife moved to quash the husband's appeal based on his wilful and ongoing breach of court orders requiring him to pay spousal support and arrears.

The Court of Appeal described the husband's breaches of the trial judge's order and a previous order of the Court of Appeal as "deliberate, relentless, and indefensible."

Except when ordered to do so, the husband had never willingly or voluntarily paid any support to the wife, over a period of years. Rather, he ignored the trial judge's original order and unilaterally reduced his monthly spousal support payment.

There is now no doubt that the court has jurisdiction to quash or dismiss an appeal in the face of non-compliance with a support order: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(3); *Dickie v. Dickie* (2007), [39 R.F.L. \(6th\) 30](#) (S.C.C.), at para. 6; *Siddiqui v. Anwar* (2018), [22 R.F.L. \(8th\) 92](#) (Ont. C.A.), at para. 19. And appellate courts have consistently refused to hear from the defaulting appellant or entertain an appeal where the record shows continuing disobedience with court orders: *Cosentino v. Cosentino* (2017), [98 R.F.L. \(7th\) 53](#) (Ont. C.A.), at para. 8; *Hokhold v. Gerbrandt* (2015), [64 R.F.L. \(7th\) 54](#) (B.C. C.A.); *Fawson Estate, Re*, [2013 CarswellNS 260](#) (C.A.); *Aalbers v. Aalbers* (2015), [71 R.F.L. \(7th\) 291](#) (Sask. C.A.). In one Ontario case, the Court of Appeal even refused to hear from a respondent that was in default: *Murphy v. Murphy* (2015), [56 R.F.L. \(7th\) 257](#) (Ont. C.A.).

That said, the Court was also clear that quashing or dismissing an appeal for non-compliance is not automatic. Factors to be considered by the court in determining whether to exercise its discretion to quash an appeal include: the wilfulness of the breach; the amount of arrears; the excuse for the breach; and the efforts to correct the breach. But in this case, the Court was satisfied

that all these considerations "unequivocally favour [the wife] and her motion to quash the appeal." The record clearly showed that the husband had deliberately taken all the steps he could to avoid his support obligation.

Even though the spousal support and retroactive spousal support arrears totalled only \$23,901, that was a very significant sum to the wife who was disabled. That, combined with the husband's purposeful and flagrant breaches, resulted in the Court of Appeal quashing the husband's appeal, and ordering him to pay the wife's full indemnity costs of her motion to quash the appeal. The Court of Appeal also exercised its discretion to refuse to entertain a further proceeding in the face of a record showing continuing disobedience with court orders, and precluded the husband from bringing any further proceeding before the Court of Appeal until he had complied with the trial judge's order and the previous orders of the Court of Appeal.

And finally, the Court noted that Rule 1(8)(e) of the *Family Law Rules*, O. Reg. 114/99, empowers the court to order that a party who has not complied with prior orders is not entitled to any further order from the court unless the court orders otherwise. Therefore, reasoned the Court of Appeal, any attempt by the husband to vary support or take any other step in the Superior Court of Justice proceedings while he remained in substantial non-compliance with the trial judge's order and the orders of the Court of Appeal would appropriately attract such an order.

What We No Longer Permit, We No Longer Promote

MacKinnon v. Richards (2020), 41 R.F.L. (8th) 283 (N.S. C.A.) - Bourgeois, Saunders, and Scanlan JJ.A.

Similar to the Ontario Court of Appeal's decision in *Abu-Saud* (discussed above), this brief decision from the Nova Scotia Court of Appeal provides a clear warning to family law litigants that courts will not tolerate non-compliance with court orders and the *Rules*, and that parties who persistently fail to comply with their obligations will face serious consequences. It is a message we are hearing more-and-more often from appellate courts.

In 2005, the husband was ordered to pay child support for the parties' four children. He did not pay all that he should have - not even close. In 2014, he commenced an Application to reduce his child support payments and the significant arrears that had accrued by that time. The wife responded by asking for various changes to the 2005 Order in her favour.

The trial was supposed to have started on June 11, 2018. However, at the beginning of the trial, the husband requested an adjournment as he was not ready to proceed. The trial judge granted the husband's request for an adjournment, but also ordered him to pay the wife \$1,000 in costs.

