
CANADA / JUDGMENT

Quelch v. Quelch

2012 BCSC 667

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 667 Quelch v. Quelch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Quelch v. Quelch,

2012 BCSC 667

Date: 20120509

Docket: E050320

Registry: Vancouver

Between:

Laurel Jean Quelch

Claimant

And

Dale Theodore Quelch

Respondent

Before: The Honourable Mr. Justice Meiklem

In Chambers

Reasons for Judgment

Counsel for Claimant:

M.E.B. Wood

Counsel for Respondent:

I.B. Hayward

Place and Date of Hearing:

Vancouver, B.C.

March 14 & 15, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 9, 2012

Introduction and Overview

- [1] This hearing dealt with cross-applications in a very protracted divorce proceeding.
- [2] Mrs. Quelch filed a notice of application on April 7, 2011, seeking a divorce and specific final corollary relief orders by way of a summary trial under Rule 11-3 of the Supreme Court Family Rules.
- [3] Mr. Quelch filed an application on November 3, 2011, and amended application on November 22, 2011, seeking to amend his filed statement of defence and counterclaim to claim a declaration of final settlement and final orders:

...in accordance with the settlement reached in or about 2007 and documented in a draft order finalized between counsel for the parties, as set out at Schedule "A" hereto.

- [4] Mr. Quelch's application also seeks orders to enforce and implement the terms of the parties' settlement, and to stay the proceedings except for the purpose of enforcing the agreement. Alternatively, Mr. Quelch seeks an order that all claims be adjourned to a full trial.
- [5] Mrs. Quelch argues that the corollary relief issues are amenable to being decided by way of summary trial. She asserts that the agreement reached in September 2007 was tentative and not finalized with either a signed agreement or an entered consent order, and in any event is impeachable on the basis of duress and unconscionability. In the event it is found to be enforceable, Mrs. Quelch argues it should nevertheless not be enforced by the court because it falls far short of substantial compliance with the general objectives of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) and the Spousal Support Advisory Guidelines [SSAG], considering the lengthy traditional marriage circumstances. I will expand later on the specific shortcomings alleged.
- [6] Mrs. Quelch deposed that the September 2007 "tentative" settlement was agreed to because she relented to pressure to settle exerted by Mr. Quelch; and she agreed to spousal support below the applicable ranges in the SSAG because Mr. Quelch was finally agreeing to an immediate sale of the jointly owned former matrimonial home, which she expected would provide her with sufficient funds to buy a house, pay her debts and have savings. Her expectations were not realized because the house remains unsold approximately four and a

half years later.

- [7] I granted Mr. Quelch's application to amend the pleadings without opposition from counsel for Mrs. Quelch, thus bringing the issue of whether there was a valid and binding settlement agreement between the parties into the forefront in this summary trial. Mr. Quelch takes the position that this issue of settlement is amenable to summary trial, but if there is no declaration upholding a binding settlement, the property and spousal support issues are not suitable for determination on a summary trial basis. One of his arguments in support of that position is that a vocational assessment of Mrs. Quelch, which was provided for in a September 12, 2007 order, should proceed before the issue of spousal support is tried.
- [8] The first issue before the court is, therefore, whether the parties reached a settlement agreement in September 2007 which they intended to be final, binding and enforceable.

