
CANADA / JUDGMENT

J.W.J.M. v. T.E.R.

2004 BCSC 1062

COURT

Supreme Court of British Columbia

DECIDED

9 August 2004

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

J. W. J. M. v. T. E. R.,

2004 BCSC 1062

Date: 20040809

Docket: E031794

Registry: Vancouver

Between:

J. W. J. M.

Plaintiff

And

T. E. R.

Defendant

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiff

P. M. Daykin

Counsel for the Defendant

P. Daltrop

Date and Place of Trial/Hearing:

July 12, 2004

Vancouver, B.C.

- [1] The parties entered into a separation agreement in August 2001 and agreed that based on a Guideline income of \$400,000 a year, commencing August 1, 2001, the plaintiff would pay (a) child support for the three children of the marriage, of \$5,409 a month, plus an additional annual payment of \$10,000 on March 31 of each year; and (b) spousal support of \$2,841 a month, plus an additional annual payment of \$10,000 on November 30 of each year. The agreement provided that the defendant's entitlement to, and the quantum of spousal maintenance would be reviewed on the fifth anniversary of the date of the agreement, that is, August 2006.
- [2] The plaintiff applies to rescind or reduce his spousal support obligations on the ground that there have been material changes in the defendant's circumstances; more particularly, that she has entered a new relationship.
- [3] The terms of the separation agreement were not incorporated into a court order, and it is agreed that the plaintiff's application is governed by s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [4] The defendant applies for an order increasing the plaintiff's child support obligations under the terms of the separation agreement on the ground that the plaintiff's Guideline income has increased from \$400,000 to \$508,965.
- [5] The parties were married in October 1981 and have three children. C. turned 19 years old this February. R., who was born in [] 1986, is now 17. M., who was born in [] 1989, is 14. The parties separated on November 7, 2000 and were divorced in January 2002. Both parties are presently 44 years old.
- [6] The plaintiff, Mr. M., is a securities lawyer who holds an interest in a law partnership through a professional law corporation. The defendant, Ms. R. was a homemaker throughout the marriage, and recently completed a commercial photography course.

THE AUGUST 9, 2001 SEPARATION AGREEMENT

- [7] On August 9, 2001 the parties entered into a detailed separation agreement (the "Agreement"). The Recitals to the Agreement include the following:
 - 1. Mr. M.'s earnings for the last three fiscal years: \$348,851 in 1998, \$368,445 in 1999, and \$606,706 in 2000 (Recital D.);
 - 2. a description and value of the family assets, including the matrimonial home on W.[] Avenue in Vancouver and recreational property on M.[] which had fair market values of approximately \$800,000 and \$250,000 respectively; Mr. M.'s and Ms. R.'s RRSPs worth

approximately \$115,000 and \$220,000 respectively; his \$314,000 interest in the law corporation; Ms. R.'s earnings of approximately \$3,000 each year from a one-quarter interest, along with her siblings, in the R. Farm Property transferred to them by their father's estate plan; the fair market value of her share in the Property ranged from \$625,000 to \$750,000; a family membership in the Arbutus Club (Recital F. (a) to (l));

3. the outstanding balance of approximately \$220,000 on the law corporation's line of credit which was secured by a collateral mortgage against the matrimonial home and Ms. R.'s personal guarantee (Recital G.);
4. the \$8,250 a month Mr. M. had been paying to Ms. R. since separation, plus through the law corporation, payments of interest on the line of credit, and insurance and taxes on the matrimonial home. (Recital H.); and
5. recital J. reads as follows:

J. J. and T. separately intend this Agreement to be:

- a. the final settlement of their respective rights in or to the property of the other and the property held by them jointly;
- b. a full release of any right, interest or claim that either party may have upon the property of the other;
- c. an allocation or responsibility with respect to the Bank of Montreal Line of Credit; and
- d. a settlement with respect to the care and control of the Children, child support and spousal maintenance.

[8] Following the Recitals, the Agreement includes the following terms:

CHILD SUPPORT AND SPOUSAL MAINTENANCE

4.1 The parties agree that, for the purposes of calculating child support, J.'s Guideline income shall be \$400,000 per year.

4.2 Commencing August 1, 2001, and continuing for so long as each Child is a child [of] the marriage within the meaning of the Divorce Act, J. shall pay to T. maintenance for the support of the Children in the sum of \$5,409 per month, plus an additional annual payment of \$10,000 payable on March 31 of each year.

4.3 Upon the execution of this Agreement J. shall pay to T. the sum of \$10,000 in respect of the child support payment due on March 31, 2001.

