

Spousal Support: Variation, Retroactive Claims and Income Fluctuations

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This paper will address three issues related to spousal support. First, various arguments that may be advanced on an application to vary the terms of an agreement related to spousal support that have been incorporated into a court order, where the agreement and court order contain a threshold for a variation of those terms other than a “material change”, will be considered. Second, the paper will examine recent cases addressing retroactive claims for spousal support. Finally, there will be a consideration of recent cases where courts have addressed fluctuations in a payor’s income.

Consent Orders Incorporating Agreements with a Different Threshold

Courts have taken various approaches when considering an application to vary of spousal support where a consent order incorporates the terms of an agreement between the parties. The question that will be examined in this paper is: What analyses might a court undertake when faced with an application for a variation of spousal support, where the threshold provided for in the parties’ agreement is something other than a “material change”?

The difficulty in such cases arises for several reasons. First, there is uncertainty as to how the material change test will be applied. Further, the definition of a “material change”, itself is unclear. A second and significant issue is whether a court would apply the test from the Supreme Court of Canada’s decision in *Miglin v. Miglin*¹ in these circumstances.

Agreements between Parties

Counsel should be cognizant of some basic principles regarding the manner in which courts view agreements reached between parties. It is a well established principle that the law ought not to make or maintain orders that cannot be complied with through no fault

¹ [2003] 1 S.C.J. No. 21 (S.C.C.).

of the parties. Courts ought to avoid unreasonable interpretation or construction of agreements whenever possible.² Further, the court's supervisory jurisdiction over spousal support cannot be extinguished by contract.³ As stated by Professor McLeod:

The exercise of discretion being an exercise of legal power must reflect the dominant social views if it is to operate as an effective vehicle of social regulation. Just as society changes, so discretion structuring factors must change in nature and weight to reflect societal aims. Given that it is desirable for spouses to settle their financial relationship by agreement, the exercise of discretion must protect the settlement reached.⁴

The Statutory Framework

The court has the jurisdiction to vary, rescind or suspend a support order or any provision thereof pursuant to section 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) The court also has the jurisdiction pursuant to subsection 37(2) of the *Family Law Act*, R.S.O. 1990, c. F.3 to “discharge, vary, or suspend” a spousal support term of an order. The focus of this paper will be on the relevant provisions found in the *Divorce Act*.

Under the *Divorce Act*, an application to vary an order for support is brought pursuant to subsection 17(1), which reads, in part, as follows:

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses;⁵

The factors that must be considered by a court on any such application are set out in subsection 17(4.1) of the *Divorce Act*:

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.⁶

When deciding whether or not to vary a support order, a court ought to consider the four objectives that a variation order should achieve, as set out in subsection 17(7) of the

² *Leman v. Leman* 1998 CarswellOnt 240 (S.C.) (Annotation by Prof. James G. MacLeod).

³ *Pelech v. Pelech*, [1987] S.C.J. No. 31 (S.C.C.) at para. 44

⁴ *Webb v. Webb* 1984 CarswellOnt 227 (C.A.) (Annotation by Prof. James G. MacLeod).

⁵ *Divorce Act*, subsection 17(1).

⁶ *Divorce Act*, subsection 17(4.1).

Divorce Act, which are as follows:

- (a) recognize any economic advantages or disadvantages to the former spouse arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.⁷

The objectives set out in subsection 17(7) of the *Divorce Act* mirror those found in subsection 15.2(6) of the *Divorce Act*, which are the objectives of a spousal support order. No single objective is paramount.⁸

Conceptual Bases for Spousal Support

The three conceptual bases for spousal support are the compensatory, contractual and non-compensatory models. A court should consider all of these conceptual bases for spousal support, and any or all of them may be considered in fashioning the ultimate support order, as may be appropriate in the circumstances of the case.⁹

The three conceptual bases for support have been summarized as follows:

1. Compensatory. [...] The Court is directed to look at the economic consequences of each spouse's role during the marriage in determining support.
2. Contractual. Using this model, the basis will be an agreement between the parties. The express or implied agreement will either create or negate spousal support.
3. Non-Compensatory. Where compensation is not the basis, a support obligation may arise from the marriage relationship itself when a spouse is unable to become self-sufficient. Spousal support can be based on need. Under this model, spousal support will be based on economic hardship resulting from the breakdown of marriage, but not necessarily the roles assumed during the marriage. The needs based support could, therefore,

⁷ *Divorce Act*, subsection 17(7).

⁸ *Huzarik v. Fairfield*, [2004] O.J. No. 3957 (Sup. Ct.) at para. 18.

⁹ *Ibid.* at para. 18, and *Bracklow v. Bracklow*, [1999], 1 S.C.R. 420 (S.C.C.).

consider the recipient's ability to become self-sufficient for reasons such as health.¹⁰

Although the conceptual bases for a spousal support order should be considered in detail when fashioning a spousal support order, at first instance, these bases cannot be ignored on an application for a variation. When assessing whether a change has occurred that would justify a variation in the terms of a spousal support order, the analysis may vary depending on the conceptual basis employed when making the initial order. A change assessed in light of a compensatory support order may lead to a different result than the same change assessed in light of a non-compensatory support order.

Analysis

A review of the relevant authorities reveals that the analysis to be applied by the courts in assessing an application to vary or terminate support, which is set out in a consent order incorporating the terms of a separation agreement or minutes of settlement and provides for an alternate threshold for variation, is unclear.

In some cases, despite the terms of the agreement, the court may apply the material change test from *Willick*, which is the threshold test, and also consider the overall objectives of the *Divorce Act* in accordance with *Miglin*. This includes the four objectives listed in subsection 17(7) of the *Divorce Act*. As noted by the Court in *Miglin*, the court must apply those objectives in light of the entire statute. Counsel may argue that there has been a sufficient change in the circumstances of the Applicant and/or the Respondent so that continued reliance on the pre-existing agreement no longer conforms with the objectives of the *Divorce Act*, or no longer reflects an equitable sharing of the economic consequences of the marriage in accordance with the principles of *Miglin v. Miglin*.

In other cases, courts will only look to the threshold test set as set out in the parties' agreement. If that threshold is not met, the court may dismiss an Application.

¹⁰ *Ibid.* at para. 19, citing *Bracklow v. Bracklow*, [1999], 1 S.C.R. 420 (S.C.C.).

Another available argument may be advanced using the analysis from *Miglin*. Where the threshold found in the agreement is extremely high, for instance, requiring a “catastrophic change”, counsel may try to rely on the test in *Miglin* should be applied despite the particular threshold set out in the agreement. The threshold in that test could potentially be less stringent than the threshold to be met pursuant to the parties’ agreement. In *Miglin*, the court considered the right of a party to seek an Order for spousal support in the face of a release of spousal support contained in a separation agreement. If the Court in *Miglin* was able to consider a variation application in the face of a full release of spousal support, a Court could consider an application to vary or terminate spousal support using the same analysis where the agreement or court order contains a threshold other than a material change (i.e. catastrophic change or non-variable order)

The Material Change Test

Regardless of the terms of the agreement in question, the statutorily imposed requirement for varying a support order pursuant to section 17(4.1) of the *Divorce Act* is that a change in the “conditions, means, needs, or other circumstances of either former spouse” has occurred.

