
CANADA / JUDGMENT

Turpin v. Clark

2009 BCCA 530

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 530 Turpin v. Clark

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Turpin v. Clark,

2009 BCCA 530

Date: 20091125

Docket: CA036631

Between:

David Howard Turpin

Appellant

(Plaintiff)

And

Shirley Laurene Clark

Respondent

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, October 27, 2008

(Turpin v. Clark, 2008 BCSC 1425)

Counsel for the Appellant:

M. Ellis, Q.C.

Counsel for the Respondent:

G. Lidstone

Place and Date of Hearing:

Victoria, British Columbia

September 23, 2009

Place and Date of Judgment:

Vancouver, British Columbia

November 25, 2009

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Madam Justice D. Smith:

- [1] This appeal raises two issues. The first involves the proper test to be applied on a variation of a consent order made under the Divorce Act, which incorporates terms of a final agreement, and the court's authority to vary such an order in accordance with the Spousal Support Advisory Guidelines [SSAG]. The second relates to the effect on a payor's obligation for child support under s. 7 of the Federal Child Support Guidelines [Guidelines] where a payee has failed or refuses to disclose an adult child's income or earning capacity as required by a term of the consent order.

A. Overview

- [2] The appellant, David Howard Turpin, age 53, and the respondent, Shirley Laurene Clark, age 55, began their spousal relationship in 1984. They were married on October 12, 1985, separated on July 1, 2004, and were divorced on October 25, 2005 (the "divorce order"). The parties have two children, a daughter (C.T.), now 22, who attends university away from home, and a son, now 17, who continues to reside with Ms. Clark.

- [3] The divorce order, by consent, incorporated the property and corollary relief provisions of Minutes of Settlement signed by the parties and made effective October 21, 2005 (the "Minutes"). The Minutes disclosed an intention by the parties to enter into a final settlement agreement for an equal division of the family assets, child support under ss. 3 and 7 of the Guidelines, and "step-down" (decreasing) spousal support for a fixed term. The unusual form of the divorce order provided that Mr. Turpin was to pay child and spousal support to Ms. Clark "in accordance with the Minutes of Settlement attached hereto as Schedule 'A.'" The order itself did not contain the material provisions of the Minutes.
- [4] Twenty-seven months after the divorce order and one month after the second-stage reduction in spousal support, Ms. Clark applied for a variation of the spousal support provisions of the divorce order that would increase and extend the support to comply with the SSAG. In particular, she sought an amount of support based on Mr. Turpin's annual ceiling income of \$350,000 and her annual income of \$2,000, for an indefinite term, and for an increase in child support both retroactively and prospectively.
- [5] Mr. Turpin opposed Ms. Clark's variation application on the grounds that the parties had entered into a final settlement agreement. He also claimed that Ms. Clark had not complied with the Minutes by failing to disclose her reasonable business expenses for the purpose of calculating her income. He further opposed any increase in the child support on several grounds, including a lack of disclosure of C.T.'s ability to contribute to her educational costs as required in the Minutes.
- [6] On October 27, 2008, the chambers judge varied the divorce order by increasing both spousal and child support (the "variation order"). He found that Ms. Clark had met the threshold test for a material change in circumstances pursuant to s. 17(4.1) of the Divorce Act and the threshold test for a variation of a final agreement in accordance with *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303. The reasons for judgment are indexed at 2008 BCSC 1425.
- [7] The effect of the new spousal support provisions in the variation order was to rescind the step-down provisions of the divorce order and provide monthly spousal support of \$9,300, a level that was consistent with the range provided for by SSAG, until 2011, when the amount of support would decrease to \$7,500. In deference to the parties' agreement, no change was made to the duration of the spousal support award.
- [8] Mr. Turpin appeals the variation order. He raises two grounds of appeal in that regard. First, he submits the chambers judge erred in finding that Ms. Clark had met the jurisdictional threshold of a material change of circumstances for a variation of spousal support pursuant to s. 17(4.1) of the Divorce Act. Section 17(4.1) requires that "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." Second, Mr. Turpin claims that, even if the jurisdictional threshold was

met, the chambers judge erred in finding that Ms. Clark had met the higher threshold required by Miglin for variation of a final support agreement. Where the negotiation of the agreement is not impugned and it is acknowledged to be in substantial compliance with the Divorce Act (as in this case), Miglin requires an applicant seeking to vary a final agreement to establish that new or changed circumstances have occurred which amount to a significant departure from the range of reasonable outcomes within the contemplation of the parties when they made the agreement. Bastarache and Arbour JJ., for the majority, described this higher threshold as follows:

- [87] 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 it is still in substantial compliance with the objectives of the Act.
- [88] The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.
- [9] The Miglin test, though developed in the context of an initial application under s. 15.2 of the Divorce Act, is equally applicable to a variation application under s. 17(4.1) of the Divorce Act (Miglin at 91).
- [10] Mr. Turpin further submits that, if the Court concludes the chambers judge was correct in finding that Ms. Clark had met the Miglin threshold for variation of a final agreement, the extent of the court's intervention in changing the provisions for spousal support went beyond the degree warranted by any unanticipated circumstances.

- [11] The variation order also increased child support for both children based on an increase in Mr. Turpin's income. Mr. Turpin does not take issue with the increased child support for the parties' minor son or the orders for the payment of arrears of child support. He disputes, however, the increased award for C.T., not on the basis of any miscalculation of the award, but due to Ms. Clark's failure to disclose the daughter's income or capacity to contribute to her own support, as required by the Minutes.

