IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Proust v. Proust,* 2025 BCSC 214

Date: 20250211
Docket: E220856
Registry: Vancouver

Between:

Maria Jane Proust

Claimant

And

John Graham Proust

Respondent

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Claimant:	S.L. Booth, K.C.
Counsel for the Respondent:	B. St. Pierre
Place and Date of Trial/Hearing:	Vancouver, B.C. February 3, 2025
Place and Date of Judgment:	Vancouver, B.C. February 11, 2025

Introduction

[1] In an application filed August 7, 2024, the respondent John Proust seeks orders pursuant to s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) varying the terms of a separation agreement made with his ex-spouse Maria Proust on December 14, 2023 (the "Separation Agreement"). In particular, Mr. Proust seeks to reduce the amount of monthly spousal support agreed to in the Separation Agreement, with spousal support payable from April 2024 onward based upon a guideline income for him of $276,000 and for Ms. Proust of $75,000. If this order is granted this would result in Mr. Proust's current obligation to pay monthly spousal support of $18,500, to approximately $7,328 per month, based on the mid-range of spousal support calculated under the Spousal Support Advisory Guidelines. Mr. Proust seeks to have this reduction apply retroactively, to April 1, 2024[1].

Background

[2] Mr. Proust is currently 65 and Ms. Proust is 58. The parties were married in 1993 and separated in December 2021. They have three children, two of whom are no longer children of the marriage (aged 24 and 25) and a third (aged 20) who is currently attending university and is still considered to be a child of the marriage.

[3] Mr. Proust earns income through the provision of management services to publicly traded junior resource companies through two companies of which he is currently the sole shareholder – J. Proust & Associates Inc. and Portland Management Inc.

[4] Ms. Proust was a stay-at-home parent during the parties' marriage. She obtained her real estate licence in 2020 and since that time has worked as a realtor in Vancouver.

[5] After the parties' separation, in March 2023, Ms. Proust filed a notice of application for interim spousal support. Negotiations proceeded after that time and

[1] Although Mr. Proust's notice of application sought to impute income to Ms. Proust of $159,000 per year he revised this amount downward to $75,000 in submissions before the Court.

resulted in the parties agreeing on substantially all financial issues by July 1, 2023, although the Separation Agreement was not finalized and executed until December 14 and 15, 2023.

[6] The Separation Agreement provides at Recital W that "the parties, through discussions with their counsel, settled all of the financial issues arising from the breakdown of their marriage, with an effective date of July 1, 2023" and were entering into the Settlement Agreement to formalize the terms of the July 2023 settlement.

[7] The Separation Agreement provides that no child support would be payable in respect of the remaining child of the marriage although Mr. Proust would be responsible for payment of university expenses for as long as the child remained in full time studies and certain other expenses while she remained a child of the marriage. Mr. Proust continues to pay the child's education expenses.

[8] With respect to spousal support the Separation Agreement provides as follows:

> 43. Commencing on January 1, 2024 and continuing on the 1st day of each month thereafter until further written agreement or court order:
>
> …
>
> b. John will pay Maria spousal support of $18,500 per month.
>
> …
>
> 46. The above noted spousal support obligations shall be open-ended, but either party may apply to vary spousal support on the occurrence of a material change in the financial circumstances of either of them.
>
> 47. At the request of either party, not more than once per year, the other party will provide, pursuant to s. 21 of the *Child Support Guidelines* his or her "applicable income documents" …
>
> 48. Without limiting the right of each party to apply for a variation of the spousal support provisions of this Agreement under s. 17 of the *Divorce Act,* the following shall constitute a material change in circumstances for the purpose of an application for the variation of spousal support:
>
> a. if John retires at any time after attaining the age of 65;
>
> b. if John's income exceeds $300,000 per year;
>
> c. if Maria's income exceeds $60,000 per year; or

> d. when [the child] ceases to be a “child of the marriage” …

[9] Although Mr. Proust paid spousal support pursuant to the terms of the Separation Agreement for a time he stopped doing so regularly, and for the agreed upon amount, in or about June 2024. At this time Mr. Proust is in arrears of his spousal support obligations in the amount of approximately $104,000. Ms. Proust is seeking payment of arrears of support through the Family Maintenance Enforcement Program. Ms. Proust does not take the position that this precludes Mr. Proust from bringing this application.

Legal Overview

[10] There is no specific jurisdiction set out in the *Divorce Act* to vary the spousal support provisions of an agreement. Section 17(1) confers jurisdiction on the court to vary, suspend or rescind a support order and therefore, where there is no previous order, the court's jurisdiction to vary under s. 17 is not engaged: *D.N.L. v. C.N.S.*, 2013 BCSC 858.