There is a substantial amount of jurisprudence with respect to the test to be applied where a party seeks spousal support contrary to the terms of an express separation agreement. The starting point is the *Pelech* trilogy from the Supreme Court of Canada. The thrust of the trilogy cases was summarized by the Majority of the Court in *Miglin v. Miglin* at paragraph 31:

Suffice it to say that the *Pelech* trilogy has come to stand for the proposition that a court will not interfere with a pre-existing agreement that attempts fully and finally to settle the matter of spousal support as between the parties unless the applicant can establish that there has been a radical and unforeseen change in circumstances that is causally connected to the marriage. The trilogy represents an approach to spousal support that has been described as a “clean break”, emphasising finality and the severing of ties between former spouses. As Wilson J. put it in *Pelech*, at p. 851:

[I]t seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decision should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future

misfortunes which may befall the other.¹¹

As evidenced by the above passage, the old requirement with respect to a variation of an agreement concerning spousal support was a “radical” or “catastrophic” change. This view was superseded by the less onerous requirement of a “material change” as adopted by the majority of the Supreme Court of Canada.¹² There has been significant commentary regarding the definition of a material change from the courts, some of which is discussed below. As noted by Professor D.A. Rollie Thompson, one helpful definition is found in *Carter v. Carter*¹³ where Justice Proudfoot stated that “there should be a change in circumstances that is substantial, unforeseen and of a continuing nature.”¹⁴

As noted by Professor Thompson, much of the confusion in the area stems from the term “unforeseen”, which refers to a change that was not foreseen when the previous order was made (looking backwards) versus the term “foreseeable”, which is prospective and examines what the parties, looking forward, considered when making their agreement.¹⁵ The later term is found in *Miglin* and “reflects the distinctive concerns around final agreements.”¹⁶

In *Willick v. Willick*, the Supreme Court of Canada stated that where a party seeks to vary a support order, the onus of proof lies on the applicant and the standard of proof is on the balance of probabilities. In *Willick*, the Majority of the Court agreed with the following statement regarding the threshold test for determining a change of circumstances:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.¹⁷

¹¹*Dolson v. Dolson*, [2004] O.J. No. 4197 (Sup. Ct.) at para. 43 citing *Miglin v. Miglin*, [2003] S.C.J. No. 21 (S.C.C.) at para. 31.

¹² See *T. (T.L.A.) v. T. (W.W.)*, 1996 B.C.J. No. 1577 (C.A.); *G. (L.) v. (B. (G.))*, [1995] S.C.J. No. 72 (S.C.C.); and *Willick v. Willick*, [1994] S.C.J. No. 94 (S.C.C.).

¹³ [1991] B.C.J. No. 2209 (C.A.) at p. 6.

¹⁴ 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).

¹⁵ For a discussion of the difference between “foreseen” and “foreseeable”, as it relates to variations, see Professor Thompson’s article, *supra*.

¹⁶ *Supra* note 14 at p. 8-3.

¹⁷*Dolson*, *supra* note 11 at para. 49 citing *Willick v. Willick* [1994] 3 S.C.R. 670.

A recent decision from Ontario elaborated on the analysis to be applied in determining whether the agreement in question reflects the original intention of the parties:

This analysis requires an examination of whether at the time of the application the agreement still reflects the original intention of the parties. Thus, a final order will always be subject to variation to protect against future events. A variation is available not only when there is an unexpected change in circumstances but also when an anticipated set of specified circumstances fail to materialize (*Fisher v. Fisher* (2008), 88 O.R. (3d) 241 at para. 71). That is, a non-happening of an anticipated event can constitute a material change in circumstances.¹⁸

In *Henteleff v. Henteleff*, the Manitoba Court of Appeal considered an appeal by the husband from a decision refusing to reduce his spousal support, which was provided for in the parties' agreement. The Court dismissed that husband's application. The agreement provided that an application to decrease spousal support could be brought in the event of "a significant change in circumstances". The Court commented on the trial judge's decision and the applicability of *Miglin* to the case:

In rejecting the application of the husband, the trial judge was invited to and did rely upon the decision of the Supreme Court of Canada in *Miglin v. Miglin*, [...]. With respect, I do not think the *Miglin* decision has any application. It dealt with an application to reduce spousal support as set forth in a separation agreement which was final in nature and did not contain a clause comparable to the provision in the present agreement relating to "a significant change in circumstances."¹⁹

The Court in *Henteleff* went on to note that a court has discretion in considering any particular set of circumstances: "There is discretion to be exercised. What would constitute a significant change of circumstances when considered in isolation may not be so regarded when offsetting factors are taken into account. That is the situation in the present case."²⁰

In *Marinangeli v. Marinangeli*²¹, the Ontario Court of Appeal considered a variation application by the husband regarding a support provision contained in minutes of settlement. The question was whether the husband's increased income constituted a material change in circumstances, which was the test set out in the minutes.

¹⁸ *Palombo v. Palombo*, [2011] O.J. No. 1986 (Sup. Ct.) at para. 23.

¹⁹ *Henteleff v. Henteleff*, [2005] M.J. No. 109 (C.A.) at para. 7.

²⁰ *Ibid.* at para. 15.

²¹ [2003] O.J. No. 2819 (C.A.).

In dismissing the wife's appeal the Court of Appeal stated that *Miglin* should not apply in the circumstances:

For the reasons that follow, I would hold that although the trial judge did misapprehend some evidence, his errors were not sufficiently palpable and important nor did they have a sufficiently decisive effect so as to justify appellate intervention. In relation to spousal and child support I would hold that the profit realized by the appellant from the exercise of his stock options was income and constituted a material change in circumstances under the Minutes. This is not a case like *Miglin v. Miglin*, [2003] S.C.J. No. 21, where the parties had entered into a separation agreement providing for a full and final release of all future obligations. Rather, in this case the parties expressly agreed in the Minutes that spousal and child support could be varied if there was a material change in circumstances. I would further hold that it was within the trial judge's discretion to award retroactive support as the criteria for making such an award are met. I would allow the appeal only with respect to the award of retroactive child support prior to May 1, 1997 before the Guidelines came into force. In all other respects I would dismiss the appeal.²²

The Court of Appeal made the following comments regarding the nature of the agreement in that case:

The comments of the Supreme Court in *Miglin*, supra were intended to address the situation where the parties chose to release one another from all future support obligations by a one-time payment of lump sum support. Since no future adjustments were envisaged, the parties were expected to consider such foreseeable future changes in the ordinary course of living as an increase or decrease in income before arriving at the amount of the one time payment.