Background

- [9] The parties were married on June 25, 1977. They separated on or about January 31, 2005, although they continued to reside in the same home until January 2006, when Mrs. Quelch moved out. These proceedings were commenced in February 2005. Mr. Quelch has continued to reside in the former matrimonial home. The parties are not yet divorced, so they have been married for nearly 35 years, of which they co-habited for nearly 28 years.
- [10] The first relevant court order in the proceeding was the November 3, 2006 order of Rogers J. which included a s. 57 Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] declaration and determined a Guideline income of \$160,000 per annum for Mr. Quelch while he was working as an airline pilot and \$98,600 while he was on disability. Mrs. Quelch's Guideline income was determined at \$12,000 per annum.
- [11] The November 3, 2006 order provided for interim spousal support of \$3,340 per month when Mr. Quelch was working and \$1,600 per month if he was on disability. (He had been taking stress leave, the stress being partially attributed to the separation). The order determined child support for the 18 and 16 year old sons of the marriage. (The parties' older daughter was by then independent). Child support for the older son was discontinued in a consent order dated September 12, 2007, which provided that child support for the younger son would continue at \$1,380.00 per month. (Support for the youngest child came to an end in September 2009).
- [12] The September 12, 2007 order also provided, by consent, that Mrs. Quelch would produce certain financial documents, and it provided that Mrs. Quelch would attend a named vocational consultant at a time and date to be agreed to by the parties. At the time of that order, the trial of the proceedings was scheduled for five days commencing November 5, 2007.

- [13] On September 14, 2007, an examination for discovery of Mr. Quelch was scheduled, but the parties and their lawyers used the meeting for settlement negotiations. By letter dated September 26, 2007, counsel for Mr. Quelch (Mr. Hayward) forwarded a draft consent order to counsel for Mrs. Quelch (Ms. Wood) ostensibly setting out, in 5 pages and 37 paragraphs, the terms of their comprehensive agreement on all issues in the proceeding.
- [14] The main terms of the draft consent order were as follows (paraphrased):
- 1) Child support, initially \$1,380 per month would be adjusted on May 15th of each year to conform to the Federal Child Support Guidelines (the "Guidelines"); child support would be binding on Mr. Quelch's estate;
 - 2) The matrimonial home would be listed forthwith at a price recommended by a jointly selected realtor. Upon sale of the home, the proceeds after encumbrances and commission would be divided equally, except that Mrs. Quelch would receive \$40,000 more than Mr. Quelch;
 - 3) Pending the sale of the matrimonial home, Mr. Quelch would pay the mortgage, taxes, utilities and maintenance of the home;
 - 4) Pensions would be divided under Part 6 of the FRA with other specific terms as recommended by pension consultant, Tom Anderson;
 - 5) Commencement dates and final entitlement dates would be dates of first employment and November 3, 2006, respectively (the latter being the date of Rogers J. s. 57 declaration);
 - 6) Mrs. Quelch would assume responsibility for the joint line of credit at Coast Capital Savings, but other debts would be assumed by the party whose name was on the obligation;
 - 7) Mr. Quelch would retain his shares in two corporate entities, a one-third interest in property at Nimpo Lake, his truck, a boat and trailer, and Mrs. Quelch would retain her vehicle and her interest in a modelling agency and modelling school;
 - 8) Mr. Quelch would pay \$3,000 per month spousal support until (his) age 60, being March 2016, "at which time all spousal support payments shall terminate absolutely";
 - 9) The spousal support obligation would be binding on his estate;
 - 10) Spousal support paid in 2006 would be declared by a re-filing of Mrs. Quelch's income tax return and Mr. Quelch would pay any tax on the approximately \$3,000 increase in the amount declared; and
 - 11) Each party would bear their own costs.
- [15] In addition to these main provisions there were clauses setting out agreements on specific expenses associated with the remaining child of the marriage, sharing of pension administration fees, transfer of a small number of Aeroplan points, and a division of family photographs.

[16] Mrs. Quelch's lawyer, Ms. Wood, suggested some minor changes relating to form, such as reorganizing the paragraphs under subheadings, changing the word "will" to "shall" throughout the document, but no changes of substance were suggested. Counsel for the parties discussed the possibility of speaking to the order in court before entry, and by an email dated January 23, 2008, Ms. Wood wrote to Mr. Quelch's counsel, Mr Hayward, inquiring if he had yet had Mr. Anderson draft the pension clauses. This email stated:

The draft order should be finalized and entered. Laurel wants this matter wrapped up.

[17] Later in January 2008, Ms. Wood wrote to Mr. Hayward, advising of her client's concerns about Mr. Quelch not having signed the listing agreement on the house and repeated that her client wanted to proceed and to have the consent order entered. Ms. Wood commented that she may have to apply to court to finalize matters.

