FAMLNWS 2021-27
Family Law Newsletters
July 19, 2021

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

In Ontario You can Cohabit without Cohabiting . . . and in Alberta You May Not Be Cohabiting While Cohabiting . . . This Is Getting Very Confusing

Mitchell v. Reykdal, 2021 CarswellAlta 957 (Q.B.) - Loparco J.

Mr. Reykdal and Ms. Reykdal were high school sweethearts. They married in 1988, bought a home in Red Deer, and had three children together. They were together for 38 years, including 30 years of marriage. As Mr. Reykdal worked in the oilfield services industry to support the family, and was regularly away from home, Ms. Reykdal was primarily responsible for raising the children.

By all appearances, they were a happily married couple. But there was, however, a small problem: Ms. Mitchell.

Unbeknownst to Ms. Reykdal, for the last 17 years of their marriage, Mr. Reykdal had also secretly been in a marriage-like relationship with Ms. Mitchell, and had financially supported her and her daughter from a previous relationship. (Ms. Mitchell apparently knew that Mr. Reykdal had a wife and children, but Mr. Reykdal told her they were separated.)

Ms. Mitchell and Mr. Reykdal separated in November 2017. A few months later, Ms. Reykdal finally found out that Mr. Reykdal had been deceiving her for almost two decades, and ended the marriage (they were ultimately able to resolve the issues arising out of the breakdown of their marriage by way of a separation agreement).

In March 2018, Ms. Mitchell filed a claim for, among other things, adult interdependent support (i.e. the Alberta equivalent of spousal support for a common law spouse) pursuant to the *Adult Interdependent Relationships Act* ("*AIRA*").

At first glance, Ms. Mitchell appeared to have a strong claim for support. She clearly had standing pursuant to s. 3(1)(a)(i) of the *AIRA*, which provides that "a person is the adult interdependent partner of another person if (a) [s/he] has lived with the other person in a relationship of interdependence (i) for a continuous period of not less than 3 years[.]"

Furthermore, while Mr. Reykdal tried to argue that he had not actually "lived with" Ms. Mitchell "in a relationship of interdependence", he must have realized that this argument was unlikely to succeed given that, among other things:

• Mr. Reykdal financially supported Ms. Mitchell and her daughter during their 17-year relationship;

• They spent significant amounts of time together at the various homes that Mr. Reykdal rented for Ms. Mitchell;

• They regularly travelled together, spent holidays together, and attended Ms. Mitchell's family's events, funerals, and birthdays together;

• They held themselves out as a couple;

• They had a joint email account; and

• Mr. Reykdal gave Ms. Mitchell a ring.

But finding that Mr. Reykdal and Ms. Mitchell had lived together in a relationship of interdependence was not the end of the analysis. In Alberta, s. 5(2) of the *AIRA* provides that "[a] married person cannot become an adult interdependent partner while living with his or her spouse." Thus, argued Mr. Reykdal, he could not be Ms. Mitchell's adult interdependent partner because he had never stopped "living with" his wife, Ms. Reykdal. The law in this regard is different from that of other jurisdictions such as Ontario where a person can have more than one spouse at a time for support purposes: *Su v. Lam*, 2011 CarswellOnt 1030 (S.C.J.); *Blair v. Allair Estate* (2011), 94 R.F.L. (6th) 346 (Ont. S.C.J.).

Justice Loparco started by considering some of the "double life" cases from other jurisdictions, but ultimately concluded that they were of little assistance because of the substantial differences between the *AIRA* and the other provincial statutes that deal with support for common law spouses:

> [273] Specifically, these cases provide limited guidance in the case at bar for three reasons. **First, the *AIRA* is unique in Canada** (see John Fisher, "Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality" (2004) 49 McGill LJ 1183 at 1188; Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (19 November 2002) at 1390), **so it is difficult and potentially problematic to import other case law definitions without diligently examining the idiosyncrasies of Alberta's own legislation.**
>
> [274] Second, the factual scenario at hand is also highly distinct. This is a one-of-a-kind factual situation with little to no precedential guidance. I have surveyed the several other "double lives" cases from across Canada, but none deal with the distinctive Alberta legislation that applies here (see e.g. *Nowell v Town Estate* (1997), 35 OR (3d) 415, 1997 CanLII 14545 (CA) (*Nowell*); *Anderson v Anderson* (1994) 50 ACWS (3d) 273, 1994 CanLII 18224 (Ont SC) (*Anderson*); *Boughton v Widner Estate*, 2021 BCSC 325 (*Boughton*)).
>
> . . . . .
>
> [277] Finally, **the term "living with" in s. 5 of the *AIRA* plays a very different role in the case at bar than in the other cases across Canada interpreting "living with" or its equivalent.** In those cases, Courts adopted a broad interpretation of the term to give effect to the remedial nature of the relevant legislation - that is, to receive spousal support or a share of the deceased's estate as a "common law spouse" (see e.g. *Climans v Latner*, 2020 ONCA 554; *Naegels v Robillard*, 2019 ONSC 2662; *Austin v Goerz*, 2007 BCCA 586; *Boyd v Foster*, 2019 BCSC 901; *Coombes Estate (Re)*, 2015 BCSC 2050).
>
> [278] However, s 5 of the *AIRA* presupposes that a person can only *live* with one person for the purpose of assessing entitlement to support. [emphasis added]

After reviewing the Hansard debates about the *AIRA* and the legislative history, Justice Loparco ultimately concluded that the term "living with" in s. 5(2) of the *AIRA* should be interpreted to mean "that a person can only be living with one person in a marriage or AP-like relationship at a time[.]" Accordingly, she concluded that she had to "conduct a comparative analysis to determine who the party was de facto living with."

Justice Loparco then reviewed the history of Mr. Reykdal's relationship with both Ms. Reykdal and Ms. Mitchell, and concluded that Mr. Reykdal had "preponderantly committed his time and effort to his relationship with [Ms. Mitchell] and therefore was no longer 'living with' his wife after he rented the home in Red Deer [in 2000] and allowed [Ms. Mitchell] and [her daughter] to

move in." Accordingly, Justice Loparco was satisfied that Ms. Mitchell did, in fact, have standing to claim adult interdependent partner support from Mr. Reykdal.

Alternatively, if her interpretation of s. 5(2) was incorrect, Justice Loparco indicated that she would have found that there is an implicit exception to s. 5(2) for situations where, as in this case, one party misrepresented to the other that s/he was available to enter into a valid adult interdependent partnership. However, she also made it clear that this implied exception should only apply if one party has actually deceived the other:

> [336] [Mr. Reykdal] represented to [Ms. Mitchell] that he was available to enter into what is, on the facts, a valid AP relationship, and [Ms. Mitchell], after inquiring about his separated status, believed him and relied on what he said. Functionally, from [Ms. Mitchell's] lived reality, her and [Mr. Reykdal] were in the kind of relationship contemplated by the *AIRA*. [Mr. Reykdal] was the only one who knew that the relationship was not in fact exclusive, and that his wife believed he was living with her. **Because [Mr. Reykdal] deceived [Ms. Mitchell] and [Ms. Mitchell] relied on the legitimacy of their relationship, [Mr. Reykdal] is [Ms. Mitchell's] AP and should therefore be subject to these same protections and support obligations.**
>
> [337] I will note here that **my interpretation and application of the *AIRA* in this alternative argument does *not* extend to situations where**: 1) a person enters into an AP-like relationship with someone where one or both parties to the relationship either already have a valid AP or are already married and living with their spouse; and 2) **neither party has deceived the other into thinking that they are in a valid AP relationship.**
>
> [338] **That situation is clearly anticipated by the *AIRA* and runs afoul the key purposes of the legislation that I canvassed above**. Essentially, this means that **if [Ms. Mitchell] knew that [Mr. Reykdal] was in fact still married and living with his wife or already had an AP, her standing as an AP and entitlement to support would fail**. But because I find as a fact that she in good faith believed that her relationship with [Mr. Reykdal] was marriage-like and exclusive, and she otherwise had an AP-like relationship with [Mr. Reykdal], I conclude that she is an AP under the *AIRA* and is accordingly entitled to support. [emphasis added]