This is not a situation like *Miglin*, supra. In this case, the parties demonstrated an intention that the amount of spousal support should change if there was a material change of one party's circumstances in the sense that a party's income increased or decreased. [...].²³

The above comments of the Court of Appeal for Ontario indicate that *Miglin* should not be applied in circumstances where parties agree to a potential future variation of spousal support. Therefore, where there is no release of support, the Applicant would need to meet the threshold requirement of a material change, subject to the terms of the Agreement. The view of the court in *Marinangeli* may be contrasted with the approach of the Manitoba Court of Appeal in *Kehler v. Kehler*, discussed below, where the court stated that *Miglin* could apply in such circumstances.

Two recent spousal support cases from Quebec, *R.P. v. R.C.*²⁴ and *L.M.P. v. L.S.*²⁵ were

²² *Marinangeli*, supra note 21 at para. 4. See also *Gibb v. Gibb*, [2004] O.J. No. 1752 (Sup. Ct.).

²³ *Ibid.* at paras. 45 and 46.

²⁴ [2010] J.Q. No. 1959 (C.A.).

argued before the Supreme Court of Canada on April 20, 2011 Judgment is reserved in both cases. In both cases, which involved variations of consent orders, the Court considered the material change test. The pending decisions from the Supreme Court should provide some much needed guidance in this area.

(b) The Material Change Test and *Miglin* Principled Analysis

Under this analysis, the Court will apply the material change test, as set out above. Once the Court finds that the test has been met, it will decide whether or not a variation is warranted, keeping in mind the principles set out in *Miglin*.

In *Miglin v. Miglin*, the Court stated the following when considering a change to an agreement incorporated into an order under section 17:

Consideration of the overall objectives of the Act is consistent with the non-exhaustive direction in s. 17(7) that a variation order “should” consider the four objectives listed there. More generally, a contextual approach to interpretation, reading the entire Act, would indicate that the court would apply those objectives in light of the entire statute. Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the [page354] marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.²⁶

While weight must be given to the agreement reached by the parties, the objectives of the *Divorce Act* and specifically those objectives set out in subsection 17(7) must be considered. For instance, paragraph 17(7)(a) provides that a variation order should recognize the economic advantages and disadvantages arising from the marriage or its breakdown. This includes, for instance, a comparison of a party’s lifestyle during and after the marriage.

Paragraph 17(7)(c) states that a variation order should relieve any economic hardship of the former spouses arising from the breakdown of the marriage. Counsel should examine whether a party experienced any economic hardship since the breakdown of the marriage.

Before the court makes a support order, the court must be satisfied that there has been a

²⁵ [2010] J.Q. No. 3531 (C.A.).

²⁶ *Miglin*, *supra* note 1 at para. 91.

change in the condition, means, needs and other circumstances of either former spouse. For instance, does the payor have the means to continue paying support given his/her financial circumstances? Does the payee have any need for support? Is he/she supported by a new partner? Counsel will want to examine the changes in the payee and payor's financial positions between the date of the agreement and the date the variation is sought.

Material Change and the *Miglin* Stage 2 Analysis

In *Kehler v. Kehler*²⁷, the Manitoba Court of Appeal endorsed the view that in some circumstances involving consent orders based on separation agreements, the second stage of the *Miglin* analysis would apply in variation proceedings.²⁸ The issue of whether one or both stages of the *Miglin* analysis apply on variation applications also remains unclear.

Before examining whether one or both stages of the *Miglin* Test apply on variation applications, the question of whether *Miglin* applies at all should be considered. In *Dolson v. Dolson*²⁹, the wife brought an application to set aside or vary the spousal support terms set out in minutes of settlement, which were incorporated into a divorce judgment.

In that case, Justice Heeney traced the history of the test for a variation of spousal support before considering the decision of the Supreme Court of Canada in *Miglin*, a case that involved an original application for support pursuant to section 15; not an application to vary an existing order under section 17.

The two-stage analysis prescribed in *Miglin* may be summarized as follows:

At the formation stage, the court should look at the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it, including any circumstances of oppression, pressure or other vulnerabilities. Next, the court must consider the substance of the agreement to determine whether it was in substantial compliance with the *Divorce Act* at the time of its formation. This assessment would include not only the spousal support objectives listed in s. 15.2(6), but also the goals of certainty, finality and autonomy reflected elsewhere in the *Act*.

²⁷ [2003] M.J. No. 217 (C.A.).

²⁸ *Kemp v. Kemp*, [2007] O.J. No. 1131 at para. 64 and *Kehler v. Kehler*, *supra*.

²⁹ *Dolson*, *supra* note 11.

At the second stage, the court looks to the time of the application, and must assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act, in light of the changed circumstances.³⁰

As noted in *Dolson*, the Court in *Miglin* concluded that the *Pelech* test no longer applied to applications for support under the 1985 *Divorce Act*. The majority of the Court concluded that the importance given to the self sufficiency and clean break approach in *Pelech*, which was decided under the former *Divorce Act*, is incompatible with the 1985 *Divorce Act*.³¹ The court in *Dolson* then considered whether *Pelech* applied to variations of existing support orders and made the following observations:

While *Miglin* has thus clearly stated that the *Pelech* requirement of proving a radical change in circumstances causally connected to the marriage, does not apply to an initial application for support under s. 15.2, *Miglin* did not explicitly state that *Pelech* no longer has any relevance to a variation application under s. 17. This omission is significant, since one of the key reasons for holding that *Pelech* is inconsistent with the statutory language of s. 15.2 is the requirement for a "change". A change, however, is clearly a key consideration in a s. 17 application to vary, so that particular inconsistency is not present there.³²

Although *Miglin* dealt with an application for support under section 15, the Court discussed the interplay between sections 15 and 17 of the *Divorce Act*. The Court stated that the 1985 *Divorce Act* does not create an inconsistency between the tests to be applied for changing an initial order under section 15.2 and the variation of an agreement incorporated into an Order under section 17 of the *Divorce Act*. At paragraph 68, the court in *Dolson* cited the following paragraph from *Miglin*:

Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant 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, that the court may be persuaded to give the agreement little weight. As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. In our view, the Act does not create such inconsistency. We do not agree with the Ontario Court of Appeal when it suggests at para. 71, that once a material change has been found, a court has "a wide discretion" to determine what amount of support, if any, should be ordered, based solely on the factors

³⁰ *Dolson*, *supra* note 11 at paras. 64 and 65.

³¹ *Ibid.* at para. 56.