[18] On February 15, 2008, Ms. Wood again emailed Mr. Hayward as follows:

Laurel was told by Dale that he had signed the listing agreement with Roslyn. Laurel gave Dale time at the beginning to try and come up with the money to purchase her interest, but she understood that the property had been listed since December 2007.

Laurel got a call from the real estate agent yesterday and was told that Dale had still not signed the listing agreement. As you are aware, Dale's discovery last September was adjourned because the parties reached an agreement. This included Dale's agreement to list the property for sale. 5 months have passed without a listing agreement. The property has to be listed on the MLS immediately.

Although Dale keeps telling Laurel that he is going to get the money to buyout her interest, he has not been able to raise the money. Could you please have Dale sign the listing agreement with Roslyn immediately. It needs to be listed on the MLS for maximum exposure.

[19] Mr. Hayward responded on February 18, 2008, advising that his client had informed him that he was going to sign the listing agreement that day.

[20] In March 2008, without prior consultation with their family lawyers, the parties arranged to refinance the matrimonial home, paying out the pre-existing mortgage and providing Mrs. Quelch with \$225,000 and Mr. Quelch with \$337,094.31 from their equity in the home. The parties eventually advised their family lawyers of this and the draft consent order was revised by Mr. Hayward and Ms. Wood some months later to reflect a different division of proceeds upon the sale of the matrimonial home, and to provide for a partial contribution from Mrs. Quelch towards the new mortgage payments pending the sale of the home. She had agreed to pay a portion of the new mortgage payment proportionate to the amount of the equity she had received. This portion turned out to be \$991.50 per month, which was 29.0323% of the whole payment.

[21] In April 2008, Mr. Hayward forwarded Mr. Quelch's Air Canada pension statement to the pension consultant, Mr. Tom Anderson. Mr. Anderson had been selected as a consultant to draft the appropriate pension clauses due to his known expertise on the subject of the Air Canada Pension plan. Counsel were aware from previous experience that Air Canada did not honour simple division at source directions and required special provisions and language in order to implement court-ordered or agreed pension division on divorce. This was not expected to require any further negotiations between the parties who had agreed on an equal division and on the relevant commencement and entitlement dates.

[22] The evidence does not inform us as to when the lawyers first communicated about the revisions required to the draft consent order to deal with the equity draw down by the parties, but Mr. Hayward sent Ms. Wood the following email on February 23, 2009:

I recognize that your client had a very difficult family situation but I am respectfully wondering if you are now in a position to finalize this order. Please let me know as soon as possible.

[23] Ms. Wood's emailed response, also dated February 23, 2009, was:

Laurel was in to see me. We reviewed the paragraph relating to the house. It's confusing and I was going to reword it. But the end result is the same. I'll forward it to you. Do you have the pension clauses/agreements from Tom Anderson yet? We need these to enter the consent order.

Thanks. Laurel wants this matter concluded as well.

[24] In her March 11, 2009 letter to Mr. Hayward dealing with the wording of the revisions necessitated by the re-mortgaging of the home, Ms. Wood wrote:

The formula for calculating Ms. Quelch's share of the sale proceeds in paragraph 16(c) is correct, however, for clarity could you have the Order show:

- c. to pay to the Plaintiff an amount equal to 50% of the sale proceeds less the Sale Adjustments minus 42.77% of the payout amount for the Mortgage at the time of completion of the sale, in other words

$50\% \times (\text{sale proceeds} - \text{Sale Adjustments}) - 42.77\% \times \text{Mortgage}$

There is one other item in paragraph 16 that is different from the initial draft order. Paragraph 16.d provides for the payment of \$20,000 to Ms. Quelch after her share of the sale proceeds is determined under the formula. The initial draft order stated in paragraph 16.c that the balance of the sale proceeds would ... "be divided between the Plaintiff and Defendant such that the Plaintiff receives exactly \$40,000 more than the Defendant". I confirm that the revisions made to the wording in paragraph 16 will still result in Ms. Quelch receiving \$40,000 more than Mr. Quelch.