While we appreciate that Justice Loparco was trying to avoid depriving Ms. Mitchell of what would otherwise have been a meritorious spousal support claim, we are not sure that her Honour's interpretation of s. 5(2) is correct. Based on a plain reading of the *AIRA*, s. 5(2) provides a person in an intact marriage with a defence against a claim for spousal support by anyone other than the married person's husband or wife. There does not appear to be anything in the *AIRA* to indicate that the statute requires the court to somehow try to assess who the potential payor "lived with" more. The statute could not be more clear: "A married person cannot become an adult interdependent partner while living with his or her spouse."

In this case, there is no question that Mr. Reykdal spent significant amounts of time with Ms. Mitchell. There is also no question that Mr. Reykdal had a job that required him to be away for extended periods of time. However, given that Ms. Reykdal apparently thought that she and Mr. Reykdal were happily married for the entire course of his relationship with Ms. Mitchell, we have difficulty understanding how it can reasonably be suggested that they did not "live together" at all during the last 17 years of their 38-year relationship.

However, this was a very challenging set of facts, and it *may* be that her Honour's interpretation is a better-suited remedy than other possibilities such as the tort of deceit (the damages for which would be the inability, on account of misrepresentation, to claim adult interdependent support). Absent some statutory interpretation gymnastics, Ms. Mitchell may have been stuck without any remedy.

We certainly agree that Ms. Mitchell should have standing to claim spousal support from Mr. Reykdal. But instead of having to find creative ways to ensure that justice is done in individual cases, the better approach might be for Alberta to simply repeal s. 5 of the *AIRA*. While these types of "double life" cases may be relatively rare, there is little reason to deprive the court of the ability to award support to an otherwise meritorious claimant simply because that claimant happened to be in a relationship with someone who was already in another adult interdependent relationship, or married and "living with" his or her spouse.

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

Hall v. Hall, 2021 CarswellBC 748 (C.A.) - Newbury, Saunders and DeWitt-Van Oosten, JJ.A.

This was an appeal by the wife and a cross-appeal by the husband from a ruling about spousal support.

The parties started cohabiting in 1990, married in 1992, separated in 2014, and divorced in 2016. There was one adult child, born in 1999 (who was no longer a "child of the marriage" at the time of the trial).

The parties attended mediation, with counsel, and signed a comprehensive Separation Agreement (stated to be a full and final settlement of all issues between the parties) in 2015. The Separation Agreement specified that the husband's income was $134,480 - subject to the possible receipt of stock options - and that the wife's income for support purposes was $49,517. Specific paragraphs of the Separation Agreement noted:

> [The husband] is employed by Change.org Worldwide Ltd. and his 2015 income for the purposes of the Guidelines and the SSAG is $134,480, such income being subject to change based on the possibility that [the husband] may receive certain stock options through his employer later in 2015 and beyond.
>
> . . . . .
>
> Child support will be reviewed and recalculated annually on July 1st of each year in accordance with the Guidelines which govern child support. The purpose of the review will be to consider any changes in the income of either party. The parties agree that [the wife's] loss of rental income constitutes a material change in circumstance that would result in a review of child support.
>
> . . . . .
>
> Subject to a **material change in circumstances**, [the husband] will pay to [the wife] for [the wife's] support, $1,900.00 per month (the "Spousal Support"), on the first day of each month from November 1, 2014 until he reaches the age of 65. [**emphasis added**]
>
> . . . . .
>
> **Child Support**
>
> . . . . .
>
> The parties will exchange complete copies of their respective personal income tax returns and notices of assessment by May 31st of each year for so long as support is payable. Brian shall deliver complete copies of any and all information from his employer with respect to stock options from his employer within 7 days of receiving such information. In addition, the parties will exchange any other financial information reasonably requested from time to time.