B. Background

- [12] The chambers judge provided the following summary of Mr. Turpin's employment background and earning capacity:
- [4] The plaintiff has had a distinguished academic career. During the marriage he rose through the ranks of academia, gaining senior administrative positions at various universities across Canada. He was appointed President and Vice Chancellor of the University of Victoria in 2000 and continues to hold that position.
- [5] The plaintiff's current contract of employment with the University of Victoria is for a term which commenced on September 1, 2004, and expires on August 31, 2010. Initially, the plaintiff's basic annual salary under that contract was \$290,000. In addition, the plaintiff received an annual housing and automobile allowance of \$50,000, for a total of \$340,000. The employment contract also provides for annual performance bonuses of up to 15% of the basic salary. Bonuses are paid in the year following the year for which they are earned.
- [6] Each May, the university's Board of Governors review the plaintiff's performance during the previous year. The Board determines the amount of the plaintiff's bonus, and it is paid to him in August. In 2005, the Board paid the plaintiff a bonus of \$43,500 for 2004, representing 15% of his basic salary. In 2006, the board paid the plaintiff a 13% bonus for 2005 amounting to \$37,700. In 2007, the Board paid the plaintiff a 15% bonus for 2006, amounting to \$43,500.
- [7] On July 1, 2007, the Board approved an increase in the plaintiff's annual basic salary and housing and car allowance from the previous total of \$340,000 to \$357,661.
- [8] The plaintiff's employment income as reported at line 101 on his T1 General Tax Returns for each of the years 2005, 2006 and 2007 was \$384,528.02, \$378,576.93, and \$393,183.36. His line 150 income for each of those years was \$379,634.62, \$365,259.58 and \$382,720.49. The difference between the plaintiff's line 101 income and his line 150 income for each year is primarily attributable to losses claimed on rental property.
- [13] He then reviewed Ms. Clark's employment experience and contributions to the marriage:

- [9] The defendant is 54 years old. During the marriage, she moved with her husband from university to university as his career developed. She contributed to the plaintiff's career by caring for the children of the marriage and subordinating her own career to that of her husband. The defendant held and relinquished a variety of positions as her husband's academic career took him from Queen's University to UBC, back to Queen's, and then to the University of Victoria.
- [14] To that summary, I would add the following. Ms. Clark has a Master's degree in Public Administration from Queen's University. During the marriage she worked periodically outside the home. She was primarily employed in management, including stints as general manager of the Kingston and District Chamber of Commerce and manager of Kingston and Island Boat Lines. She has also acquired some business experience. When the parties moved to Vancouver in 1991 she purchased a retail shoe business where she worked part-time. She sold the business in 1993 when the parties returned to Kingston.
- [15] Upon their return to Kingston, she was hired by Queen's University to assist in establishing Queen's International Study Centre in England. That position was followed by an appointment as Director of Enrichment Studies and thereafter to a position that involved the establishment of the Advanced Technology Education Consortium for Queen's University. From 1994 to 1999 her reported earnings increased from \$73,523 to \$81,585. In 2000 the parties returned to Victoria. Between 2001 and 2003, Ms. Clark obtained employment as the CEO of the Greater Victoria Chamber of Commerce. Her reported income for 2002 and 2003 was \$109,433 and \$116,656, respectively, of which \$20,000 in 2001 and \$16,500 in 2002 related to an income splitting arrangement with Mr. Turpin. In 2003, she was dismissed from her position with the Chamber of Commerce for reasons, and on terms, that were not disclosed. She has not been employed since that date.
- [16] In 2002, Ms. Clark began a home-based consulting business, which generates rental income from certain recreational property and business income from small consulting contracts. Against the gross income of the business, Ms. Clark is able to deduct a percentage of her residential expenses. With the exception of one year (2004), the business has not realized any taxable income.
- [17] Since the parties' separation, Ms. Clark had unsuccessfully responded to a number of Requests for Proposals and unsuccessfully applied for a number of employment positions in Victoria. She claims that she is limited in the hours that she can work because of her parenting responsibilities for her son, who is now 17. Recently she decided to retrain as a realtor, although it is unclear why she has chosen that new career or how realistic her expectations are that her choice will lead to self-sufficiency. She was advised that it will probably take her 3-5 years before she is able to earn a "living" from real estate and then she might expect to earn at best an average income of between \$44,000 and \$55,000. Typically, the course takes about a year to complete; for Ms. Clark it has taken longer because of the difficulties she has encountered since the divorce.

- [18] Ms. Clark has experienced a number of health-related issues. In 1996, she was diagnosed with breast cancer and underwent surgery, chemotherapy and radiation therapy. In 1999, she was on sick leave for six months due to an unrelated health issue. The nature of that illness was not disclosed. In 2001, she suffered a compound fracture of her left index finger which she states is now arthritic and no longer flexible. Between 2000 and 2004 she underwent two operations for the removal of breast lumps. Her sister, aunt and mother died of breast cancer in 2002, 2004 and 2005, respectively. She has suffered from depression for an unspecified period of time, for which she continues to be treated and which has been exacerbated by the loss of so many family members. In 2004, her oncologist recommended a prophylactic mastectomy and reconstruction surgery. Since 2005, she has undergone three surgeries in November 2005, May 2006, and April 2007, respectively, with 4-12 week recovery periods for each surgery. She attests that in February 2008 another lump was found in her breast and that she will require at least one more operation due to unspecified "complications" from her previous surgeries. She claims that she is at a high risk for osteoporosis as a result of early menopause that was triggered by her earlier chemotherapy treatment. In 2005, she was diagnosed with a tremor in her left hand, which she said is at times acute.
- [19] Ms. Clark provided no independent medical evidence about her health difficulties or the degree to which they may have affected or may continue to affect her capacity to earn income. She relies on *Leskun v. Leskun*, 2006 SCC 25 at para. 28, [2006] 1 S.C.R. 920, as did the chambers judge, for the proposition that while some independent medical evidence is highly desirable, where incapacity is alleged it is not essential to provide such evidence. In *Leskun*, the wife was unrepresented and responding to Mr. Leskun's application to discontinue spousal support payments because of a decrease in his financial circumstances. The circumstances in this case are substantially different. Here, Ms. Clark was applying to vary the provisions of a consent order that incorporated the provisions of a final agreement on spousal support. The central reason for the application was Ms. Clark's ongoing health issues. The burden was on her first, to meet the jurisdictional threshold of a material change of circumstances under s. 17(4.1) of the Divorce Act, and thereafter the higher threshold test set by *Miglin* for the variation of a final agreement. In my view, it would have been preferable for Ms. Clark to have provided some medical evidence to support her position that her health problems, many of which were known when the Minutes were signed, have since affected her capacity to support herself in a manner that was not contemplated by the parties at the time. However, the chambers judge was satisfied with the limited evidence provided by Ms. Clark of her health problems. Given that many of her health claims were not disputed, the lack of independent medical evidence was not fatal in these circumstances. However, other judges may not be so lenient.