Lastly, could you please provide me with a draft of the pension clauses that were to be prepared by Tom Anderson. These pension clauses are required before the draft Order can be finalized.

[25] On April 9, 2009, Ms. Wood sent Mr. Hayward an email stating:

It appears that the pension clauses are now holding up the entry of the consent order. If it will assist in moving matters along, I am willing to contact Tom Anderson to deal with the pension clauses. Please let me know your views.

- [26] In his April 11, 2009 response, Mr. Hayward advised that he would be contacting Mr. Anderson on April 14 to check on his progress and would advise Ms. Wood right away upon hearing from him. The next communication appears to be Ms. Wood's letter of June 8, 2009, asking if Mr. Hayward had heard from Mr. Anderson in regards to the pension clauses. That email string does not include a response from Mr. Hayward, (although there may have been a response by telephone), but on September 19, 2009, Mr. Hayward wrote to Mr. Anderson inquiring about the status of the pension clauses and offering to provide anything further that might be required. Enclosed in that letter, for Mr Anderson's "convenience", was a copy of what Mr. Hayward termed "our draft order as it currently exists". That draft included the revisions that were made to incorporate the effect of the parties' remortgaging of the former matrimonial home, including the wording suggested by Ms. Wood in her March 11, 2009 letter quoted in para. 24 above.
- [27] In mid-October 2009, Mr. Anderson emailed Mr. Hayward advising that he had reviewed the information provided and that it would be necessary to retain an actuary which he sought authorization to arrange. It appears that there was some delay in Ms. Wood obtaining Mrs. Quelch's approval regarding the cost of an actuary, but she informed Mr. Hayward on November 20, 2009, confirming that he could go ahead and retain the actuary on the basis that Mr. Quelch would pay for same and deduct Mrs. Quelch's one-half share of the cost from money he owed her for the cost of their daughter's wedding.
- [28] There does not appear to have been any further correspondence regarding the drafting of the pension clauses by Mr. Anderson until June of 2011, when Mr. Anderson forwarded materials regarding his approach to the pension division clauses to both parties and their respective counsel. Mr. Anderson received permission from both sides to proceed as suggested and on August 12, 2011, he advised Mr. Quelch and Mr. Hayward that he was going to be on vacation, but would give the matter priority upon his return.
- [29] I note that by August 2011, Ms. Wood had already filed the notice of application currently before the court. The application and the supporting affidavit of Mrs. Quelch, sworn March 30, 2011, were filed with the court on April 7, 2011.
- [30] The following paragraphs of Mrs. Quelch's March 30, 2011 affidavit capture her main reasons for wanting to resile from the terms of the September 14, 2007 settlement:
18. On September 27, 2007 Dale's lawyer sent a draft consent order to my lawyer which incorporated the tentative settlement. The draft consent order was incomplete in that it did not contain pension clauses dealing with Dale's pension with Air Canada.