Despite being warned several times that he would not be permitted to proceed with his claims against the wife if he did not comply with the costs order and his disclosure obligations, the husband failed to do so. As a result, when the trial resumed on December 21, 2018, the trial judge told the husband that she would not allow him to proceed with his claims or lead any evidence, but that she would permit him to cross-examine the wife and her witnesses vis-à-vis the wife's claims against him. So the husband walked out.

After the husband left, the trial judge heard the wife's case, and ordered the husband to pay her \$99,525.49 in arrears and retroactive child support at a rate of \$750 a month. She also dismissed the husband's claims against the wife.

The husband appealed, and argued that the trial judge did not have jurisdiction to prohibit him from leading evidence. He also argued that he could not afford to pay the \$1,000 in costs, and that he had satisfied his disclosure obligations before the trial.

In dismissing the appeal, the Nova Scotia Court of Appeal confirmed that trial judges in Nova Scotia do, in fact, have discretion to preclude a party from leading evidence, both under the Nova Scotia *Civil Procedure Rules* and as part of the court's inherent jurisdiction to control its own process. The Court also found that given the husband's blatant breaches, the trial judge had properly exercised her discretion:

[15] Both of the [husband's] complaints are easily dismissed. **It is categorically incorrect that the trial judge lacked jurisdiction to preclude [the husband] from presenting direct evidence at the hearing of the applications and, in particular, because of his failure to pay the costs as ordered. Her source of jurisdiction was two-fold: the Nova Scotia**

Civil Procedure Rules (see Rules 2.02 and 77.02) and the court's inherent jurisdiction to control its own processes. [The husband] claims his impecuniosity prevented him from paying the costs. Given that he failed to make a motion under Rule 77.04 for relief in the six months between the costs being ordered and the commencement of the hearing, this argument rings hollow.

[18] Having reviewed the trial judge's written reasons and the record we have been provided, I am of the view that not only did she possess the discretion to preclude [the husband] from calling evidence, she exercised it appropriately in the circumstances before her. We have been presented with nothing to support the bald assertion that [the husband] had fully met his financial disclosure obligation and the trial judge was wrong in concluding otherwise. **It was entirely reasonable, in light of [the husband's] failure to follow the direction of the court with respect to costs and making complete financial disclosure (notably his most recent income), for the trial judge to prohibit him from presenting *viva voce* evidence at the hearing.** To do otherwise would have placed [the wife] at a disadvantage and given [the husband] a tactical advantage. The purpose of early and complete financial disclosure is to avoid such unfair consequences, added expense and unnecessary adjournments. [emphasis added]

This decision is unquestionably correct. Parties cannot breach court orders, refuse to follow the rules, resist making disclosure - and then "have their day in court." And where, as in this case, a party refuses to change his or her behaviour despite being given multiple chances to do so, striking pleadings or limiting trial participation will often be the only viable sanction left. To quote Justice Myers in *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.), aff'd (2016), 84 R.F.L. (7th) 374 (Ont. C.A.), parties who do not comply with their obligations must be "assess[ed] a game misconduct to eject them from the proceeding."

We recognize that this type of remedy will not be appropriate in every case, particularly when the case involves a child's best interests (for example, see *King v. Mongrain* (2009), 66 R.F.L. (6th) 267 (Ont. C.A.) at para. 31). Nor are we suggesting that pleadings should be struck or trial participation limited because of inadvertence or for reasons beyond a party's control - or where only comparatively minimal disclosure remains outstanding. It is a very serious matter to strike pleadings or limit trial participation, which is why the case law has frequently referred to it as a "remedy of last resort" (for example, see *Peerenboom v. Peerenboom* (2020), 39 R.F.L. (8th) 11 (Ont. C.A.) at para. 48). However, it is also a very serious matter to ignore the rule of law, increase the other party's costs, and waste scarce judicial resources by not following the rules or complying with court orders. So in our view, the more our courts can do to send a clear and unwavering message that this type of behaviour is unacceptable and will result in meaningful consequences - the better.

Miglin Claims: Onus, Onus, Who has the Onus?

Nicholl v. Nicholl, 2020 CarswellBC 1567 (C.A.) - Fitch, Butler, and DeWitt-Van Oosten, J.J.A.