[20] In 2005, Mr. Turpin commenced divorce proceedings. Thereafter, the parties negotiated the Minutes, each with the assistance of experienced family law counsel. Mr. Turpin deposed that during the negotiations Ms. Clark had documents in her possession that detailed her pending surgeries as well as doctors' letters concerning her depression. Ms. Clark did not deny that allegation. Nor did she disclose or refer to those documents in the materials filed in support of her variation application.

[21] The preamble to the Minutes set out the parties' intention to "settle all claims that either party may have against the other arising from their relationship" and:

... in full consideration of any claims arising out of the status of the parties as husband and wife for division of property or assets, family or otherwise, at common law or in equity, or in particular pursuant to parts 5 and 6 of the Family Relations Act, RSBC 1996, c. 128, for any claims for child and spousal maintenance either pursuant to Part 7 of the Family Relations Act, RSBC 1996, c. 128 or the Divorce Act (Canada) RSC 1985, c. 3 and amendments thereto, and in respect of rights each of the parties may have against the other arising by virtue of their relationship.

[22] The finality of the agreement was addressed in the following paragraphs:

43. The Plaintiff and Defendant acknowledge that this is a full and final settlement of all issues between them and all rights and obligations arising out of their marital relationship including any rights to maintenance and support and to share in each other's estates.

44. The Plaintiff and Defendant acknowledge that these Minutes of Settlement contain the entire agreement between them according to the terms of separation and divorce.

45. Save and except an application for an order dissolving their marriage, or any directions as might be called for in relation to these Minutes of Settlement, all claims other than the foregoing as between the Plaintiff and the Defendant shall be dismissed.

[23] The Minutes provided for an equal division of the family assets in accordance with Schedule A to the agreement. The chambers judge described the division as follows:

[13] Under the Minutes, the plaintiff [Mr. Turpin] received assets valued at approximately \$1,017,000, and the defendant [Ms. Clark] received assets valued at \$1,115,000. The plaintiff received approximately \$200,000 more than the defendant in pension assets, while the defendant received approximately \$200,000 more than the plaintiff in real property.

[24] Mr. Turpin claims that the division of property disclosed an effective reapportionment of approximately \$119,000 (or \$80,000 net) of the matrimonial estate in favour of Ms. Clark and should have been considered by the chambers judge as a factor weighing against reopening the agreement. I do not interpret the chambers judge's comments in paragraph 13 as finding that a reapportionment of the family assets occurred in the division of assets, particularly in light of his later discussions of the distribution (para. 103). In my view, the language of the Minutes disclosed a clear intention to divide the family assets equally. The parties each received different classes of assets, some of which were offset by family debt. They also

relied on approximate valuations. In the circumstances of the parties' agreement, I am satisfied the intent was, and the agreement provided, for an approximately equal division of the family assets.

[25] The spousal support provisions of the Minutes were detailed in paragraphs 32 to 34. They provided:

SPOUSAL SUPPORT

32. The Defendant acknowledges her obligation to become financially self-sufficient in so far as is practicable within a reasonable period of time.
33. The Plaintiff will pay spousal support to the Defendant as follows:
 - (a) November 1, 2005 - December 31, 2006 = \$9,800.00 per month
 - (b) January 1, 2007 - December 31, 2007 = \$8,000.00 per month
 - (c) January 1, 2008 - December 21, 2008 = \$6,500 per month
 - (d) January 1, 2009 - December 31, 2010 = \$5,500.00 per month
 - (e) January 1, 2011 until the Plaintiff retires from salaried employment, \$4,000 per month.
34. Provided that:
 - (a) Spousal support shall not terminate absolutely until the later of September 1, 2012 or the Plaintiff retiring from salaried employment. Each party acknowledges that the division of assets herein has provided adequately for his or her retirement.
 - (b) Any involuntary decrease in the Plaintiff's employment income below \$340,000 before December 31, 2010 will result in a proportionate decrease in spousal support for the period below which the Plaintiff's income was below \$340,000.
 - (c) Any decrease in the Plaintiff's employment income after September 1, 2011 to less than \$190,000 shall result in a proportional decrease in spousal support.
 - (d) If the Defendant at any time earns income in excess of \$25,000.00 per year, support shall be reduced by \$0.50 for every dollar she earns over \$25,000.00. Such reduction shall take place in the month following the month she earns more than \$2,083.00.
 - (e) If the Defendant's income is income earned by the Defendant through any company controlled by the Defendant, her income shall be her gross income less only reasonable business expenses directly attributable to her work.
 - (f) The parties agree that spousal support as provided herein is fair and adequate under all foreseeable circumstances including any increase in the Plaintiff's income and that under no circumstances will spousal support increase.

(9) The parties will cooperate subject to independent accounting advice to obtain the maximum tax benefit to the extent possible arising from the income splitting or payment of spousal support, sharing in any net tax benefit arising from the income splitting or support paid prior to November 1, 2005.

[26] The amount of support during the first year of the agreement was consistent with the range in the SSAG. It can reasonably be inferred from these provisions that the parties contemplated a "front-end loading" of spousal support for the period in which Ms. Clark anticipated undergoing the surgeries, and a decreasing amount of spousal support as her consulting business expanded and her income increased.

[27] The variation order deleted paragraphs 33 and 34 (b) to (g) of the Minutes and replaced them with the following provisions:

That the Plaintiff [Mr. Turpin] shall pay spousal support to the Defendant [Ms. Clark]:

(i) in the amount of \$9,300 per month commencing May 1, 2008 and on the first of every month thereafter to December 31, 2010; and

(ii) in the amount of \$7,500 per month commencing January 1, 2011 until the later of September 1, 2012 or the Plaintiff's retirement from salaried employment.

The effect of the variation order was to create arrears of spousal support. The chambers judge included in the variation order an order of arrears of spousal support in the amount of \$19,600, retroactive to November 1, 2008, which Mr. Turpin has since paid.

[28] The Minutes also provided for child support. Ms. Clark receives s. 3 Guidelines support and a pre-determined monthly amount of \$350 as s. 7 Guidelines support for the youngest child. She also receives s. 7 Guidelines support for C.T. The s. 7 support relates to Mr. Turpin's proportionate share of C.T.'s post-secondary expenses and monthly allowance of \$500, as well as a monthly sum of approximately \$1,000 to Ms. Clark for when C.T. returns home to reside with her mother during the summer recess (May to August).