³² *Ibid.* at para. 63.

set out in s. 17(7). As La Forest J. said in his dissent in *Richardson, supra*, at p. 881, an order made under the Act has already been judicially determined to be fit and just. The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs.³³

In *Kemp v. Kemp*, the court noted that the above comments of the Supreme Court of Canada do not provide a great deal of guidance to trial judges with respect to the application of the *Miglin* analysis on variation applications. How that analysis relates to the threshold test of material change remains unclear.³⁴

In *Dolson*, Justice Heeney had the following to say regarding the difference between applications under s. 15.2 and s. 17:

To the extent that any differential treatment is to be accorded s. 17 applications as compared with s. 15(2) applications it appears to be confined to the remedy to be granted by the court. Assuming that the judge has found a variation to be justified he or she must start from the proposition that the initial order was fit and just and fashion an order that takes account of the changed circumstances in a way that still gives due weight to the original order which reflects the parties understanding of what constitutes an equitable sharing of the economic consequences of the marriage.³⁵

The Court in *Dolson* went on to note that the requirement under the *Pelech* Test that the change be “radical” has been displaced by the requirement that the change be “significant”. The Court further concluded that the requirement that the change be “causally connected to the marriage” has been expressly eliminated.³⁶

Justice Heeney clearly wrestled with the issue of whether the analysis set out in *Miglin* would also apply on variation applications. At paragraph 69 he wrote:

On the one hand, the majority seems to be saying that a court must undergo the same two-stage analysis, whether dealing with an initial application for support or a variation application. However, reference is then made to the well-established principle that an order is deemed to be fit and just when it is made. If that is the case, it should follow that the order is also deemed to comply with the objectives of the Divorce Act, which would largely dispense with the need for the first stage of the analysis. Logical though it may seem, the majority does not appear to say that.

Justice Heeney went on to conclude that a court hearing a section 17 application must embark on the two stage analysis prescribed by *Miglin*, “but if the variation is warranted,

³³ *Miglin, supra* note 1 at para. 91 as cited in *Dolson v. Dolson, supra* note 11 at para. 68.

³⁴ *Kemp supra* note 28 at para. 63.

³⁵ *Dolson supra* note 11 at para. 70.

the variation order must start from the proposition that the original order was fit and just, and the court must give consideration to the fact that the initial order and agreement reflected the parties' understanding of what constitutes an equitable sharing of the economic consequences of the marriage."³⁷

In *Patton-Casse v. Casse*³⁸, Justice McDermot recently considered whether the test in *Miglin* applied on variation applications. The court endorsed the view that the *Miglin* analysis would apply in the circumstances and went on to apply various principles from *Miglin*.

It is important to note that the *Miglin* test is more stringent than just proving a change in circumstances as required under section 17.³⁹ The court in *Patton-Casse* elaborated on the reasoning behind this:

There is good reason for this more stringent test. First, the facts upon which a consent order or agreement may rest upon may not be easily determined at the date of the motion to vary that order. This is because there has not been a trial and there may be issues as to what the circumstances actually were at the time the original order was made. Second, *Miglin* and the other cases that follow it are consistent in stating that deference has to be given to a consent order or agreement as the policy of the courts is to encourage settlement of matters between parties in matrimonial proceedings; to lightly vary any such consent order would discourage settlement and encourage litigation.⁴⁰

The following excerpt from *Miglin* demonstrates why the test set out in stage 2 is so difficult to meet:

[...] 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.

We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some

³⁶ *Ibid.* at para. 73.

³⁷ *Ibid.* at para. 74.

³⁸ 2011 CarswellOnt 7090 (Sup. Ct.).

³⁹ *Ibid.* at para. 116.

⁴⁰ *Ibid.* at para. 117.

changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention. That said, we repeat that a judge is not bound by the strict Pelech standard to intervene only once a change is shown to be "radical". Likewise, it is unnecessary for the party seeking court-ordered support to demonstrate that the circumstances rendering enforcement of the agreement inappropriate are causally connected to the marriage or its breakdown. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.⁴¹

Application of the Variation Test

Although it remains unclear how the *Miglin* analysis relates to the material change test under s. 17(4.1) of the *Divorce Act*, the statutorily imposed requirement to find a material change of circumstances is the threshold test which must be met.⁴²

It is instructive to examine how decisions such as *Kehler* have been applied, in cases where an agreement is incorporated into a court order. In *Palombo v. Palombo*⁴³, Justice Nolan considered a Motion to Change an Order based on an agreement between the parties that provided for time limited spousal support, the duration of which was non-variable. The quantum of support was variable in the event of a material change in circumstances. The wife sought indefinite spousal support.

As noted above, there appears to be some disagreement as to whether only the second stage or both stages of the *Miglin* test would apply on variation applications. Before commencing her analysis of whether there had been a material change in the circumstances, Justice Nolan stated:

To determine whether there has been a material change in circumstances from the time that the order was made, the court must “first review the nature and sufficiency of the changes ... in order to determine whether the threshold for variation has been met.” In this case, although it is a provision in a court order which is sought to be changed, the court order was arrived at by way of an agreement which, therefore invokes the principles set out in *Miglin*. In that case, the Court stated that a material change in circumstances must be judged objectively.⁴⁴

⁴¹ *Miglin*, *supra* note 1 at paras. 88 and 89.

⁴² *Kemp* *supra* note 28 at para. 68.

⁴³ [2011] O.J. No. 1986 (Sup. Ct.).

⁴⁴ *Palombo*, *supra* note 43 at para. 21.

Justice Nolan went on to cite *Kehler v. Kehler*, where, as noted above, the Manitoba Court of Appeal endorsed the view that the second stage of the *Miglin* analysis is applicable in variation proceedings. “The court took this view since, at variation, it is not a question of the appropriateness of the agreement at the time of initial formation, but rather a question of the agreement in light of a recent material change in circumstances.”⁴⁵ The court in *Palombo* went on to cite an article by Julien D. Payne, Q.C. (May 1, 2003), which is also cited in *Kehler*:

Pursuant to section 17(4.1) of the Divorce Act it falls on the applicant to satisfy the court that there has been a change in the condition, means, needs or other circumstances of either former spouse since the existing order was made. The court has no discretionary jurisdiction to revisit the existing order de novo and cannot second guess at the merits of the order which is sought to be varied: *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 at 313 (B.C.C.A.). ... Consequently, the first stage of a Miglin inquiry, insofar as it involves a review of the spousal settlement at the time of its negotiation and execution, would seem more readily applicable to an original application for a spousal support order under section 15.2 of the Divorce Act than to a variation application brought pursuant to section 17 of the Divorce Act. (As quoted in *Kemp v. Kemp*, [2007] O.J. No. 1131, at para. 64).⁴⁶

Justice Nolan adopted the reasoning of the court in *Kehler* and began her examination of the agreement at the second stage of the *Miglin* test, having found that as a result of a material change in the circumstances the threshold test had been met.