5.1 Commencing August 1, 2001, and continuing until the review of spousal maintenance described in subparagraph 5.4 hereof has been completed, J. shall pay to T. maintenance for her own support in the sum of \$2,841 per month plus an additional annual payment of \$10,000 payable on November 30 of each year.

...

5.4 T's entitlement to, and the quantum of, spousal maintenance shall be reviewed on the fifth anniversary of the date of this Agreement. During such review and pending either an agreement between the parties of [or] a Court Order, J. shall continue to pay to T. the sums required by sub-paragraph 5.3 hereof.

...

5.7 In each year commencing in May 2002, each party shall supply to the other a copy of his or her annual income tax return and, where applicable, a copy of the financial statement for any partnership or professional corporation from which he derives income.

5.8 Either party may apply to vary the child support provisions of this Order [agreement] upon the occurrence of a material change in the circumstances of either party or of any Child for whom such support is required.

...

6.2 In respect of each Child that attends post-secondary school:

- a) if the Child attends school locally and remains resident with T. during the school year, J. shall pay that portion of the Child's educational expenses, including tuition and books, that are not met by scholarship funding from either the Heritage plans or those obtained by the Child, and shall continue to pay to T. the child support required by sub-paragraph 5.1 hereof; or
- b) if the Child elects to attend school outside the Lower Mainland of the Province of British Columbia and no longer resides with T. during the school year, J. shall pay that portion of the Child's educational expenses, including tuition, books, room and board and travel, that are not met by scholarship funding from either the Heritage plans or those obtained by the Child, and J.'s responsibility to pay child support in respect of that child shall be suspended during that portion of the year in which the Child is away at school.

...

8.1 As security for child and spousal maintenance, J. shall maintain and pay all premiums on a term life policy or policies having a total death benefit of no less than \$600,000, naming T. as the beneficiary thereon. J. shall, upon T.'s request, provide to her proof that such policy remains in good standing.

8.2 The requirement for and quantum of such life insurance coverage shall be reviewed by the parties at the same time as the review of spousal maintenance.

[9] Paragraphs 9 to 19 of the Agreement deal with the division of property: Ms. R. received exclusive occupancy of the matrimonial home, and upon sale of the home, the net proceeds were to be divided equally; Mr. M. holds the M.[] property in trust for the children; Ms. R. retains her interest in the R. Farm Property, and the Arbutus Club membership. They each retained their own RRSPs, separate properties, and the vehicles they drove.

[10] Paragraph 20 of the Agreement provides:

RELEASES

20.1 Subject to the review of spousal maintenance, and the ongoing rights and obligations of each of the parties with respect to the Children, this Agreement constitutes a full and final settlement of all issues between the parties and all rights and obligations arising out of their marital relationship.

20.1 Except for the enforcement of the terms of this Agreement and the review of spousal maintenance, each party hereby forever discharges and releases the other from all claims at law, in equity or by statute, including, without limiting the generality of the foregoing, the Family Relations Act and the Divorce Act, and amending acts thereto, with respect to:

- a) division of assets; and
- b) any other matter arising from their marriage or its breakdown.
- b) to be reimbursed for any reasonable cost incurred to enforce that right.

[11] The Agreement also provides:

26. J. and T. separately acknowledge that:

- a) all matters in dispute between them, including those pertaining to family assets and to real and personal property interests, have been settled to his or her satisfaction;
- b) he or she has received independent legal advice;
- c) he or she has made full disclosure of his or her assets and liabilities, as set out in the Recitals to this Agreement;
- d) he or she has read the entire Agreement carefully, knows and understands its contents, and has executed it voluntarily, without any undue influence from or coercion by the other.

[12] The numbers dealing with the amount of spousal and child support were quite precise because they were apparently based on the \$8,250 Mr. M. had been paying since separation.

CIRCUMSTANCES SINCE THE MAKING OF THE AGREEMENT

[13] Since the Agreement was made in August 2001, both parties have entered into new relationships.