19. Five months lapsed. The Matrimonial Home remained unlisted. Although Dale, who was living in the Matrimonial Home, had been provided with a listing agreement prepared by the real estate agent, he delayed the signing of the listing agreement.
- ...
21. I was relying on the sale of the Matrimonial Home. I was in debt. I had numerous bills to pay and loans to repay. I had borrowed money to pay for family expenses incurred after Dale and I separated in 2005. I was also relying on receiving sale proceeds so that I could purchase a house. I was still paying rent.
22. In the latter half of February 2008 Dale finally signed the listing agreement for the sale of the Matrimonial Home. Although developers were interested in our property, we had not received any firm offers. I needed money. Dale also wanted money. We agreed to refinance the Matrimonial Home without consulting our family lawyers.
- ...
25. The refinancing of the Matrimonial Home complicated matters and required a new method for calculating the division of the sale proceeds when the Matrimonial Home sold. The wording of the draft consent order had to be revised to reflect the change in circumstances. Although the draft consent order was further revised at least two times, the pension clauses related to Dale's pension with Air Canada were never drafted. The draft consent order remained incomplete.
- ...
27. In November 2008 I asked the lawyer in Surrey who prepared the new mortgage with TD Canada Trust to provide a breakdown of my responsibility and Dale's responsibility under the new financing agreement. The mortgage payments under the new mortgage with TD Canada Trust were \$4,875 per month. Since I received \$225,000 from the mortgage proceeds, my share of the mortgage payments was calculated to be 29.03% or \$1,415 per month. Dale received \$337,094 from the mortgage proceeds, therefore his share of the mortgage payments was calculated to be 43.75% or \$2,132 per month on the funds advanced. Dale was also responsible for paying the percentage of the mortgage payment related to the payout of the "old mortgage" with CIBC calculated to be 27.22% or \$1,328 at the time of refinancing. Dale was responsible for the portion related to the "old mortgage" because he was living in the Matrimonial Home, whereas I was paying rent of \$1,315 per month.
- ...
32. I do not have any money left from the \$225,000 that I received from the mortgage proceeds. My legal fees had accumulated over four years and I paid them from the mortgage proceeds. I also used the mortgage proceeds to pay 1) my credit card debt of approximately \$15,000, 2) all of my daughter's wedding expenses including the engagement party, bride's and bridesmaids' dresses, bridal shower, bridesmaids' dinner and reception which totalled

approximately \$46,000, 3) \$10,000 to my son for the purchase of a truck, 4) \$10,000 to my other son for the purchase of a truck, 5) \$11,000 to Revenue Canada for taxes and 6) make loan payments on my 2006 Ford Focus. The balance remaining from my share of the mortgage proceeds have been used to meet the shortfall between my income and monthly expenses.

33. In September 2009 the child support of \$1,380 per month that I was receiving for Nicholas was terminated because Nicholas turned 19 and was no longer attending school. Since September 2009 my only source of income has been spousal support of \$3,000 per month, and employment income which averages \$1,000 per month.

...

35. I am seeking to increase or vary the amount of spousal support that Dale has been paying to me under the tentative settlement that was never finalized. I never anticipated or expected that I would be paying rent, plus making a mortgage payment today. In 2007 Dale exerted a great deal of pressure on me to accept \$3,000 per month for spousal support even though it was below the spousal support advisory guideline range. I understood that I would have enough money to buy a house, be debt free and have savings. I had no way of knowing that my financial circumstances would unfold the way they have over the past 3 ½ years. My financial circumstances have changed substantially, particularly since I am spending a total \$2,306.50 per month on shelter costs related to rent (\$1,315) and mortgage payments (presently \$991.50). I have not been able to purchase my own house, and there appears to be no end in sight since the Matrimonial Home remains unsold.

...

39. In 2007 Dale obtained a court order requiring me to attend a vocational consultant to undergo a vocational assessment. I am 55 years of age. I have now worked in sales of women's fashions for a number of years. I am still prepared to attend for a vocational assessment. However, based on my age, the present job market, the economy and the fact that I have no post-secondary schooling other than bible college, I am not confident that I will find work that will pay more than I am presently earning. I have made real efforts, without success.
40. I also have health problems that have affected my ability to work more hours. My father passed away in January 2009 from complications related to colon cancer and emphysema. I have since been caring for my elderly mother who has medical issues. The stress related to the care of my mother, this litigation and financial worries has affected my health. I have been sick off and on, and have undergone a number of tests. I was recently diagnosed with supraventricular tachycardia. I suffer from rapid heartbeat, heart palpitations, dizziness, chest discomfort and become breathless.

41. I also suffer from numbness in my face and right arm and recently underwent new tests including a neck x-ray and MRI. I was diagnosed with osteoarthritis from the neck x-ray. My doctor does not have the results from the MRI. I am presently seeing a neurologist, Dr. Singh, to determine the cause of the numbness.
42. I am also receiving message therapy for the stiffness in my neck and shoulders which causes headaches and pain. I have been told that I should continue the massage therapy to prevent the shortening of the neck and back muscles.