The Court in *Palombo* outlined the factors from *Miglin* that should be considered at the second stage of the analysis to determine whether and to what extent to vary the terms of the agreement. These factors include:

- a) The extent, source and impact of the change in circumstances;
- b) Whether the agreement reflects a clear and unequivocal intention to insulate it from review or variation;
- c) The extent to which the agreement satisfies the objectives of the *Divorce Act*; and
- d) Where there is an agreement to waive support or limit its duration to a fixed event or time, how lengthy a period has elapsed since the waiver, event or expiration of the time limit.⁴⁷

Justice Nolan stated that the objectives of section 15.2 of the *Divorce Act*, which include the length of the parties’ cohabitation, the functions performed by the parties during the

⁴⁵ *Ibid.* at para. 28.

⁴⁶ *Ibid.*; Julien D. Payne, Q.C., *First Impressions of Miglin in the Supreme Court of Canada* (May 1, 2003).

cohabitation and the order, and the agreement or arrangement relating to support of either spouse must also be considered.⁴⁸ In addition, Justice Nolan considered the *Spousal Support Advisory Guidelines* and sections 17(7) and 15.2(6) of the *Divorce Act*.

The approach taken by Justice Nolan in *Palombo* may be contrasted with the analysis undertaken by Justice McDermot in *Patton-Casse*, where the agreement in question provided that no further spousal support was payable after a certain date. Justice McDermot considered the parties' intention at the time of the negotiation of the agreement. The court cited *Dolson* for the proposition that deference must be given to the original order and determined that the question of "whether or not to set aside a consent order requires an analysis of the parties' intentions at the time of the execution of the consent in this matter as well as the circumstances surrounding the negotiation of the agreement."⁴⁹

A Different Threshold

When addressing the threshold set out in the particular agreement/order significant research will need to be conducted and the jurisprudence considering the relevant terms will need to be reviewed. It will also be important to examine how the terms describing the threshold have been defined both generally and by the courts. Counsel seeking to vary the terms of the agreement will need to consider the threshold provided for in the agreement in question relative to the material change test and/or the *Miglin* analysis. Counsel seeking to vary the support term will want to argue that the court undertake the analysis that will result in the lowest threshold being applied to the variation. For instance, the terms of an agreement may contain language providing for a threshold higher than that found in both the material change test and *Miglin* analysis. For example, the agreement may require that there be a "catastrophic change". In such a case, counsel may want to argue that one of the aforementioned approaches be adopted by the court.

Summary

There is no doubt that there is some confusion in this area depending on the type of

⁴⁷ *Palombo*, *supra* note 43 at para. 31.

⁴⁸ *Ibid.* at para. 32.

⁴⁹ *Patton-Casse*, *supra* note 38 at para. 118.

variation being sought (i.e. from a court order or from an agreement incorporated into a court order or an agreement containing a release or time limit).

In discussing this confusion, Professor D.A. Rollie Thompson stated:

Let's get back to the more typical confusions. To be obvious, if the agreement contains a variation clause (or a review clause), then the agreement is not "final". If the agreement is incorporated in a consent order, our focus here, then the ordinary law of variation (or review) applies. On the variation, the material change test applies. Obviously this may seem, but some courts have still tried to apply Miglin in these cases.

What if the incorporated agreement or consent order fixes an amount of spousal support, but is "silent" about variation or review? Here the agreement or order is equally "silent" about a time limit on support. In these circumstances, the ordinary law of variation applies. There is no "finality" to the agreement. The material change test applies. Some courts still try to apply the Miglin test, wrongly, in these cases.⁵⁰

However, how do we address the situation that is not so clear. If an agreement contains a variation clause that imposes a higher threshold than a material change, it is not a "final agreement". According to Professor Thompson, it would appear that the ordinary variation would apply. Does the higher threshold then get ignored. Further, what if there is a non-variable clause in the agreement or subsequent court order.

The fact of the matter is that the circumstances and the analysis cannot be predetermined for every case. Depending on the specific facts of a case, a straightforward material change test will apply, while in others a consideration of the *Miglin* factors is necessary.

Perhaps the Supreme Court of Canada will clarify this troubling issue when the decisions in *R.P. v. R.C.* and *L.M.P. v. L.S.* are released.

In conclusion, counsel should have the ability to make some creative legal arguments when faced with variation applications, as the law in this area is unsettled.

⁵⁰ *Supra* note 14 at p. 8-5.

Retroactive Spousal Support Claims: What is the Test?

The law regarding claims for retroactive spousal support was recently considered by the Supreme Court of Canada in *Kerr v. Baranow*⁵¹, where the Court stated that similar factors to those considered on applications for retroactive child support should be applied in determining claims for retroactive spousal support.

In *Kerr*, one of the issues considered by the Court was whether the Court of Appeal erred in holding that the trial judge should not have made his order for spousal support in favour of Ms. Kerr effective on the date she had commenced proceedings rather than on the first day of trial. Justice Cromwell found that the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her significant disability. The Appellate court concluded that she was entitled to a spousal support award that would permit her to live at a lifestyle similar to that which the parties enjoyed during their marriage. The Court of Appeal held that the trial judge had properly determined the quantum of support. However, the Court of Appeal concluded that the trial judge had erred in ordering support effective to the date that Ms. Kerr had commenced proceedings. The Court of Appeal criticized the trial judge for several reasons, including:

...making the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.⁵²

Ms. Kerr argued that the Appellate Court equated “the principles pertaining to retroactive spousal support with those of retroactive child support without any discussion or legal analysis.” The Appellant further argued that the Court of Appeal’s reasoning creates a

⁵¹ [2011] S.C.J. No. 10 (S.C.C.).

⁵² *Ibid.* at para. 202.

burden on applicants, requiring them to apply for interim spousal support or lose their entitlement. Last, the Appellant argued that there is a legal distinction between retroactive support claims made before and after the application is filed. In the latter case, there is “less need for judicial restraint”.⁵³ Justice Cromwell agreed with the second and third arguments advanced by the Applicant.

The Appellant sought support effective to the date that her writ of summons and statement of claim were issued and served. Ms. Kerr was not seeking support for the period before she commenced her proceedings. Justice Cromwell noted that pursuant to the relevant statute, the trial judge had the discretion to award support effective as of the date that proceedings were commenced.

Justice Cromwell noted the competing interests at stake where, as in this case, the payor alleged that support could have been sought earlier:

The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable “retroactive” award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *D.B.S.*, at paras. 100-103).⁵⁴

None of the above concerns were present in *Kerr*, as the order was made effective to the date “on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount.”⁵⁵ Cromwell J. further noted that “the commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered.”⁵⁶

Justice Cromwell went on to discuss the relevant dates to consider on a claim for retroactive support. Regarding the date on which the payor receives notice, the Court in *D.B.S.* stated that the date of effective notice is the “general rule” and “default option” for the choice of effective date of the order. Justice Cromwell then cited the Ontario

⁵³ *Ibid.* at para. 203.

⁵⁴ *Ibid.* at para. 212.