[29] The child support provision of the Minutes which gives rise to the second ground of appeal read:

28. Support for [C.T.] shall be reviewable when she turns 19, taking into account her educational costs and her contributions to them.

[30] The Minutes also provided for an annual adjustment of Mr. Turpin's Guidelines income in the event that he received any bonuses. This provision caused some delay in the recalculation of Mr. Turpin's increased child support obligation as his income increased. That delay, in turn, contributed to communication difficulties and conflict between the parties. After reviewing the child support provisions of the Minutes, the chambers judge made several orders imposing new provisions for the adjustments, and made a finding of arrears of child support. Most of those orders were not appealed and Mr. Turpin has since paid the child support arrears. The only aspect of the child support provisions of the

variation order under review by this court is the requirement that Mr. Turpin pay an increased proportionate share of C.T.'s s. 7 Guidelines support.

- [31] After C.T. turned 19, Mr. Turpin, in accordance with the Minutes, requested that her support be reviewed. He offered to conduct the review through mediation at his cost. Ms. Clark made no response to his request and Mr. Turpin did not schedule a review. While C.T. and Ms. Clark have produced numerous documents regarding the daughter's expenses, neither has provided any evidence related to her ability to contribute to her own support.
- [32] In her affidavit in support of the variation application, Ms. Clark expressed a number of concerns about the agreement itself and the circumstances of her consent to it. She specifically complained that the "claw back" clause (34(d)), in addition to an increase in her proportionate share of the children's extraordinary expenses, meant that she could neither maintain a standard of living similar to that of the appellant nor become financially self sufficient. She continued, stating:
- [45] I consented to the Order under the duress of a looming trial, scheduled surgery, ongoing depression, and rising legal bills of over \$80,000 to my original counsel [], and my current counsel, and with more optimism for my employability than has proven to be the case. Self sufficiency is not yet foreseeable and at present my ability to combine spousal support with employment income to maintain a lifestyle comparable to that of the Plaintiff is impossible. Without a reasonable level of spousal support, I will have no choice but to rely on retirement savings to meet expense obligations for myself and the children. The Plaintiff has the capacity to pay reasonable ongoing spousal support without affecting any of his capital or retirement sources.
- [33] Mr. Turpin currently resides in a residence owned by his spouse, who also has a substantial earning capacity. For the most part, Mr. Turpin has continued to enjoy a standard of living comparable to that which was enjoyed by the parties during their marriage. Ms. Clark, on the other hand, has not been so fortunate and has found her post-divorce standard of living significantly diminished as a result of her ongoing health issues and inability to earn income. As a consequence, she has had to down-size her residence and has expended monies to build a rental suite in her new residence in order to assist her in paying for her household expenses.
- [34] It is Mr. Turpin's position that the difficulties Ms. Clark has experienced since the divorce order were all within the contemplation of the parties, or at least reasonably foreseeable when they negotiated the Minutes. In support of that position, he relies on the documents relating to Ms. Clark's pending surgeries and depression that were disclosed during the parties' negotiations over the Minutes. Mr. Turpin also claims that in his view the real reason behind Ms. Clark's variation application is her dissatisfaction with the agreement itself, as reflected by her comments in paragraph 45 of her affidavit as quoted in paragraph 32 above.

- [35] Ms. Clark contends the chambers judge was correct in concluding that the Minutes no longer met the objectives of the Divorce Act at the date of the application because of a substantial departure from the circumstances anticipated by the parties: after a 20-year relationship she could no longer contribute to her own support despite her reasonable efforts to do so, or adequately contribute to her share of the children's support requirements without having to draw on her capital. In support of her position, she relies on *Chutter v. Chutter*, 2008 BCCA 507, 60 R.F.L. (6th) 263, 86 B.C.L.R. (4th) 233, for the proposition that a spouse who is entitled to compensatory spousal support following a lengthy marriage should not have to encroach upon her capital in order to maintain, post-separation, a comparable marital standard of living to that of the other spouse.

C. The Chambers Judge's Reasons

- [36] The chambers judge found that Ms. Clark had met the test for a variation of the spousal support provisions of the divorce order, namely a material change of circumstances. Those circumstances included: (i) the deterioration in her health, and (ii) her inability to earn income almost three years after the Minutes were signed, despite reasonable efforts (paras. 73 and 100). He concluded: "These are changes from what was contemplated by the parties at the time of the Order and which, if known, would likely have resulted in different terms: [Willick v. Willick, [1994] 3 S.C.R. 670] at 688."
- [37] The chambers judge found, and it was not disputed by Ms. Clark, that the first stage of the Miglin inquiry had been met. This stage examines the conditions under which the agreement was negotiated and whether the substance of the agreement adequately addressed the factors and objectives of the Divorce Act at the time the agreement was made. The chambers judge was satisfied there were no circumstances during the negotiation and execution of the Minutes that required the agreement to be discounted (para. 84) and that the substance of the agreement substantially complied with the overall objectives of the Divorce Act. He reached this determination by inferring that the judge who granted the divorce order must have been satisfied with the validity and reasonableness of the parties' agreement when he acceded to the parties' request to have its terms incorporated into the divorce order (para. 85).
- [38] The chambers judge then turned to the second stage of the Miglin inquiry. Stage two addresses the extent to which an agreement, at the time of the application, continues to reflect the parties' original intentions and complies with the objectives of the Divorce Act. The chambers judge found that this stage of the inquiry raised "the more difficult issue" which he framed as:

- [86] ...whether there are new circumstances not reasonably contemplated by the parties at the time of settlement which now warrant a variation of spousal support. The onus is on the defendant [Ms. Clark] to show that new 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: Miglin, para. 88.
- [39] The chambers judge concluded that Ms. Clark had met the burden of the Miglin threshold for variation of a final agreement based on the evidence of her deteriorating health and her inability to earn income through her consulting company. He summarized his findings as follows:
- [98] The plaintiff and defendant were aware at the time they made their separation agreement that the defendant would require an operation for cancer. They also knew that the defendant suffered from depression and a tremor in her left hand, and that she was at risk for osteoporosis.
- [99] What the parties did not contemplate was that the defendant's health would take a significant turn for the worse, and that she would undergo not one but three operations for cancer and would continue to require treatment for that condition three years after the Order was pronounced. Nor did the parties contemplate that despite her reasonable and extensive efforts to find consulting work, as described in her affidavit, the defendant would be unsuccessful in doing so, and would have to retrain for a new career in real estate in order to attempt to achieve economic self sufficiency.
- [100] I find that the deterioration in the plaintiff's health and her inability to earn income through her consulting company almost three years after the Minutes were signed represent a significant departure from the range of reasonable outcomes anticipated by the parties at the time that the Minutes were signed and incorporated into the Order. These developments also constitute a material change in circumstances.
- [101] Where incapacity is alleged on a support application, independent medical evidence is highly desirable, but not essential: Leskun v. Leskun, 2006 SCC 25 at para. 28. The defendant has deposed to the dates of each of her cancer-related surgeries, and the periods of time she required for recovery after each operation. She has also deposed to her depression and its impact from time to time on her ability to accomplish meaningful work. I am satisfied that the defendant's several cancer operations were beyond the reasonable contemplation of the parties, and together with her depression, have impeded her capacity to contribute to her own support since October 2005.

[102] At the same time, the plaintiff's annual income has increased significantly since October 2005. He has remarried. As a result of that marriage, he resides in a home purchased by his new wife, whose income makes a substantial contribution to the financial well-being of his new household. It was not within the contemplation of the parties that the defendant would find herself in a position three years after the Order where she is not yet able to make any contribution to her own support, or that of her children.

...

[104] I find that the provisions of the Minutes relating to spousal support no longer meet the objectives of the Act in light of the material changes in the defendant's circumstances. The plaintiff and the defendant were married for twenty years, during which time the plaintiff was able to advance his career with the support of the defendant. The spousal support provisions of the Minutes were based on both compensatory and non-compensatory principles. The parties recognized that as a result of the marriage and its breakdown, the defendant had suffered a disadvantage, in that she had forgone the opportunity to develop her own career or to pursue long-term pensionable employment. The parties also recognized that the defendant, following the loss of her position with the Victoria Chamber of Commerce, was in need of some support while she sought to achieve economic self-sufficiency through the development of her consultancy practice. In light of the deterioration in the defendant's health, and the unanticipated difficulties she has encountered in earning her own income, the spousal support provisions of the Minutes are no longer adequate to satisfy the objectives of the Act and should be varied to take into account the material changes in the defendant's circumstances.

[105] With retraining and time, the defendant should be able to find new employment and make progress toward economic self-sufficiency. However, that process will take longer than the parties anticipated at the time they signed the Minutes. [Emphasis added.]

[40] Mr. Turpin contends the chambers judge mischaracterized Ms. Clark's surgeries as "cancer" operations when they were related to a prophylactic mastectomy. He suggests they would more accurately be characterized as preventative health care, which he submits were within the contemplation of the parties at the time of the agreement. This submission, in my view, is based on a distinction without a difference. But for Ms. Clark's history with breast cancer and her family's predisposition to this disease, she would not have chosen to undergo the procedure. In my view, it was not the operations themselves but their effect on Ms. Clark's ongoing health issues and ability to work that the chambers judge determined fell outside the scope of the circumstances contemplated by the parties when they executed the Minutes.

[41] After deciding that court intervention was required to vary the agreement, the chambers judge turned to the SSAG to determine the range of monthly support. He first calculated the range of monthly support based on the gross ceiling income of \$350,000 for Mr. Turpin and on an assumed annual employment income of \$2,000 for Ms. Clark (based on her 2007

reported business income). The resulting range was from \$8,460 to \$10,155. He also calculated a range of monthly support based on Mr. Turpin's 2007 line 150 income of \$382,720 and Ms. Clark's 2007 income of \$2,000. The resulting range was between \$9,351 and \$11,211. In both instances, the duration of support under the SSAG was indefinite. The chambers judge concluded that an appropriate variation would be to increase the amount of Ms. Clark's monthly spousal support from \$6,500 (the third stage of the original step-down provisions) to \$9,300, an amount within the range provided by the SSAG, until 2011, when it would be decreased to \$7,500 in anticipation that Ms. Clark would be realizing income by that time. He did not vary the duration of the award, but retained the fixed term provided for in the Minutes in deference to the "cautious approach" to the use of the SSAG in variation applications, as discussed in *Beninger v. Beninger*, 2007 BCCA 619 at para. 52, 47 R.F.L. (6th) 11, 75 B.C.L.R. (4th) 228.

- [42] On the issue of C.T.'s support, the chambers judge found that a material change of circumstances had occurred since the divorce order based on a number of new circumstances: (i) Mr. Turpin's increase in annual basic salary and benefits from \$340,000 to \$357,661 in July 2007, in addition to the increase in his annual bonuses of between 13% and 15% (para. 71); (ii) Mr. Turpin's remarriage to a spouse who owns the home in which they reside and earns a significant salary which was found to enhance Mr. Turpin's capacity to pay child support (para. 72); (iii) the deterioration in Ms. Clark's health since October 2005 and her inability to generate income through her consulting company despite reasonable efforts (para. 73); and (iv) the conflict that has arisen between the parties regarding the retroactive adjustment of the child support to reflect Mr. Turpin's bonuses (para. 74). Based on Mr. Turpin's increased income since the divorce order, the chambers judge increased child support in accordance with the Guidelines, effective May 1, 2008. He also made orders for arrears of child support and prospectively increased child support.

D. Discussion

1. Did the chambers judge err in assuming jurisdiction to vary the divorce order under s. 17(4.1) of the Divorce Act?
- [43] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 the Supreme Court identified three distinct conceptual bases for spousal support obligations: compensatory, non-compensatory and contractual. A spousal support agreement which is incorporated into a divorce order most closely reflects a contractual basis for spousal support. In *Shackleton v. Shackleton*, 1999 BCCA 704, R.F.L. (5th) 459, Saunders J.A., writing for the Court, described such an order:
- [12] A consent order is a formal expression of an agreement between the parties. Where parties intend to finally dispose of the issues between them, a consent order will operate as a final judgment: *Campbell v. Campbell* (1954), 1 D.L.R. 304 (B.C.S.C.). For the same reason that courts enforce settlement agreements, to provide certainty to parties settling disputes, consent orders are not easily altered. Subject to statutory provisions otherwise a consent order may be set aside or altered in substance only in circumstances which justify the same

treatment to the underlying contract: [Citations omitted.]