The husband's agreed-upon spousal support obligation of $1,900 was about the mid-point of the mid-range and high-range SSAGs using the "with child support" formula. This amount was said to be payable subject to a material change in circumstances.

In August 2018, the wife claimed that, as a consequence of their child no longer being a child of the marriage, there had been a material change in circumstances justifying a change in spousal support. After significant wrangling over whether the husband had a continuing disclosure obligation, the husband's disclosure showed that his income was $142,000 in 2016; $154,000 in 2017; and $263,000 in 2018.

The husband explained that the increases in his taxable income reflected increases in salary in 2016, a change of employment on January 3, 2017, and a restricted stock unit ("RSU") valued at approximately $165,179 recommended by his new employer

in January 2017 that vested stock options to him in 2018. The RSU provides for vesting of the shares on a declining schedule, ending in 2025. In 2018, his taxable income from the first vesting of the RSU was $117,972, bringing his 2018 income to $263,212.70.

The wife's income for support purposes in 2017 and 2018 was $55,724 and $56,888 respectively.

Based on these annual incomes for the husband, the trial judge found there had been a material change in circumstance, and the husband's increase in income from stock options was contemplated by the parties in the Separation Agreement. Therefore, the trial judge nearly quadrupled the husband's support obligation from $1,900 to $7,479 a month, but denied a retroactive increase.

The trial judge considered the case as essentially one of contractual interpretation of the meaning of the phrase "material change in circumstances" (referenced above) in the Separation Agreement. The trial judge based his order increasing spousal support on his interpretation that the word "support" in the ongoing financial disclosure section of the Separation Agreement (again, referenced above) applied to *both* child support and spousal support even though housed in the "Child Support" provisions of the Agreement. The trial judge reasoned:

> [14] As the [husband] points out, the parties clearly anticipated at least the possibility of increased income to the [husband]. However, it seems to me that Recital "H" goes further and says that the [husband's] income will be "subject to" any changes in income from stock options. This conclusion is supported by the requirement in s.20(g) for the [husband] to disclose copies of all information from his employer with respect to stock options in the context of support.
>
> . . . . .
>
> [16] As above, I have concluded that a material change in circumstance under this agreement can be changes in the [husband's] income. And there can be a change in the [husband's] income, under the agreement, as a result of being subject to change based on the possibility of stock options. That is what has happened here.
>
> . . . . .
>
> [18] Here there was certainly a material increase in the [husband's] income for 2018 inasmuch as it was about two times the 2015 income used in the separation agreement of that year. It seems to me clear that if the parties knew that when they were drafting their agreement, they would have said something about such a significant increase in income. In fact, they said something, albeit only in general terms, which is to say that the Guideline income of the [husband] was to be subject to an increase in stock options.
>
> [19] Overall, I find that the [husband's] income has changed, indeed, that is not in dispute. Further, at least for 2018, it was a significant and material change in circumstances. As provided for in the agreement, the Guideline income for the [husband] must be changed.

Instantly, this reasoning should raise eyebrows. Unless the occurrence of an event is specifically contemplated in a Separation Agreement to *be* a material change, it is peculiar that the happening of an event specifically contemplated in a Separation Agreement would be found to be a material change. This goes right to heart of what is, or is not, a material change: a change that was contemplated cannot form the basis of a variation application: *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.); *B. (G.) c. G. (L.)* (1995), 15 R.F.L. (4th) 201 (S.C.C.); *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.); *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.); *Goodkey v. Goodkey*, 2015 CarswellAlta 2269 (C.A.); *Droit de la famille - 141364*, 2014 CarswellQue 5386 (C.A.); *Q.D.T. v. H.L.D.*, 2020 CarswellNB 142 (C.A.). The test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties *actually contemplated* at the time.

The wife appealed the trial judge's denial of a retroactive increase, and the husband cross-appealed the increase in his monthly obligation.