⁵⁵ *Ibid.* at para. 210.

⁵⁶ *Ibid.*

Court of Appeal decision of *MacKinnon v. MacKinnon*⁵⁷, where the date of the initiation of proceedings for spousal support was described as the "usual commencement date", absent a reason not to make the order effective as of that date (para 24). Justice Cromwell then stated that "the decision to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances" and "the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed."

Justice Cromwell noted the following considerations on applications for retroactive spousal support:

Other relevant considerations noted in *D.B.S.* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example concealing assets or failing to make appropriate disclosure: *D.B.S.*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *D.B.S.* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present.⁵⁸

His Honour went on to adapt the following comments from *D.B.S. v. S.R.G.*⁵⁹ to claims for spousal support:

The comments of Bastarache J. at para. 113 of *D.B.S.* may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *D.B.S.* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.⁶⁰

The factors a court should consider on applications for retroactive spousal support, from *D.B.S.*, are as follows:

- 1) the needs of the recipient;

⁵⁷ [2005] O.J. No. 1552 (C.A.).

⁵⁸ *Kerr*, *supra* note 51 at para. 212.

⁵⁹ [2006] 2 S.C.R. 231 (S.C.C.).

⁶⁰ *Ibid.*

- 2) conduct of the payor;
- 3) reason for the delay in seeking support; and
- 4) any hardship the retroactive award may have upon the payor spouse.⁶¹

In *Kerr*, Justice Cromwell highlighted the distinction between spousal and child support claims. At paragraph 208, he made the following comments:

Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. ... In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support.

Justice Cromwell concluded that the Court of Appeal erred in setting aside the portion of the trial judge's order for support between the commencement of proceedings and the beginning of trial for two reasons. First it erred by finding that the circumstances of the Appellant were such that Ms. Kerr had no need prior to the trial when, in fact, she had constant need for support. The Court of Appeal also did not indicate that there was any financial hardship that the trial judge's award would have on Mr. Baranow.

Second, the Court of Appeal was wrong to fault Ms. Kerr for not bringing an interim application, as she had commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen months afterward, she apparently pursued those proceedings to trial with diligence. The Court found that Mr. Baranow received clear notice that support was being sought. Justice Cromwell noted that requiring interim applications "risks prolonging rather than expediting proceedings".⁶²

In *S.P. v. R.P.*⁶³, the Ontario Court of Appeal applied the reasoning in *Kerr* and stated that "the principles relating to the award of retroactive spousal support are similar to

⁶¹ *Supra* note 51 at para. 207.

⁶² *Ibid.* at para. 216.

⁶³ 2011 CarswellOnt 2839 (C.A.).

those considered in the award of retroactive child support.”⁶⁴ In analyzing the issue of retroactive spousal support, the court found that the wife was entitled to “at least some retroactive spousal support” for similar reasons to those supporting her claim for child support.⁶⁵

Prior to the decision in *Kerr*, the principles applied on claims for retroactive spousal support were set out by Justice Weiler writing for the Ontario Court of Appeal in *Marinangneli v. Marinangneli*, who stated that the same test should be applied to claims for both spousal and child support. At paragraph 72, Justice Weiler wrote:

The decision to award retroactive support is one to be exercised sparingly. In relation to child support the term retroactive may be somewhat of a misnomer since the obligation to pay support arises immediately upon the birth of the child and continues regardless of whether or when the payee spouse brings an action for support: *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 175 D.L.R. (4th) 423 (C.A.). In *S. (L.)*, supra, Rowles J.A. provides a very helpful summary of the criteria for making or declining to make an award of retroactive support under the Divorce Act, at paras. 66 and 67, as follows:

A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

The factors described by Rowles J.A. were made in the context of child support but they are in the main also applicable to spousal support. I propose to address the various factors below. Globally, these factors are aimed at discerning the fairness of a retroactive award of support. Following this, I will consider the appropriateness of the quantum of spousal and child support awarded.⁶⁶

⁶⁴ *Ibid.* at para. 59.

⁶⁵ *Ibid.* at para. 60.

⁶⁶ *Marinangneli*, supra note 21 at paras. 72 to 73.

The issue of retroactive spousal support was addressed by the Court of Appeal in *Horner v. Horner*⁶⁷. In that case, Weiler J.A. cited the following passage from *Miglin* regarding the distinction between spousal and child support claims:

Unlike child support, for which relatively clear normative standards have been set, spousal support rests on no similar social consensus. [...] We note too that Parliament's adoption of broad, and at times competing, objectives for spousal support contrasts with its promulgation of uniform Child Support Guidelines.

The basis for awarding spousal support and the lack of clear normative standards for when it should be awarded have a bearing on whether and to what extent retroactive spousal support should be awarded. Clearly different principles will apply where retroactive claims are made for spousal support versus child support.⁶⁸

Courts have applied the following factors, as set out in the Court of Appeal's decision in *Bremer v. Bremer*⁶⁹, when determining claims for retroactive spousal support:

The considerations governing an award of retroactive spousal support include: i) the extent to which the claimant established past need (including any requirement to encroach on capital) and the payor's ability to pay; ii) the underlying basis for the ongoing support obligation; iii) the requirement that there be a reason for awarding retroactive support; iv) the impact of a retroactive award on the payor and, in particular, whether a retroactive order will create an undue burden on the payor or effect a redistribution of capital; v) the presence of blameworthy conduct on the part of the payor such as incomplete or misleading financial disclosure; vi) notice of an intention to seek support and negotiations to that end; vii) delay in proceeding and any explanation for the delay; and viii) the appropriateness of a retroactive order pre-dating the date on which the application for divorce was issued.⁷⁰

The distinction between spousal and child support claims was recently highlighted in *Ellis v. Ellis*⁷¹, where Justice van Rensburg stated that “[r]etroactive spousal support is not granted as a matter of course. A party is expected to act in her own interests to pursue an increase in support promptly. A court will deny an award of retroactive support where a party is aware of changed circumstances but delays in bringing an application.”⁷²

⁶⁷ [2004] O.J. No. 4268 (C.A.).

⁶⁸ *Ibid.* at para. 57 citing *Miglin*, *supra* note 1 at para. 56.

⁶⁹ [2005] O.J. No. 608 (C.A.).

⁷⁰ *Ibid.* at para. 9.

⁷¹ [2010] O.J. No. 1250 (Sup. Ct.).

⁷² *Ibid.* at para. 16.

Ontario courts have applied the factors set out in *D.B.S.* on claims for retroactive spousal support in a number of recent cases. In *Rivard v. Rivard*⁷³, the court considered the comments from *Kerr* regarding *D.B.S.*. The husband in that case sought retroactive spousal support from his wife. The parties married in 1970 and divorced in 2006. The husband was struggling financially and was living off capital and his CPP benefits. The wife claimed that she did not have the ability to pay the husband support. The husband commenced his claim in December 2007 and sought support retroactive to January 2008. The wife claimed that the husband owed her money pursuant to an agreement between the parties.