- [44] Similarly, K. Smith J.A., for the Court in *B.G.D. v. R.W.D.*, 2003 BCCA 259, at para. 10, 226 D.L.R. (4th) 378, 35 R.F.L. (5th) 315, observed that a consent order, which incorporates the terms of a spousal support agreement, "is really the formal expression of an agreement between the parties" and "must be interpreted and dealt with as if it were a contract."
- [45] While the initial basis for spousal support in this case was contractual, the incorporation of the parties' agreement into an order under the Divorce Act brought Ms. Clark's application to vary the spousal support provisions of the divorce order under the variation provisions of the Divorce Act. As previously noted, s. 17(4.1) of the Divorce Act requires the applicant to establish a material change of circumstances before the court can assume jurisdiction to vary the previous order.
- [46] The test for establishing a material change of circumstances was articulated in *Willick*, in the context of a variation application for increased child support, as a change that, if known at the time the prior order was made, would likely have resulted in a different order (at 688). In *Carter v. Carter* (1991), 58 B.C.L.R. (2d) 45, 34 R.F.L. (3d) 1 (C.A.), a material change in circumstances was described, in the context of a variation application to rescind spousal support, as a change that was "substantial, unforeseen and continuing." In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, it was described, in the context of a variation application for custody of a child, as a change "which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order" (para. 13).
- [47] In an attempt to reconcile these differing articulations of the test, Lambert J.A. in *Stones v. Stones*, 2004 BCCA 99, 48 R.F.L. (5th) 223, redefined the "foreseeable change" version, focussing on unanticipated changes that were not within the contemplation of the parties when they made their agreement:
- [15] In my opinion, the question of what is a material change of circumstances may vary from one case to another. That is particularly so in relation to foreseeability. There are a group of cases which decide that retirement from employment, even at the retirement age set by the employer, or by collective agreement, can be a material change of circumstances, although clearly it would be foreseeable.
- [16] I suppose that the question should really be asked in each case of whether the circumstance in question was one which the parties must have had in contemplation and built into the framing of their agreement. Perhaps it is a change that the parties were prepared to leave out of contemplation in the agreement because of complexity or some other reason, so that when it occurs it is a material change of circumstances, even though the parties knew it must be going to happen at some time or another. [Emphasis added.]
- [48] Professor James G. McLeod in his annotation to *Stones* provided some helpful suggestions on how an agreement might provide for those circumstances that are intended to be within in the contemplation of the parties:

This makes it important for lawyers drafting support agreements to set out the factual basis upon which support was calculated. It is a small matter to include a clause in an agreement stating that the support provisions of the agreement are based on the parties' financial circumstances at the time and attach the parties' financial statements or income statements to the agreement. It would also be wise to include a clause outlining any contingencies that the parties took into account and those that they have expressly decided to leave until later. Settlement agreements are supposed to provide a road map for the parties, so that they can decide what is expected of them in the future without having to resort to litigation on a regular basis. By including clauses explaining what was taken into account and what was not taken into account, drafters can also prevent events from unfolding in a fundamentally different way from what one or both parties expected at the time of the agreement. [Emphasis added.]

- [49] What might be taken from these comments is that the more precise the wording in an agreement, the more accurately a reviewing court might be able to determine the parties' actual intention. In the absence of express language as to the parties' intentions and expectations, a court is left with the plain and ordinary meaning of the words of the agreement and any reasonable inferences that may be drawn from the meaning ascribed to them.
- [50] In this case, the Minutes did not exhaustively list the anticipated circumstances that were within the contemplation of the parties. They did specify, however, that an increase in Mr. Turpin's income would not be grounds for increased support. Therefore, any subsequent increases in Mr. Turpin's income were a circumstance that was expressly foreseen and within the contemplation of the parties when they executed the Minutes. His increase in income could not have provided the grounds for a finding of a material change of circumstances that if known at the time would have resulted in a different order, as it was expressly anticipated by the parties in their agreement.
- [51] There were other circumstances that, while not specified in the agreement, were also known to the parties at the time. It was common ground that when the Minutes were signed the parties knew the terms of Mr. Turpin's employment arrangements (which included a basic salary, housing and car allowance as well as an annual performance bonus). They also knew that Ms. Clark had not worked since 2003, had realized very limited business income, and was experiencing ongoing health issues with depression, her left index finger, the tremor in her left hand and her pending surgeries for a prophylactic mastectomy. The agreement also anticipated that Ms. Clark might have earnings of over \$25,000 (clause 34(d) provided for a 50% reduction in any spousal support for every dollar earning over \$25,000) and that she had an obligation to become self-sufficient "in so far as is practicable within a reasonable period of time."
- [52] The chambers judge drew inferences from these undisputed circumstances and provisions about what the parties might reasonably have contemplated would occur in the future. He determined that although the parties had anticipated that Ms. Clark would undergo her surgery in the first year of the support payments (para. 98), they did not contemplate that

her health would deteriorate significantly thereafter and that she would need further cancer treatment three years after the divorce order (para. 99). He also found that while the parties knew that Ms. Clark had not had any employment income in the two years pre-dating the Minutes, they did not contemplate that she would remain unemployed and have no business income three years after the divorce order, despite her "reasonable and extensive efforts" to do so (para. 99).

- [53] The chambers judge concluded that the cumulative effect of Ms. Clark's multiple surgeries and lack of employment, which he found had not been anticipated by the parties and delayed Ms. Clark's ability to become self-sufficient, constituted a material change in her circumstances from when the divorce order had been made. Absent palpable and overriding error, these inferences of fact were open to the chambers judge based on the evidence before him and provided the foundation for his finding that a material change of circumstances had occurred since the divorce order. I find no basis for interfering with that inference.
2. Did the chambers judge err in his application of the Miglin test by varying the order for spousal support to a greater extent than justified in the circumstances?
- [54] Miglin involved an initial application by the wife for spousal support under s. 15.2 of the Divorce Act, four years after she had waived her right to spousal support in a separation agreement. The Supreme Court of Canada concluded that her application should have been dismissed, and allowed an appeal by the husband from an order that required him to pay spousal support. The Court held that a reasonable and fairly negotiated final support agreement should not be displaced unless the applicant is able to establish that his or her current circumstances amounted to a significant departure from the range of outcomes that could reasonably be found to have been within the contemplation of the parties when they executed the agreement.
- [55] On the change that is required to override an agreement, the Court stated:
- [89] 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. [Emphasis added.]