On behalf of a unanimous B.C. Court of Appeal, Justice Saunders first considered the general legislative scheme of the *Divorce Act*, noting that as the wife's application was the first application for a court order concerning spousal support for these parties,

her application had been brought under s. 15.2 as an initial claim for spousal support (as the Separation Agreement had never been converted into an order).

Justice Saunders noted that the case presented a somewhat unusual situation that has not been directly addressed in the jurisprudence: an application for an initial order to increase spousal support on the theory that the increased support sought was consistent with a Separation Agreement that allowed for a change in the agreed amount in the event of a "material change in circumstances."

Oddly, both parties agreed that the Separation Agreement met, and continued to meet, the objectives of s. 15.2 of the *Divorce Act*. However, they had diametrically diverging views as to the meaning of the Separation Agreement.

The Court then considered the three established routes to a court determination of spousal support in a proceeding under the *Divorce Act*: s. 15.2, s. 17, and a review provided for by a court order or agreement.

Miglin v. Miglin (2003), 34 R.F.L. (5th) 255 (S.C.C.) is the leading authority on the application of s. 15.2 of the *Divorce Act* where there is a pre existing separation agreement. There, the Supreme Court of Canada set out the correct approach to applications under the *Divorce Act* for a spousal support order that would be inconsistent with the terms of a final agreement. As we all know, in *Miglin*, such an application requires a two-step analysis. First (assuming an unimpeachably negotiated agreement), the court must consider whether, when the agreement was signed, it met the objectives of s. 15.2. If so, the court must go on to consider whether, in the circumstances existing at the time of the application, the separation agreement still complies with the objectives of s. 15.2.

In *Sandy v. Sandy* (2018), 6 R.F.L. (8th) 253 (B.C. C.A.), the Court of Appeal addressed the *degree* of change required for an initial application for spousal support inconsistent with a pre existing separation agreement:

> [60] The Supreme Court of Canada in *Miglin* disagreed with the approach taken by the Ontario Court of Appeal in that case, which had imported into s. 15.2 the material change test developed for s. 17 (see para. 61). Justices Bastarache and Arbour, writing for the majority, concluded the statutory language did not support that approach given that s. 17 directs the court to satisfy itself that a change has occurred, but s. 15.2 does not. The majority noted that "on an initial application for support, the very concept of 'change of circumstances' has no relevance," but added "*except to the limited extent that there might have been a pre-existing order or agreement that needs to be considered*" (at para. 43; emphasis added). The majority thus recognized that **changes in the parties' circumstances after completion of a separation agreement "are obviously not wholly irrelevant considerations** in assessing the weight to be given to a pre-existing agreement at the time of the application" (at para. 63). Addressing stage two of the test, the majority said:
>
> > 88 The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned. [**emphasis added**]

Both *Miglin* and *Sandy* clarified that an initial application under s. 15.2 engages different considerations than a variation application under s. 17, and that the measure of "material change of circumstances" is, generally, not appropriate under s. 15.2 (even though the concept of a change of circumstances should be considered).

The wife's claim, therefore, whether assessed under s. 15.2 or s. 17 of the *Divorce Act*, turned on whether the husband's increase in income was a "significant change that was not within the contemplation of the parties when they negotiated their agreement." Under either section, whether the specific change was contemplated was a relevant question.

The third route for court-ordered spousal support is a review pursuant to a previous agreement or order: *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.), also governed by s. 15.2 of the *Divorce Act*. On a review, an applicant is not required to prove a material change, and the agreement or order providing for the review usually (and should) set out the basis and/or conditions for the review and what exactly is to be reviewed. If the condition is met, the court moves directly into a consideration of the issue(s) to be reviewed. An *ambiguous* review provision only creates confusion; a review is not meant to be an opportunity to reargue the support case *de novo*. See *Seymour v. Seymour* (2015), 65 R.F.L. (7th) 93 (Sask. Q.B.); *Westergard v. Buttress* (2012), 14 R.F.L. (7th) 1 (B.C. C.A.); *Dumont-Dizy v. Dizy*, 2015 CarswellSask 207 (Q.B.); *S. (R.M.) v. S. (F.P.C.)* (2011), 90 R.F.L. (6th) 1 (B.C. C.A.); *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.).