- [14] In February 2002 Mr. M. remarried. He and his new wife have two infant children. His wife who is also a lawyer, was a partner in a large firm, but with two infants, she now works part-time from home as an associate counsel, and expects to earn only \$25,000 this year. Mr. M.'s earnings for 2001, 2002, and 2003 were \$520,143, \$508,965, and \$503,179 respectively.
- [15] Mr. M. and his wife have purchased a home close to where Ms. R. and the children live. As a result, R. and M. now spend more time with him, including Thursday evenings to Tuesday mornings on alternate weeks (5 overnights out of 14) and dinner every Monday and Thursday (7 dinners out of 14).
- [16] An amendment to the Agreement was made on August 9, 2002 relating to the sale of the matrimonial home, Ms. R.'s purchase of another home on West 37th Avenue for \$849,000, and her need for bridge financing. The closing date for the sale of the matrimonial home was April 10, 2003, and the closing date for the purchase of the new home was February 3, 2003.
- [17] Ms. R. used the \$400,000 she received from the sale of the matrimonial home as a down payment towards the \$849,000 purchase price of the West 37th Avenue house which she owns with her new partner. They started living together in February 2003 and plan to marry this year. Ms. R.'s new partner is a businessman who last year earned \$257,000 from a company he either owns or controls. He did not contribute to the down payment on the house that he shares with Ms. R., but he has been paying the mortgage. They share equally the housing and utility costs.
- [18] From September to November 2002 Ms. R. worked in a clerical position for her new partner or his company and earned \$4,739.22. In 2001 - 2002, she took two courses to qualify for a nursing program. When she was unable to enter the nursing program in September 2003, she started a 10-month commercial photography course which she completed in July 2004. There is, not surprisingly, no evidence that she has started earning any income from commercial photography.
- [19] C. has recently completed her first year at the University of Western Ontario. As provided under the Agreement, while she was at university, Mr. M.'s child support obligation was reduced to \$4,192 a month. That amount corresponds to the Guideline amount for two children based on a Guideline income of \$400,000. However, Mr. M. pays for all of C.'s education expenses, including \$500 a month for her room and board, a \$500 a month spending allowance, her airfare, and incidentals. From May to August, when C. is in Vancouver, living with her mother, child support will revert to \$5,403 a month. C. presently works at a Vancouver clothing store earning \$13.00 an hour. She will be returning to the University of Western Ontario this fall.

SHOULD THERE BE A VARIATION OR TERMINATION OF SPOUSAL SUPPORT?

- [20] Mr. M. contends that, notwithstanding paragraph 5.4 of the Agreement, there is nothing in the Agreement that prevents either party from applying to vary the amount of spousal support, based on changed circumstances. In this case, the material change of circumstances is Ms. R.'s new relationship with a partner who makes the mortgage payments on the house they share, and who shares equally the housing expenses with her. In the following cases the recipient spouse entered a new relationship, and spousal support was consequently varied or terminated: *May v. May* (1993), 48 R.F.L. (3d) 432 (Ont. Gen. Div.), *Edwards v. Edwards*, [1993] B.C.J. No. 2544 (S.C.), *Harris v. Gilbert* (1992), 39 R.F.L. (3d) 458 (Ont. Gen. Div.), *Range v. Range* (1995), 14 R.F.L. (4th) 11 (B.C.S.C.), *Wrobel v. Wrobel* (1994), 8 R.F.L. (4th) 403 (Alta. Q.B.), and *Kits v. Kits* (1998), 42 R.F.L. (4th) 167 (B.C.S.C.).
- [21] In my view, the cases are distinguishable on the basis that, with the exception of *Harris v. Gilbert*, none of them involved a settlement agreement. In any event, *Harris v. Gilbert* was decided before the decision of the Supreme Court of Canada in *Miglin v. Miglin* [2003] 1 S.C.R. 303, 2003 SCC 24.
- [22] Counsel for Mr. M. contends that *Miglin* only applies where a separation agreement provides for either a waiver of spousal support or a fixed term of support. Here, the Agreement is not a full and final settlement of spousal maintenance; it is an "open ended" spousal maintenance agreement: after a review under paragraph 5.4 Mr. M. may be obliged to pay spousal support for an indefinite period. *Miglin*, it is argued, only applies where an agreement creates finality between the parties.
- [23] With respect, in my view, the two-stage approach and principles enunciated in *Miglin* are not that restricted. As Bastarache and Arbour JJ. for the majority stated at p. 314:

In broader terms, the appeal raises the question of the proper weight to be given to any type of spousal support agreement that one of the parties subsequently wishes to have modified through an initial application in court for such support. In that sense, the matter is not restricted to spousal support agreements that contain a time-limited support arrangement or to agreements which contain a full and final release from support obligations by one or both parties.

- [24] According to *Miglin*, at the first stage, the court is to review the circumstances surrounding the making of the agreement to determine whether there is any reason to discount it. Neither party in this case suggests there was any oppression, pressure or other vulnerabilities in the making of the agreement. It is conceded that both parties had experienced counsel, and Mr. M. himself is a lawyer.

- [25] Dealing with the second stage of the analysis, *Miglin* states at pp. 351-353:

(b) Stage Two

Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find

themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should 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.

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.

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 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.

...

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.