[56] As to the degree of intervention if the threshold change is established, the Court noted:

[90] The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred per se. That is to say, we do not consider "change" of any particular nature to be a threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted. That is, at this stage, even if unbending enforcement of the agreement is inappropriate, that agreement may still indicate to a trial judge the parties' understanding of their relationship and their intentions. Even an agreement that is not determinative as a result of the parties' circumstances at the time of the application warrants compulsory consideration under s. 15.2(4). [Emphasis added.]

[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. The Miglin test further limits the scope of the court's jurisdiction to vary that order if it is based on a final support agreement.

[58] Stage two of the Miglin inquiry examines the range of outcomes that could reasonably have been within the contemplation of the parties when the agreement was executed. The onus is on the party seeking to set aside the agreement to show that the new or changed circumstances were a significant departure from the range of reasonable outcomes anticipated when the parties executed the agreement, and that the agreement at the time of the application was "at odds with the objectives of the Divorce Act". If those conditions are met, Miglin requires that the agreement be reconsidered.

[59] Deference to an agreement should give way where the integrity of an agreement is successfully challenged or where it is patently unfair in the context of the objectives of the Divorce Act at the time of execution (stage one), or where an agreement becomes patently unfair as a result of changed and unanticipated circumstances (stage two).

- [60] In this case, the Minutes reflected a support agreement that was subsequently incorporated into the divorce order by consent. The plain and ordinary meaning of the words in the preamble and concluding provisions of the Minutes clearly reflected an intention by the parties that the spousal support provisions of the divorce order would be final. It is also noteworthy that the Minutes did not include a variation or review clause for the spousal support. In light of the finality of the agreement, Ms. Clark had to meet the higher threshold for variation of the agreement, as established by Miglin.
- [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. In hindsight, Ms. Clark may believe that she could have done better with court-awarded spousal support in accordance with the SSAG. However, the standard of substantial compliance with the factors and objectives of the Divorce Act is a subjective test of the parties' views, not the court's, on the equitable sharing of the economic consequences of the breakdown of their marriage. The chambers judge's finding that stage one of the Miglin inquiry had been met was not challenged on appeal and by inference rejects Ms. Clark's claims of duress and unfairness of the agreement.
- [62] At stage two of the Miglin inquiry the chambers judge had to determine "the extent to which enforcement of the agreement still reflect[ed] the original intention of the parties and the extent to which it [was] still in substantial compliance with the objectives of the Act" (Miglin at para. 87). Mr. Turpin's increased income was a foreseeable and anticipated circumstance. It did not fall outside the contemplation of the parties when they executed the Minutes. The Minutes also provided for the payment of spousal support in decreasing amounts that would terminate by 2012 or when Mr. Turpin retired from salaried employment, whichever event occurred last. Clearly, Mr. Turpin's retirement was a circumstance that was anticipated by the parties, as was Ms. Clark's retirement, by the provision that "[e]ach party acknowledges that the division of assets herein has provided adequately for his or her retirement." In my view, it could also be reasonably inferred that the parties anticipated Ms. Clark would earn a level of annual income over \$25,000 as there were provisions that allowed for a reduction in support the month following the month that she earned more than \$2,083. Further, the Minutes required Ms. Clark to deduct only "reasonable business expenses directly attributable to her work" in calculating her business income. Again, suggesting that the parties anticipated she would enjoy a level of business income that would require an application of this provision.

- [63] The new circumstances which the chambers judge found were unanticipated included Ms. Clark's complications from her surgeries and her inability to earn income despite her reasonable attempts to do so. Both circumstances, he found, caused a delay in the reasonable time in which the parties anticipated Ms. Clark would become self-sufficient. It was these circumstances that provided the evidentiary basis for the material change of circumstances test in s. 17(4.1) and the higher threshold for variation of a final support agreement at the second stage of the Miglin test. In my view, it was open to the chambers judge, on the evidence before him, to find that both tests had been met by Ms. Clark. While the parties anticipated Ms. Clark's pending surgeries, they did not anticipate the complications she in fact experienced from them. Nor did they anticipate the resulting impact on her ability to earn income approaching or surpassing the \$25,000 contemplated by the agreement.
- [64] I do not find any error in the chambers judge's finding that the parties' agreement no longer complied with the objectives of the Divorce Act. The parties had cohabited for 20 years. Ms. Clark was the primary caregiver to the parties' two children which enabled Mr. Turpin to pursue his academic career. Ms. Clark supported her husband's frequent career moves at the expense of her own career development. Her claim for compensatory support on the breakdown of their marriage was substantial. Under the SSAG, that claim would have fallen at least within the level of her first year of spousal support under the Minutes and have continued for an indefinite duration. The cumulative effect of the complications from her operations, which clearly impeded her ability to become self-sufficient, made the parties' agreement patently unfair at the time of her application.
- [65] The central issue, in my view, is whether the degree of intervention imposed by the variation order was appropriate in the circumstances. The final version of the SSAG confirms that:
- ...if a spousal support agreement is set aside or overridden on the basis of Miglin or other applicable legal doctrines, the Advisory Guidelines may be relied upon in determining the amount and duration of support. See *K.A.M v. P.K. M.*, 2008 CarswellBC 135, 2008 BCSC 93 and *Gammon v. Gammon*, [2008] O.J. No. 603. However, as recognized in *Miglin*, the parties' intentions, as reflected in their agreement, may still continue to influence the appropriate spousal support outcome and lead the courts to an outcome different from that suggested by the Advisory Guidelines. See *Santoro v. Santoro*, [2006] B.C.J. No. 453, 2006 BCSC 331.
- [66] This Court in *Beninger* cautioned about use of the SSAG on variation applications and said they should be considered on a case-by-case basis only. The Court relied on the SSAG to determine the appropriate quantum of spousal support in circumstances where the initial award was substantially below the SSAG ranges and the wife continued to experience the economic disadvantages of the marriage breakdown as well as health problems that limited her ability to find work. The parties in *Beninger*, however, had not negotiated a final support agreement, a factor that weighs heavily in consideration of the degree of intervention that should be exercised by a court on a subsequent variation application.