The court noted that while making spousal support retroactive for over three years is unusual, the husband required support since January 2008.⁷⁴ Further, there was nothing about his conduct that would cause a court to deny him his claim. The court found that requiring the wife to pay retroactive support would extend the hardship she had suffered as a result of her husband's conduct. However, as the husband had to utilize capital during the above period, the court found that it was fair to expect the wife to resort to capital to contribute to his expenses during the same period.⁷⁵ The amount of support owed to the husband was set off against the debt he owed to his wife.

In *Samis (Guardian of) v. Samis*⁷⁶, Justice Sherr provided a concise summary of the principles in *Kerr*:

The court found that there is no presumptive entitlement to spousal support and, unlike child support, the spouse is, in general, not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support. The court found that *D.B.S.* emphasized the need for flexibility and a holistic view of each matter on its own merits and that the same flexibility is appropriate when dealing with retroactive spousal support.⁷⁷

In *Samis*, the court ordered a retroactive temporary support award. The Applicant in that case had a strong case for entitlement to spousal support, including a sizeable claim for

⁷³[2011] O.J. No. 3455 (Sup. Ct.).

⁷⁴*Ibid.* at para. 60.

⁷⁵*Ibid.* at para. 60.

⁷⁶[2011] O.J. No. 2381 (Ct. J.).

⁷⁷*Ibid.* at para. 50.

retroactive spousal support based on significant evidence, and the decisions of other courts that had dealt with the parties.

The principles from *Kerr* relating to spousal support were recently considered in *Taylor v. Taylor*, [2011] O.J. No. 3882 (Sup. Ct.) and *Duggan v. Duggan*, [2011] O.J. No. 1309 (Sup. Ct.). In both cases, the courts also considered the principles set out in *MacKinnon* regarding the appropriate commencement date.

Fluctuations in Income and the Material Change Test

In this section, some recent cases where courts have addressed changes in income and the corresponding affects on support obligations are considered.

In *Hayes v. Hayes*⁷⁸, the support paid by the husband was increased due to an increase in the husband's income from the exercise of his stock options. Justice Cohen found that the husband's employee stock options were a regular and significant part of his compensation and the Court rejected Mr. Hayes' argument that the exercise of his stock options was a one-time source of income to him. Justice Cohen found that despite the husband reporting monthly deficits, his net worth increased from \$171,663 in April 1998 to \$1,384,058 in June 2004. The husband was ordered to pay support in the amount of \$5,500 per month effective January 1, 2002.

The court considered the material change test in *Willick* and found that the husband's increase in income constituted a material change in circumstances. Mr. Hayes claimed that his income was \$120,000, despite the fact that in 2004, his Line 150 Income was approximately \$665,000.

In 2009, the husband filed a motion to change the support order of Justice Cohen, seeking to terminate his spousal support obligations. The husband was 69 years of age and was forced to retire in January 2008, with severance until March 2009. Mr. Hayes suffered from poor health and had depleted his investment portfolio. In February 2010, he filed for

bankruptcy. The Husband brought a motion to change the support order and argued that the combination of these factors constituted a material change in circumstances.⁷⁹ Despite the above changes, including the decline in the value of the Husband's investments, which the court determined was a material change, the husband still had an obligation to contribute to the wife's support.

In *Vanbeek v. Vanbeek*⁸⁰, the husband brought a Motion to vary a default Order made in 2004 regarding spousal and child support. The parties were married for 15 years and divorced in 2005. The wife had sole custody of the parties' child. The Judge who had made the Order determined the husband's income to be \$67,000 in 2004, while his reported income in 2005 and 2006 was \$9,600 and his income in 2007 was \$10,800. The wife earned approximately \$36,000 per year and lived with a partner who contributed \$800 per month towards the household expenses. In 2004, the judge determined that the husband's income was \$67,000. The husband was employed as a carpenter and worked for his mother's company. According to the husband's mother, his income would be \$10,800 in 2008. The husband could not perform physical work due to an injury.

The court found that the "drastic drop" in the husband's income met the test under either the *Family Law Act* or the *Divorce Act* for a variation. The court then considered whether the husband was underemployed due to his injury or the fact the he was trying to avoid his support obligation. The circumstances of his employment and the absence of evidence that he had attempted to find less onerous employment, take any re-training, or relocate where appropriate employment might be available, led the court to conclude that he was intentionally underemployed. The court imputed an income of \$25,000 to the husband.

In *Dickinson v. Dickinson*⁸¹, the parties were married for 11 years and had three children. The wife earned approximately \$35,000 per year and the husband, a police constable, earned the following employment income: \$83,361 in 2003; \$80,371 in 2004; \$95,353 in 2005, and approximately \$100,000 in 2006. The husband contended that he would not

⁷⁸ [2005] O.J. No. 3301 (Sup. Ct.).

⁷⁹ 2011 CarswellOnt 1918 (Sup. Ct.).

⁸⁰ [2008] O.J. No. 2004 (Sup. Ct.).

continue to earn the same level of income, as no future overtime pay would be available to him. The husband's projected income in 2007 based on a cheque stub was \$111,000. In 2007, the husband was ordered to pay spousal support of \$850 per month and child support of \$1,935 per month.

The husband sought relief from the Order of 2007 and anticipated his 2008 income to be \$84,000. The most recent information indicated that the husband's income in 2008 would be \$22,500 less than the amount earned at the same time in 2007. The Court found that this decrease, along with the wife's increase in income of approximately \$6,000, constituted a material change and warranted a variation to reflect the husband's actual income. The husband was ordered to pay spousal support of \$500 per month.

Many of the recent cases addressing variations of spousal support focus on issues related to the retirement of the payor spouse. In *Elcich v. Okecka*⁸² the husband sought to terminate his spousal support obligation to his former wife, who was 49 years old, based on his early retirement. The review date set out in an Order made in 1997 stipulated that support would be reviewed on the date of the husband's retirement. The wife insisted that the husband's decision to retire was voluntary and that it substantially reduced his ability to pay her support. The husband argued that the wife had ample opportunity to become self-sufficient. The husband's income dropped from approximately \$87,000 in 2007 to \$40,000 in 2008, which consisted of his pension income from General Motors. The husband provided no medical reason for his decision to retire in 2008 when he was 60 years of age. The husband had a poor track record regarding his support payments and was in constant arrears.

Justice Tucker found that the wife was still in need of support and that the husband had the ability to pay. The court found that the wife was entitled to compensatory support and compared the situation to "one where a person gives up employment to reduce his/her obligation to pay spousal support."⁸³ The court suggested that individuals "consider their

⁸¹ [2008] O.J. No. 4577 (Sup. Ct.).

⁸² 2010 CarswellOnt 175 (Sup. Ct.).