Discussion

- [31] Ms. Wood's written argument makes the point that the draft consent order attached to Mr. Quelch's application, and which he seeks to have the court enforce, is not the same as what she calls the "tentative" agreement reached in September 2007, because it sets out the revised terms concerning the new mortgage obtained in March 2008, and it bears a date of November 2007. She argued that since the 2007 "tentative" agreement provided that Mr. Quelch would make all payments under the mortgage, enforcement should mean that he should continue to do so, even for the new \$775,000 mortgage, because his payment of all mortgage payments was a condition upon which Mrs. Quelch agreed to accept \$3,000 per month for spousal support.
- [32] With respect, this argument does not address the question as to whether a final agreement was reached in 2007; it merely attempts to exploit an obvious omission in the drafting of Mr. Quelch's amended pleading, which implicitly intends, as I read it in the context of undisputed facts, to treat the September 2007 agreement as subsequently amended in 2008 by the oral agreement of the parties and their belated instructions to their respective lawyers to revise the draft consent order. The previously quoted portions of Mrs. Quelch's March 30, 2011 affidavit clearly verify her participation in the re-mortgaging as well as her agreement to pay a share of the new mortgage payment proportionate to her drawdown of equity and her understanding of the need to revise the draft consent order accordingly.
- [33] Clearly Mr. Quelch is asking the court to enforce the terms of the 2007 settlement as subsequently amended by agreement, the entirety of which is evidenced by the last revision of the draft consent order which was agreed to by the parties through counsel.
- [34] Mr. Quelch relies on the following cases respecting the finality and enforceability of settlement agreements in various factual circumstances which are comparable in varying degrees to this case: *Sudmant v. Campbell* (1993), B.C.L.R. (2d) 361 (CA); *Sudmant v. Campbell*, [1990] B.C.J. No. 2415 (BCSC) ; *Fewer v. Fewer*, 2011 BCCA 502; *Flick v. Flick*, 2011 BCSC 264; *Frolick v. Frolick*, 2007 BCSC 84; *G.E.F. v. O.S.P.F et al*, 2005 BCSC 669; *S.S. v. D.W.S.*, 2004 BCSC 597; and *C.R.E. v. K.L.K.*, 2003 BCSC 1570.
- [35] The law is clear that the absence of a written document signed by the parties is not determinative of whether a binding settlement agreement was reached, provided that there is satisfactory evidence of the intentional meeting of the minds of the parties on all the

essential terms of the agreement, and a discernible meaning to the terms. In this case, the agreement of the parties was negotiated in a September 14, 2007 meeting together with their lawyers, who subsequently settled the expression of the agreed terms in a draft of a consent order, which the lawyers intended to file with the court pursuant to instructions from the parties, once the specialized provisions to be drawn by Tom Anderson were incorporated. There was nothing further to be negotiated, so the trial of their divorce proceeding set for November 2007 was adjourned generally.

- [36] The terms of the original settlement agreement as set out in the draft consent order are certain and unambiguous. The parties' common intention to finalize their litigation on the terms of the draft consent order was reiterated in email and letter exchanges between counsel several times over the course of what unfortunately became several years. The parties have acted in accordance with the terms of the settlement, except for Mr. Quelch's initial tardiness in not signing a listing agreement until February 2008, rather than "forthwith" as he had agreed to do. Mrs. Quelch did not elect to treat that tardiness as a fundamental breach and carried on with efforts to make the revised consent order complete and ready for entry.
- [37] Mrs. Quelch was alleging a certain degree of intimidation and pressure by Mr. Quelch in affidavits filed in this proceeding even before September 2007. Considering that she has been represented by the same experienced counsel throughout the proceeding, including during the September 14, 2007 meeting, I must infer that counsel was aware of her potential vulnerabilities in that regard and was satisfied that her client's agreement on September 14, 2007 was not obtained by coercion or economic duress arising from Mr. Quelch's conduct.