- [67] In this case, the Minutes, in the clearest of terms, provided that "under no circumstances" would spousal support be increased. They also described the spousal support provisions as "fair and adequate under all foreseeable circumstances including any increase in the Plaintiff's income". Therefore, the parties intended and contemplated that there would be an absolute prohibition on any increase in spousal support in the future. The Minutes provided a less rigid standard on the duration of support, which did not "terminate absolutely" until the later of September 1, 2012, or Mr. Turpin's retirement from salaried employment. The Minutes also acknowledged Ms. Clark's obligation to become financially self-sufficient insofar as was practicable, within a reasonable period of time. Thus, although the duration of the support was specified, it was also described in the more general term as "within a reasonable time". What is reasonable in duration can change with new and unanticipated circumstances.
- [68] The chambers judge held that while the cumulative effect of Ms. Clark's post-agreement surgeries and inability to earn income had delayed her ability to progress toward economic self-sufficiency, with retraining and time she would eventually reach that goal (para. 105). He also acknowledged that an award of indefinite support would amount to a degree of intervention that was unwarranted (para. 108), in part because of the parties' acknowledgement in the Minutes that the equal division of assets adequately provided for each of their retirement.
- [69] In my view, the chambers judge erred in law by intervening to the extent that he did in varying the spousal support provisions of the divorce order. Applying the deferential standard required by Miglin, I would not interfere with the step-down provisions of the divorce order. However, due to the delay in Ms. Clark's progress toward economic self-sufficiency, which is the result of her unanticipated health complications and inability to earn income, I would extend the duration of the final amount of the award (\$4,000) for an additional three years until 2015 or when Mr. Turpin retires, whichever event occurs later.
3. Did the chambers judge err in increasing s. 7 Guidelines support for the parties' adult child in the absence of disclosure by Ms. Clark of the adult child's ability to contribute to her own support, as required by the divorce order?
- [70] A variation application of a consent order that incorporates an agreement on child support is subject to the s. 17(4) Divorce Act jurisdictional test of a material change in circumstances. It is not subject to the higher threshold established in Miglin for the variation of an agreement. There are no limitations on a court overriding or varying a child support agreement that is incorporated into a court order where the provisions of the agreement are found to be unreasonable. In Willick, Sopinka J., for the majority, stated that "[t]he reasoning which supports the restrictions with respect to interspousal support [from a complicated separation agreement] does not apply to child support" (para. 16).

- [71] In this case, Mr. Turpin was obliged to pay support for C.T. under s. 7 of the Guidelines. Her entitlement to support was not in issue. The initial child support order under s. 15.1 of the Divorce Act was based on Mr. Turpin's Guidelines income of \$340,000. The chambers judge found that Mr. Turpin's employment income for 2005, 2006 and 2007, as reported at line 101 on his T1 General Tax Returns for those years, was \$384,528.02, \$378,576.93 and \$393,183.36, respectively. He found the difference between Mr. Turpin's line 101 income and his line 150 income for each year was primarily attributable to losses he claimed on rental property (para. 8).
- [72] The difference in Mr. Turpin's Guidelines income as set out in the Minutes, from his employment income in the subsequent three years, by itself, amounted to a material change in circumstances. That was sufficient to give the court jurisdiction to vary the child support provisions of the divorce order in accordance with the Guidelines.
- [73] A term of C.T.'s support under the divorce order permitted Mr. Turpin to review her support upon her turning 19, "taking into account her educational costs and her contributions to them." While it may have been easier and less costly to undertake such a review by way of mediation, after Ms. Clark refused to participate in such a forum Mr. Turpin should have set down a review hearing. At that hearing, issues concerning Ms. Clark's level of income, her reasonable business expenses, and C.T.'s income and ability to contribute to her own support could be obtained. Orders for disclosure could be made.
- [74] The failure to disclose material information is an unfortunate blight of family law litigation. Unfortunately, we see many instances in these courts where mandatory disclosure requirements are ignored and applications must be brought to ensure their compliance. Here, Ms. Clark had agreed to provide material information, presumably to obviate the need to engage in future litigation, and that information was not forthcoming. Ultimately, however, Mr. Turpin had a remedy for Ms. Clark's failure to comply with her obligation under the divorce order, which was to schedule a review hearing before the court. In those circumstances, the expense incurred by a party of having to make such an application can be addressed, at least in part, by an award of costs. I would also note that C.T.'s continued and voluntary estrangement from her father, and the impact of such conduct on Mr. Turpin's continuing financial obligation to her, is also a factor that could be addressed at a review hearing.
- [75] There is no evidence at this time that C.T. has the ability to contribute to her own support while she is in full-time attendance at university. In the absence of such evidence Mr. Turpin cannot, in my view, claim that C.T. is not entitled to an increase in s. 7 Guidelines support by reason of the increase in his Guidelines income which would otherwise entitle her to increased child support. However, if upon a review there is evidence that some contribution could have been made by C.T. or that Ms. Clark's Guidelines income was found or was imputed to be higher than \$2,000, Mr. Turpin, in my view, would be entitled to a retroactive variation of his proportionate share of C.T.'s s. 7 Guidelines support.

[76] In the result, I would not accede to this ground of appeal.

E. Conclusion

[77] Mr. Turpin's appeal from the support provisions of the variation order is allowed to the extent that the provisions are varied to permit for the continuation of spousal support for a further three years from the date of the variation order until 2015, or whenever he retires, which ever event occurs last, at the step-down amounts provided for in the divorce order.

[78] Mr. Turpin's appeal from the child support provisions of the variation order for C.T. is dismissed, with liberty to apply to retroactively vary those provisions in the event that further evidence is obtained of C.T.'s ability to contribute to her own support and Ms. Clark's increased earning capacity.

[79] Based on each party's success in the appeal, I would award Ms. Clark 75% of her costs.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Bennett"

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