- [26] There is no suggestion that the Agreement did not, at the time it was made, or presently, reflect the overall objectives of the Divorce Act. Viewing the factors set out in s. 15.21(4), and the circumstances of the parties at the time they made the Agreement, and the Agreement as a whole, it is clear that the parties contemplated that Ms. R. would receive spousal support of \$2,841 a month commencing August 1, 2001, plus an additional \$10,000 on March 31 of each year. Her entitlement to spousal support, and the quantum of that support would be reviewed on the fifth anniversary of the date of the Agreement, that is, August 9, 2006; but the Agreement was entitled to be a full and final settlement of all issues between them.
- [27] Mr. M. argues that there is nothing preventing him from applying to terminate or reduce spousal support before the review date, if for example, he had become disabled, or Ms. R. had won a \$10 million lottery. That is true; and a court might terminate support if either of those events had happened. Indeed, a court would likely not condone Mr. M.'s obligation to pay support to Ms. R. if she won \$10 million, or if Mr. M. suddenly found himself mentally or physically incapacitated, and unable to earn a similar income. But none of those events have occurred, and none of them could be said to be reasonably anticipated at the time the Agreement was made or now.
- [28] Counsel for Mr. M. concedes in argument that it was reasonably anticipated that Ms. R. might remarry, however, he contends that it was not reasonably anticipated that she might remarry someone who would assume the mortgage and pay half of her housing expenses. I disagree.
- [29] Ms. R. contributed towards roughly one-half the purchase price of the house, while her partner, contributes roughly one-half by assuming the mortgage. They share equally the common housing and utility costs, except that Ms. R. pays approximately 75 percent of the food bills because her children reside with them on a more full-time basis, while his two children are only at the house every three or four days.
- [30] In this day and age, and considering Ms. R.'s circumstances, it is not unreasonable that she would find a new partner (Mr. M. did), and that her new partner would pay for roughly half of the common housing costs. What has occurred is neither a significant departure from the range of reasonable outcomes, or a situation that cannot be condoned.
- [31] Mr. M. must abide by the bargain that he made. If he wants to terminate or reduce the amount of spousal support he pays, he will have to wait for a review in August 2006.
- [32] Mr. M.'s application is dismissed.

SHOULD THERE BE AN INCREASE IN CHILD SUPPORT?

- [33] The Notice of Motion filed on behalf of Ms. R. seeks an order that Mr. M. pay child maintenance pursuant to the Child Support Guidelines. It does not seek a claim for retroactive child maintenance.
- [34] However, at the hearing of the application, Ms. R. sought a retroactive increase in child support based on Mr. M.'s increase in Guideline income from \$400,000 to \$508,965 in 2002. However, I decline to make an award for retroactive child maintenance.
- [35] Ms. R. says that child support was based on a Guideline income of \$400,000. Mr. M. says that the amount of child support just happened to correspond to a Guideline income of \$400,000.
- [36] Ms. R. relies on *E.E.C. v. M.A.C.*, 2002 BCSC 953, rev'd (2003), 46 R.F.L. (5th) 366 (B.C.C.A.), but that decision is quite distinguishable. There, the agreement provided that the payor husband would receive an annual income of \$215,000, but he paid child support on average in accordance with a Guideline income of \$133,000. Mr. Justice Cole found that his average income between 1997 and 2001 was approximately \$550,000 a year, but ordered ongoing child support of \$9,538 a month based on his 2001 income of \$940,000.
- [37] In this case, the Agreement set out Mr. M.'s earnings for the last three fiscal years. While they averaged \$441,334 a year, the parties agreed by paragraph 4.1, that "for the purposes of calculating child support", his Guideline income "shall be \$400,000 per year".
- [38] Paragraph 5.8 of the Agreement provides that either party may apply to vary the child support provisions "upon the occurrence of a material change in the circumstances of either party or of any Child for whom such support is required". That is, the Agreement does not provide for an annual adjustment to child support based on Mr. M.'s salary changes each year.
- [39] While there is a difference between his average salary of \$441,334 for the years 1998 to 2000, and \$510,762 for the years 2001 to 2003, Mr. M. points out that the Agreement expressly sets out that in 2000 he made \$606,706, which is more than what he earned in 2002 or at present.
- [40] I am not convinced that there has been a material change in circumstances requiring an increase in the amount of child support. The two younger children R. and M. now spend more time at their father's house than they did at the time the Agreement was entered into; Mr. M. now has responsibility for five children, rather than just three; C. is now 19, and works during the summer months between university terms.
- [41] Ms. R.'s application is dismissed.

CONCLUSION

[42] For the reasons set out above, the applications of both parties are dismissed. Counsel for Ms. R. asked for leave to speak to the issue of costs. Accordingly, if the parties cannot agree on costs, they may speak to the matter.

"F.W. Cole, J. for L.A. Loo, J."

The Honourable Mr. Justice F.W. Cole

for The Honourable Madam Justice L.A. Loo

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