In *Nicholl*, the B.C. Court of Appeal had to consider the appropriate role for the Spousal Support Advisory Guidelines (the "SSAG") when determining whether to override an agreement that deals with spousal support pursuant to the test that the Supreme Court of Canada set out in *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.).

The parties separated in 2012 after a 22-year marriage. During the marriage, the husband worked full-time and managed the family's finances, while the wife was the primary homemaker and responsible for taking care of the parties' three children.

After they separated, the parties signed a Separation Agreement that provided they would divide their approximately \$16,000,000 in assets equally, and share the children's major expenses. The husband also agreed to pay the wife \$2,150 a month in spousal support for six years, at which point his spousal support obligation would end forever. Both parties had lawyers when they negotiated and signed the Agreement.

The wife eventually decided that she was unhappy with the terms of the Agreement, and she commenced an Application for child support in accordance with the *Child Support Guidelines* (the "*Guidelines*"), and to increase and extend the husband's

spousal support obligation. At the time of the hearing, the parties' oldest child was no longer a "child of the marriage," and their other two children were already 22 and 21 years old respectively and completing their post-secondary educations.

The chambers judge dismissed the wife's Application because, in his view, the spousal support provisions of the Separation Agreement passed both stages of the *Miglin* test, and the parties' agreement to share the children's major expenses met the children's needs and were consistent with the objectives of the *Guidelines*.

The wife appealed the chambers judge's spousal support decision on two grounds. First, she argued that the chambers judge had failed to consider the SSAG, and second, that he misapplied the *Miglin* test. The Court of Appeal started by summarizing the two-stage test from *Miglin* for determining whether a court should enforce a contract that deals with spousal support (remember the parts that we have bolded for later):

[40] In summary, a court undertaking a *Miglin* analysis should:

Stage One

1. Inspect the circumstances at the time the agreement was entered into to determine if there is evidence of "oppression, pressure, or other vulnerabilities". If such negative circumstances existed, the "agreement will merit little weight".
2. If there are no such negative circumstances, **determine whether the agreement considered the *Divorce Act* factors and complied with its objectives**. If the agreement does not comply with those objectives, the intervention of a court is only warranted where the agreement operates in a way that reflects a "significant departure from the general objectives" of the *Divorce Act*.

Stage Two

If the court has not intervened at stage one, the court must still analyze the agreement at the time of the application for spousal support to consider whether it represents the parties' original intentions and **whether it continues to comply with the *Divorce Act***. The claimant needs to demonstrate that new circumstances, not reasonably anticipated at the time of the agreement, warrant the court's intervention. The change in circumstances needs to be significant but need not be "radically unforeseen". However, the focus is not on whether a change occurred, but whether the agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives. [emphasis added]

The Court of Appeal first considered the wife's argument that the chambers judge had erred by not considering the SSAG. While rejecting this ground of appeal, the Court of Appeal did accept that it can be useful to consider the SSAG when applying the *Miglin* test as they may help to "illuminate, in broad terms, the degree to which [an] agreement shows a significant variation from what the SSAG suggests as an appropriate award" (*Estephan v. Estephan* (2013), 41 R.F.L. (7th) 28 (B.C. C.A.) at para. 42). See also the SSAG Revised User's Guide, which explains that there are generally three ways that the SSAG can be used in *Miglin* cases:

- At stage one of the *Miglin* test, the SSAG ranges can be used to help consider "whether the agreement was in 'substantial compliance' with the objectives of the *Divorce Act* at the time of negotiation."
- At stage two, they "can offer some insight into whether there has been any 'departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act'."
- If the court decides to override an agreement, "the SSAG ranges can assist in determining the amount and duration of spousal support[.]"