⁸³ *Ibid.* at para. 18.

savings and debt load before taking such a step.”⁸⁴ Justice Tucker ordered that spousal support would continue at the same level for a further two years at which time support would terminate. Consequently, payors should consider the consequences of any unilateral decision to retire.

In *Jakob v. Jakob*⁸⁵, the British Columbia Court of Appeal considered whether it was appropriate to average a payor’s income was steadily increasing. The parties were married in 1986 and divorced in 2000. The wife was 60 years old and the husband was 68 years old. The order under appeal, made in June of 2008, varied an order made on February 3, 2005 that had reduced the wife’s monthly spousal support to \$200, by increasing her monthly support to \$375. The Appellant wife submitted that the chambers judge erred by increasing her spousal support to \$375 instead of \$1,000.

The Court in *Jakob* first determined whether there had been a material change and applied the test from *Willick*. In applying the principles from the relevant jurisprudence, the Court found that the threshold applied when the previous orders were made in the case, including the Order of 2008, which was under appeal, had been met.

Between 2005 and 2008 the husband’s income steadily increased from \$15,276 in 2005, to \$22,454 in 2006, to \$35,333 in 2007. The husband’s actual income at the time of the application was approximately \$35,000, or at least three times higher than his 2005 income. The Court of Appeal noted that his capacity to pay spousal support was materially greater than the \$23,029 found by the chambers judge.

Turning to the calculation of the husband’s income, the judge in the court below had averaged his income to arrive at the amount of \$23,029. The Appellate Court found this approach to be incorrect and stated as follows:

In my view, the chambers judge erred in law by calculating the respondent's income based on an average of his previous three years' annual income, when his income was increasing over that period of time. Given the steady increase in the appellant's income, his 2007 income (being the last year of the three-year

⁸⁴ *Ibid.*

⁸⁵ 2010 CarswellBC 599 (C.A.).

period) more closely reflected his actual income or income capacity. In my view, based on the new evidence, the chambers judge also erred in fact in finding the respondent's income for the payment of spousal support was \$23,029, when his actual income was \$35,000.⁸⁶

In addition to being instructive on the issue of income averaging, the case also addressed an issue raised by the wife, which was the affect of a support order stated to be “permanent”. The Court examined this term and made the following comments:

Before the introduction of the Spousal Support Advisory Guidelines ("SSAG") in 2005, the use of the term "permanent" for a spousal support order typically referred to a final order. "Permanent" in that context meant the opposite of an interim order. A permanent support order was a final order without duration. This was in contrast to a final support order for a fixed or time-limited duration. With the introduction of the SSAG, the use of the word "permanent" was replaced by the term "indefinite" for a final order where the duration is not specified.⁸⁷

The court then made the following, remarks regarding “permanent”: or indefinite orders for support, of which counsel should be mindful:

The purpose of this review on the evolution of the terminology employed for final support orders is to illustrate that regardless of whether a final spousal support order is described as "permanent" or "indefinite", the order is subject to variation upon establishing a material change of circumstances.⁸⁸

The Court of Appeal increased the husband’s spousal support to \$600 per month.

Finally, in *M. (A.A.) v. K. (R.P.)*⁸⁹ Justice Pazaratz provided an in-depth analysis of the issue of post-separation increases in income. In that case, the parties were married for 9 years and had two children. The husband’s income increased from \$92,000 at the time of separation to \$189,000 in 2009, while the wife’s income increased from \$10,000 to \$100,000. The parties signed a separation agreement which provided that the husband would pay the wife \$60,000 for the house and \$500 in monthly child support. The agreement also stated that neither party would apply for support. Both of the parties were veterinarians; however, the husband’s practice was worth \$140,000 while the wife’s was worth nothing at the time of the agreement. There was no exchange of financial disclosure and no legal advice was provided regarding the agreement. The wife brought

⁸⁶ *Ibid.* at para. 48.

⁸⁷ *Ibid.* at para. 35.

⁸⁸ *Ibid.* at para. 38.

an application to set aside the agreement with respect to property and spousal support. While the court did not set aside the agreement with respect to property, the provisions regarding spousal support were set aside and the wife was awarded lump sum support.

The court applied the principles applicable to setting aside marriage contracts. With respect to the issue of spousal support, the court applied the two stage analysis from *Miglin* and found that the terms of the agreement represented a significant departure from the overall objectives of the *Divorce Act*.

Justice Pazaratz provides a detailed discussion of a number of issues including post separation increases in income. The court cited a number of authorities on this issue including Philip Epstein's annotation to *Fisher v. Fisher* (2008), 232 O.A.C. 213 (C.A.), where it was stated:

The treatment of increases in post-separation income for spousal support purposes is not an easy issue. It is suggested that of the three types of spousal support described in *Bracklow v. Bracklow*, 1999 CarswellBC 532/533, 44 R.F.L. (4th) 1 (S.C.C.), only compensatory support allows a spouse to share in post-separation increases in income. Contractual spousal support is proscribed by the terms of the contract and need -based support is generally restricted in quantum to the lifestyle enjoyed during the marriage. Compensatory support considerations, on the other hand, might sometimes take into account post-separation increases in income, for example, where the claimant has conferred a substantial career enhancement benefit on the other spouse. See *Keast v. Keast*, 1986 CarwellOnt 257, 1 R.F.L. (3d) (Ont. Dist. Ct.) and *Ferguson v. Ferguson*, [2008] O.J. No. 1140CarswellOnt 1676 (Ont. S.C.J.).

There is no automatic entitlement to increased spousal support when a spouse's post-separation income increases. See *Dextrase v. Dextrase*, [2004] B.C.J. No. 266, 2004 CarswellBC 287 (B.C. S.C.) at para40 and *Hariram v. Hariram*, 2001 CarswellOnt 732, 14 R.F.L. (5th) 88 (Ont. Div. Ct.). Generally, there must be some economic advantage/disadvantage conferred and suffered in order to be entitled to share in any increase in income. The difficulty lies in drawing a clear line between the conduct which specifically contributed to future income potential and conduct which is only a general contribution reflective of the roles adopted during the marriage.⁹⁰

The court noted that while both parties' incomes had increased since 2004, the gap between them continued to be significant. As part of her compensatory claim, the wife argued that while her income eventually grew and would continue to grow, she continued to lag behind the Respondent, and might always lag behind him "because of the

⁸⁹ [2010] O.J. No. 807 (Sup. Ct.).

⁹⁰ *Ibid.* at para. 203.

enhancement or head-start the Respondent obtained when his career was given primacy during the early years of the marriage.”⁹¹

The court stated that ignoring the “continuing income gains by the payor, while factoring in changes in the recipient's earnings, would almost inevitably preclude consideration of an important component of a compensatory claim.”⁹²

⁹¹ *Ibid.* at para. 206.

⁹² *Ibid.* at para. 207.