The Court of Appeal noted that, missing from the considered cases, was any discussion of a provision in a separation agreement that settled all of the issues between the parties in a way "generally said to be final," but that also contemplated a change to spousal support upon a material change in circumstances.

The Court of Appeal also referred to *Van Steinburg v. Van Steinburg*, 2012 CarswellBC 3711 (S.C.), where Justice Jenkins considered an application for an *initial* order to *vary* the spousal support provisions of Minutes of Settlement that expressly provided for an application by either party "to vary spousal support if there is a material change in circumstances that affects the financial needs or abilities of either party." Referring to *Miglin*, Justice Jenkins said:

> [19] Since the Supreme Court of Canada's decision in *Miglin*, there has been considerable confusion in terms of whether the *Miglin* test applies to all sec. 15.2 applications. Specifically, some courts and commentators have questioned the applicability of *Miglin* to scenarios such as this; where there is an agreement on spousal support, but that agreement cannot be said to be "final" because it contains a variation clause.
>
> . . . . .
>
> [21] In a paper by Professor Rollie Thompson, who co-authored the *Spousal Support Advisory Guidelines* (*SSAG*), he writes, "the full force of *Miglin* is only intended to apply to 'final agreements', agreements in which spousal support is waived or time limited". He goes on to say that agreements which are not incorporated into an order and that contain variation clauses are not final: See Professor D.A. Rollie Thompson, *To Vary, To Review, Perchance to Change: Changing Spousal Support* (Presented at the 5th Annual Family Law Summit, June 17, 2011), at p. 4-5.
>
> [22] However, in the *Spousal Support Advisory Guidelines* ("SAGGs") Carol Rogerson and Rollie Thompson (Ottawa: Dept. of Justice, 2008), have this to say on the issue of modifying spousal support:
>
> > If spousal support has been negotiated, the result will be a separation agreement that deals with spousal support. The possibilities for reviewing or modifying spousal support that the spouses have agreed upon will depend on many factors, including the drafting of the agreement and whether or not the agreement has subsequently been incorporated into the divorce judgement.
> >
> > **We will deal first with the situation where there has been no incorporation of the agreement. The effect of subsequent changes in the parties' situation will be governed by the terms of the agreement.** If the agreement provides for reviews by the parties at specified times or if it includes a material change clause, and if the conditions for these are met, it is possible for the Advisory Guidelines to apply to determine amount and duration. **However, the Advisory Guidelines will have no application if the agreement is a final agreement in which spousal support has been waived or time-limited**. (Ch. 14, p. 142) [emphasis added by Justice Jenkins].

In *Van Steinburg*, Justice Jenkins then considered two possible interpretations of the term "material change in circumstances" used in the Minutes of Settlement. One was that the provision merely incorporated the test for a variation order under s. 17; the other was a broader interpretation whereby the s. 17 test became the *threshold* for an application under s. 15.2 - that is, one in which the Court was obliged to give due weight both to the agreement and to the other requirements of s. 15.2. Justice Jenkins opted for the latter approach.

In *Hall*, it was clear that the wife's application was under s. 15.2 of the *Divorce Act*, as her claim was the first request for an order dealing with spousal support. However, the parties had differing views as to the Court's task on the application although, critically, they both agreed that the Separation Agreement met the objectives of s. 15.2.

The wife argued that her application was made under s. 15.2 for *enforcement* of the Separation Agreement, and further argued that the Separation Agreement contemplated the very change in spousal support she was looking for. Her application could not have been for a *review* of spousal support, because the Separation Agreement did not contemplate a review. She argued that a simple comparison of the parties' incomes at the time of the Separation Agreement and at the time of the application should measure the extent to which there had been a "material change in circumstances".

The husband argued that the wife's application was really an application for a review, which he argued was misconceived because the wife was seeking an order inconsistent with the Separation Agreement. Therefore, argued the husband, a *Miglin* analysis was required.