The Court of Appeal explained, however, that it is not strictly necessary for a judge to consider or refer to the SSAG, because *Miglin* cases require the court to do far more than just compare whether the spousal support provisions of an agreement are

within the ranges for quantum and duration provided for by the SSAG (particularly in cases where, like this one, the SSAG does not actually apply because one or both parties is earning more than \$350,000 a year):

[45] I agree that **when a court undertakes the *Miglin* analysis, there is no absolute requirement to compare the spousal support provisions in a separation agreement with the range and duration of support calculated in accordance with the SSAG.** There are two reasons for this. First, to determine whether an agreement substantially complies with the objectives of the *Divorce Act*, **a judge must broadly consider all of the objectives that are relevant to whether the agreement reflects "an equitable sharing of the economic consequences of marriage and its breakdown":** *Miglin* at para. 84. The economic consequences can be shared equitably through division of assets and debt, the way special and extraordinary expenses for children are divided between spouses, as well as by the provision for spousal support.

[46] **The court must also consider finality, certainty and the benefit of allowing spouses to settle their own affairs under terms that are agreeable to them.** The breadth of the considerations and the resort to alternative ways of equitably sharing the economic consequences of a marriage and its breakdown will mean that in some cases a court will be able to readily conclude that the agreement is in substantial compliance with the objectives of the *Divorce Act* without looking at the SSAG. That is in part because it is only a significant departure from the general objectives of the *Divorce Act* that will warrant a court's intervention.

[47] The second reason arises from the scope and design of the SSAG. **While this Court has recognized the utility of the SSAG, it must be remembered that they are "advisory guidelines" and thus are not intended to be written in stone.** As the SSAG itself states, the guidelines are "intended to be informal guidelines that operate on an advisory basis only, within the existing legislative framework": SSAG at 14 (Emphasis in original). **If a court can determine whether an agreement substantially complies with the *Divorce Act* objectives without comparing the agreement with the SSAG, there is no requirement to do so.** That is particularly the case where one of the spouses is a high income earner as the SSAG are considered to be discretionary for spouses with income above \$350,000. Above that income level, "the formulas should no longer be automatically applied to divide income": SSAG at 110. [emphasis added]

See also *Reid v. Reid* (2017), 88 R.F.L. (7th) 253 (B.C. C.A.), where the B.C. Court of Appeal determined that when applying the *Miglin* test, "[t]he question is not one of whether the payments under the agreement mirror those that would have been ordered in the absence of an agreement, but rather whether the agreement comported with the objectives and factors that needed to be considered in setting spousal support." This is a very important principle, as it links back to the very high standard of review for support orders (*Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.)). To suggest that a support award is "wrong" simply because it does not fall within the SSAG ranges is to effectively jettison the long-established standard of review of support orders or to remove the "Advisory" from the Spousal Support *Advisory* Guidelines. This is also why courts must generally give reasons when departing from the SSAG ranges: *Slongo v. Slongo* (2017), 89 R.F.L. (7th) 27 (Ont. C.A.); *Frank v. Linn* (2014), 48 R.F.L. (7th) 34 (Sask. C.A.); *Lust v. Lust*, 2007 CarswellAlta 808 (C.A.); *Saunders v. Saunders* (2010), 88 R.F.L. (6th) 363 (N.S. S.C.); and *Kynoch v. Kynoch*, 2013 CarswellMan 441 (C.A.).

Although some degree of standardization might be a laudable objective, the SSAG must be viewed through the lens of the criteria set forth in the *Divorce Act*, which set out the statutory-mandated factors and objectives of a support order: *De Winter v. De Winter*, 2013 CarswellAlta 1721 (C.A.).

That being said, when a party is seeking to override the spousal support provisions of an agreement, generally at least *one* side will want to lead evidence about what the result might have been based on the SSAG. The claimant would want to lead this type of evidence in an effort to bolster his or her claim that the agreement did not/does not comply with the *Divorce Act* objectives. and the respondent would want to do so in order to help persuade the court that it did/does.

With respect to the wife's second ground of appeal, the Court of Appeal agreed that the chambers judge had misapplied the *Miglin* test. Although the chambers judge had found that the wife was not subject to any particular vulnerability for the purposes of stage one, and that she had not demonstrated any new circumstances that were not reasonably anticipated at the time of the

Agreement, the Court of Appeal was of the view that he did not consider whether the Agreement substantially complied with the objectives of the *Divorce Act* at either stage of the test:

[52] However, **the chambers judge failed to consider the second part of stage one of the test. He did not analyze the substance of the Agreement for whether, at the time the couple entered into it, the Agreement substantially complied with the objectives of the *Divorce Act*.** Instead, he moved directly to the second stage of the test: at paras. 29-30. This may have occurred because the [wife's] argument in the court below misstated the test by omitting the second part of stage one of the *Miglin* test.