Findings and Conclusions

- [38] I conclude that the parties did agree to a final settlement of the corollary issues of spousal support and property division in their meeting on September 14, 2007, and in the subsequent exchanges between counsel which reduced the terms of that settlement agreement and the subsequent agreed revisions concerning the former matrimonial home to a draft consent order in the form attached to Mr. Quelch's amended pleadings.
- [39] Notwithstanding that conclusion, I do not think it is appropriate to stay the proceedings and incorporate all of the terms of the settlement in a final order of divorce that speaks from today. My concern is with the spousal support provisions.
- [40] Ms. Wood's submissions have persuaded me that there is a viable argument that the spousal support terms of the 2007 settlement, if imposed today, would fall significantly short of substantial compliance with the objectives of the Divorce Act in achieving an equitable sharing of the economic consequences of marriage and marriage breakdown in this case. This court does not have jurisdiction to set aside or vary the terms of the settlement agreement not yet incorporated into a consent order: *Zimmerman v. Shannon*, 2006 BCCA 499. Nonetheless, following my finding that the parties did reach a final settlement

agreement, the parties are now in the same position as the parties in *Miglin v. Miglin*, 2003 SCC 24, namely the claimant wife has applied for an initial spousal support order inconsistent with a pre-existing agreement.

[41] In such cases, para. 64 in *Miglin* applies:

64. An initial application for spousal support inconsistent with a pre-existing agreement requires investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and, second, at the time of the application. ...

[42] The Supreme Court of Canada then sets out, in paras. 81-91 of the *Miglin* decision, the specifics of the two-stage approach to be employed in such cases. After an examination of the circumstances of the formation of the agreement and the potential vulnerabilities of the parties, the approach calls for an assessment of the extent to which the substance of the agreement took into account the objectives of the Divorce Act at the time of its creation, and then at a second stage of analysis:

Accordingly, on the bringing of an application under s.15.2, the court should assess the extent to which it is still in substantial compliance with the objectives of the Act [para 87].

[43] Only a significant departure from the general objectives of the Divorce Act will justify intervention by the court, but in my view the difference between the spousal support provisions of the agreement in this case and the applicable ranges in the SSAG may well qualify as such, particularly on the assessment at the time of the application. The agreement provided for spousal support of \$3,000 terminating absolutely at Mr. Quelch's 60th birthday in March 2016. As pointed out in paragraph 89 of Mrs. Quelch's written argument, at their respective incomes for 2010 of \$201,169 and \$13,077, the applicable SSAG "without child support" formula suggests a range between \$5,549 and \$7,272, with a mid-point of \$6,474, and suggests an indefinite duration.

[44] Thus, the agreement provides for spousal support in an amount that is less than one-half the mid-range set out in the SSAG and very limited in duration. The agreement does not appear to provide any offsetting compensation or re-apportionment of assets to justify that degree of departure. (The original slightly unequal division of house sale proceeds related to division of other property and was consistent with an equal division overall). Mrs. Quelch's evidence is that she agreed to accept \$3,000 per month (which was marginally below the low end of the SSAG "with child support" formula at the time) based on the express term of an immediate listing of the matrimonial home, but also with secondary reliance on Mr. Quelch's stated intention to borrow money from a friend and purchase her interest for \$900,000.

[45] Mrs. Quelch submitted that if the court pronounced a final order in accordance with Mr. Quelch's application it would be destined to be varied. The following portions of *B.G.D. v. R.W.D.*, 2003 BCCA 259 were cited in that regard:

- [11] Counsel argued eloquently and forcefully that the parties ought to be allowed to agree to a dismissal of the action to achieve finality without the requirement to submit themselves to further court proceedings, perhaps many years hence, with their attendant expense and anxiety. In my view, that proposition is defeated by the recent decision of the Supreme Court of Canada in *Miglin v. Miglin* 2003 SCC 24 (S.C.C.).
- [12] As I understand the *Miglin* decision, any agreement purporting to deal in a final way with spousal maintenance is open to subsequent review by a court. It has narrowed the grounds upon which such an agreement might be set aside or varied but it nevertheless reaffirms the jurisdiction of the court to examine the agreement to determine whether the circumstances are such that it ought to be varied. In that respect it confirmed, at para. 51 of the decision, that the court has jurisdiction to review and reject the terms of pre-existing agreements, as that proposition was set out in *Pelech*, supra. It must be remembered that in *Pelech* the agreement was that the wife accepted the agreed terms for spousal maintenance in full settlement of all her claims then or in future and that that agreement was incorporated in a consent order. Nevertheless, the court varied the agreement and the consent order.
- [15] LAMBERT J.A.: I agree with the reasons of Mr. Justice Smith. In the course of those reasons, Mr. Justice Smith discusses the question of the finality of an agreement between the parties with respect to support. He says it makes no difference if that agreement is subsequently incorporated in a court order. I would like to add that it is my understanding that a court order dismissing a support claim, even if it is not supported by a prior agreement of the parties, or does not incorporate a prior agreement of the parties, cannot be said to be final having regard to the decision in *Miglin*, supra. The jurisdiction of the courts always remain[s] open, if the circumstances are appropriate, to consider the matter again.
- [46] If I granted a final spousal support order in accordance with the draft consent order, Mrs. Quelch's inevitable subsequent variation application would, just like her present application, require a *Miglin* inquiry procedure because of the contractual origin of the order: *Turpin v. Clark*, 2009 BCCA 530. However, she would also face what I consider to be a false and illegitimate inference that this court had, in granting the final divorce order, found that its provisions were in substantial compliance with the objectives of the Divorce Act. This is because, as stated in *Turpin*, at para 57:
- [57] A variation application under the Divorce Act is not a hearing de novo but proceeds on the basis that "the court is to take the amount of maintenance originally ordered as the correct amount at the time the order was made and then to consider to what extent the circumstances of the parties have altered or changed since the decree nisi was granted": *Oakley v. Oakley*, [1985] B.C.J. No. 2464 (C.A.) at para. 16, 48 R.F.L. (2d) 307. ...
- [47] And at para 61:
- [61] The circumstances of this case differed from *Miglin* in that they involve a variation rather than an initial application for spousal support. On an initial application, stage one is important as it focuses on the validity and reasonableness of the agreement when it was

made. The difficulty for Ms. Clark is that stage one of the Miglin analysis was not in issue in her application because the chambers judge reasonably inferred that the judge who had acceded to the parties' request to incorporate the Minutes into the divorce order was satisfied that the agreement was fairly negotiated and substantially complied with the objectives of the Divorce Act.

- [48] In the circumstances of this case, it is wholly inappropriate and unjust that Mrs. Quelch be burdened on a variation application with an erroneous inference or presumption that the spousal support provisions of the September 2007 agreement have been adjudged correct today. Furthermore, I consider that the court has a duty not to approve the filing or pronouncement of an agreement on spousal or child support as an order of the court where there is a live question as to its compliance with statutory objectives.
- [49] Neither party came to this hearing prepared to deal with Mrs. Quelch's summary trial application on the basis of a Miglin inquiry, because of their disagreement about whether there was a final settlement agreement.
- [50] In my view there is no reason to delay the granting of the divorce (subject to the parties filing a registrar's certificate of pleadings) and the incorporation into the divorce order of the provisions of paragraphs 14 to 45, inclusive, of the draft consent order which is schedule A to Mr. Quelch's amended pleadings. These paragraphs do not include the dated provisions regarding now adult children or the spousal support provisions. The parties shall set the spousal support claim advanced in paragraph 12 of Mrs. Quelch's notice of application down for hearing, whether by way of summary trial or vive voce trial as they shall agree, but all other claims in Mrs. Quelch's application, other than the claim for costs in respect of the spousal support issue, are dismissed. I do not remain seized of this matter.
- [51] Orders are granted accordingly.
- [52] There will be no order as to costs in light of what I consider equally divided success.

"I.C. Meiklem J."

MEIKLEM J.

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