Although the wife's application had some indicia of a review, the Separation Agreement did not actually provide for a review of spousal support (nor did it set out exactly what was to be reviewed). This was a problem for the wife and an error in the analysis below. Furthermore, as the wife's claim was not actually inconsistent with the Separation Agreement, it did not engage the *Miglin* analysis done by the trial judge.

Ultimately, the wording of the Separation Agreement did not support the trial judge's conclusion that the husband receiving stock options was a material change that could cause an increase in spousal support. Rather, the possibility of the husband receiving stock options in the future was specifically contemplated by the parties in the Separation Agreement. Therefore, the receipt of the options could not be a material change for spousal support purposes, even if it could be for the purposes of child support. The trial judge also erred in the material change analysis by not considering whether the increase in the husband's income was enduring or had a sufficient measure of continuity.

The question, therefore, according to the Court of Appeal, was how to approach the phrase, "[s]ubject to a material change in circumstances" in the Separation Agreement?

Justice Saunders thought it clear that, as the wife's claim was an application under s. 15.2, the factors and objectives of that section were engaged. She thought Justice Jenkins was correct in his analysis in *Van Steinburg* that he had to look to the objectives of the *Divorce Act* in interpreting the Separation Agreement before him. Although she did not describe the phrase "material change in circumstances" as a "threshold" (as Justice Jenkins did), she believed he was correct in looking beyond the separation agreement to s. 15.2. On an application under s. 15.2, the Court had to consider the agreement as a whole, under the general approach to agreements settling family law disputes discussed in *Miglin*. Here, that approach required 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.

The Court of Appeal then spent an extraordinary amount of space discussing the principles of certainty, finality, and predictability, and the importance of allowing parties to settle as they wanted, as set out in *Miglin*.

With the foregoing principles in mind, the Court of Appeal dismissed the wife's appeal, and allowed the husband's cross-appeal.

Justice Saunders concluded that, on a full review of the Separation Agreement, it did not support the trial judge's conclusion that the receipt of stock options by the husband was a material change in circumstances triggering an increase in spousal support. Furthermore, she observed that the trial judge did not consider whether the increase in income had any measure of continuity. [Parenthetically, in *Marinangeli v. Marinangeli* (2003), 38 R.F.L. (5th) 307 (Ont. C.A.), the Ontario Court of Appeal had no difficulty finding that a regular entitlement to the vesting of options had the required "continuity".]

The Court of Appeal found that the determination that the increase in the husband's income from receiving the stock options was a material change in circumstances was flawed on two fronts.

First, the trial judge overlooked the plain effect of the provisions of the Agreement acknowledging that receipt of the stock options was in the specific contemplation of the parties when they made their agreement: " . . . such income being subject to change based on the possibility that [the husband] may receive certain stock options through his employer later in 2015 and beyond."

The parties knew the husband might receive stock options, but settled spousal support without agreeing that the stock options would trigger a recalculation of spousal support. The receipt of the stock options could not be a material change in circumstances because the parties expressly contemplated the event and did not agree it would be a basis on which to revisit spousal support.

Second, structurally, the trial judge erred in principle by finding that the financial disclosure obligation and reference to stock options for "support" purposes in the "Child Support" section was equally applicable to spousal support. (Even though the headings were said to be of no legal significance, the relevant section was "buried" in provisions specific to child support.)

Perhaps most interesting was the fact that the Court of Appeal found that the end of child support was not, on the facts of this case, a material change in circumstances with respect to spousal support. While the end of child support can constitute a material change in circumstances, here, the Court of Appeal noted that such a result is "highly contextual" - the jurisprudence being generally to the effect that an end of child support may be grounds for an increase in spousal support "if the original level of spousal support was adversely affected by child support." (See *Sandy* at para. 53.) However, in this case it was not clear on the record that the effect of child support materially reduced the spousal support agreed to by the parties. (Remember, here, the agreement called for the husband to pay at the mid-point of mid-range and high-range SSAGs.)

As a result, the Court of Appeal allowed the husband's cross-appeal.

End of Document