.....

[54] The analysis clearly attempts to satisfy part of the stage two test under *Miglin*: the judge considered whether there were new circumstances not reasonably anticipated at the time of the Agreement that could warrant the court's intervention. However, **the chambers judge did not address at either stage of the *Miglin* test the critical question of whether the Agreement was in substantive compliance with the objectives of the *Divorce Act*. Indeed, at the second stage of the *Miglin* test, the judge focused on the question of whether "a change occurred *per se*" rather than on whether the Agreement carried out the couple's original intentions as to their relative positions and satisfied the overall objectives of the Act: *Miglin* at para. 90. [emphasis added]**

As the Court of Appeal did not think that the chambers judge had made findings about all of the necessary issues, the Court of Appeal remitted the case back to the trial court for further consideration.

Respectfully, we have some reservations about this decision. While the chambers judge's reasons about whether the Agreement met the objectives of the *Divorce Act* are brief, he specifically found that the wife had "not persuaded him that the circumstances in which the Separation Agreement was entered into were such that I should set aside the agreement and order spousal support, that the Separation Agreement does not reflect the original intention of the parties, or that it is not in substantial compliance with the objectives in the *Divorce Act* or the *Family Law Act*."

Since the wife bore the onus of establishing that the Separation Agreement did not comply with the *Divorce Act*, that should have been the end of the matter. A *Miglin* claim cannot succeed unless the *claimant* proves all of the necessary elements of the test, and the chambers judge in this case clearly found that the wife had not done so. Respectfully, it appears that the Court of Appeal may have reversed the onus here. We can do no better than echo what Philip Epstein had to say about a very similar decision from the B.C. Court of Appeal, *Estephan v. Estephan* (2013), 41 R.F.L. (7th) 28 (B.C. C.A.), in the March 11, 2014 edition of *TWFL*:

It seems to me that **the onus was entirely on the wife to demonstrate exactly what she got and why it did not meet the objects of the *Divorce Act*. If the Court of Appeal concludes that they are unable to ascertain the value of what the wife received in return for a release, that means the wife did not meet the onus of demonstrating that the agreement was not in compliance with the objectives of the *Divorce Act*.** This judgment seems to require the trial judge to go way beyond what the trial judge did in this case or what the Supreme Court of Canada did in *Miglin*. **The Court of Appeal seems to suggest that it was the role of the trial judge to figure out what exactly the wife received and then compare that to what she would have received had the principles of *Moge* been applied.** In applying the principles of *Moge*, the Court of Appeal also suggests that the Court might have considered looking at the Spousal Support Advisory Guidelines to determine what the wife should have received.

I think this is turning the case on its head. The wife clearly received a lump sum in return for the release. It is perhaps of indeterminate value because the lump sum included her claim for a division of assets, arrears and future spousal support, but nevertheless was still a lump sum. **If [the settlement] was inadequate to meet the objectives of the *Divorce Act* in that it did not deal with the wife's compensatory claim, surely the onus was on the wife to demonstrate that.** It does not appear that the wife went to any lengths to prove the value of her compensatory support claim nor did she seem able to prove exactly the value of the lump sum paid towards support.

The Court of Appeal does not mention *Hartshorne v. Hartshorne*, 47 R.F.L. (5th) 5 (S.C.C.), and there is no discussion about the parties being left to make their own bargain within reasonable parameters. It seems to me that the wife did not adduce sufficient evidence below in order to warrant setting aside the agreement, but obviously the Court of Appeal seemed to think that she did not get a fair settlement and has given her another chance. **This has taken *Miglin* much farther than courts have taken it before, and it is another reminder to family law counsel that even when the parties are ad idem initially, if the deal is too good to be true, at least in British Columbia, there is risk that the court will scrutinize it in exquisite detail to determine whether it met the objectives of the *Divorce Act*.** I do not think that this is what was intended in *Miglin*. If it had been, Mrs. Miglin would have succeeded since this approach applied to the Miglin facts would have given Mrs. Miglin relief and an award of spousal support. [emphasis added]

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