[11] The parties submit that notwithstanding the reference to s. 17 of the *Divorce Act,* at s. 48 of the Separation Agreement the statutory basis for this application is found under s. 15.2 which provides as follows:

> **15.2 (1)** A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
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> R.S.C., 1985, c. 3 (2nd Supp.)

[12] Pursuant to subsection 15.2(4) of the *Divorce Act* where an application for support is made the court must take into consideration the condition, means, needs and other circumstances of each spouse, including a) the length of cohabitation, b) the functions performed by each spouse during cohabitation and c) any order, agreement or arrangement relating to support of either spouse. Relevant parts of subsection 15.2(6) provides that an interim order should a) recognize economic advantages or disadvantages resulting from the breakdown of a marriage, c) relieve any economic hardship resulting from the breakdown of a marriage and d) as far as

is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[13] Ms. Proust submits that Mr. Proust's application should be characterized as an interim, originating application for spousal support brought under s. 15.2 and not an application for a final order. I do not understand that Mr. Proust disputes this position.

[14] In *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada outlined a 2-stage test for approaching an originating spousal support application where there is an existing support agreement. Pursuant to *Miglin* the Court is required to assesses the agreement at two points in time: the time when it was made and the current circumstances. At stage 1 the Court looks at (a) the circumstances in which the agreement was made to determine whether the agreement was obtained fairly and (b) whether the agreement substantially complied with the objectives of the *Divorce Act*: *Miglin,* at paras. 80-86. There is no dispute that the requirements at stage 1 of the *Miglin* analysis are met in this case.

[15] At stage 2 the Court considers whether the agreement still reflects the original intentions of the parties and remains in substantial compliance with the objectives of the *Divorce Act*. If there has been a material change of circumstances not reasonably anticipated by the parties that led to a situation which cannot be condoned, the court may give little weight to the agreement. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the *Divorce Act*, that the court may be persuaded to give the agreement little weight: *Miglin,* at paras. 87-91

[16] As was set out in *Sandy v. Sandy,* 2018 BCCA 182, at para. 61 "…a significant part of the s. 15.2 analysis consists of determining whether there has been a significant and unanticipated change in the parties' circumstances since they entered into their agreement — and that will be so whether the court is addressing

an agreement or an agreement that has been incorporated into an order (*Miglin* at para. 60)".

[17] As was set out by the Court of Appeal in *Hall v. Hall,* 2021 BCCA 115, in addition to the avenue of an originating application for review engaging s. 15.2 of the *Divorce Act* (and therefore the two stage *Miglin* analysis) or an application to vary an order under s. 17, a third avenue exists – being a review of support according to the terms of an agreement or an order: *Hall,* at para. 31.

[18] After referring to its decision in *Jordan v. Jordan,* 2011 BCCA 518, the Court of Appeal in *Hall* stated that "a settlement agreement may provide for review, and if so, as with a court order, the application does not impose a burden on any party to establish a change in circumstances. Rather, the applicant is required to establish that the condition triggering a review has been satisfied": *Hall,* at paras. 32- 33.

[19] As set out earlier Clause 46 of the Settlement Agreement provides that "either party may apply to vary spousal support on the occurrence of a material change in the financial circumstances of either of them". This is similar to the clause "either party may seek to vary spousal support if there is a material change in circumstances that affects the financial needs or abilities of either party" which was at issue in *Van Steinburg v. Van Steinburg,* 2012 BCSC 1772.

[20] In *Van Steinburg*, at para. 19, Justice Jenkins noted the following:

> since the Supreme Court of Canada's decision in *Miglin*, there has been considerable confusion in terms of whether the *Miglin* test applies to all sec. 15.2 applications. Specifically, some courts and commentators have questioned the applicability of *Miglin* to scenarios such as this; where there is an agreement on spousal support, but that agreement cannot be said to be "final" because it contains a variation clause.

[21] At para. 22 of *Van Steinburg*, Justice Jenkins referred to the following comments made by Carol Rogerson and Rollie Thompson in the Spousal Support Advisory Guidelines (Ottawa: Dept. of Justice, 2008), which I consider to be of assistance:

> If spousal support has been negotiated, the result will be a separation agreement that deals with spousal support. The possibilities for reviewing or modifying spousal support that the spouses have agreed upon will depend on many factors, including the drafting of the agreement and whether or not the agreement has subsequently been incorporated into the divorce judgement.
>
> We will deal first with the situation where there has been no incorporation of the agreement. The effect of subsequent changes in the parties' situation will be governed by the terms of the agreement. If the agreement provides for reviews by the parties at specified times or if it includes a material change clause, and if the conditions for these are met, it is possible for the Advisory Guidelines to apply to determine amount and duration. However, the Advisory Guidelines will have no application if the agreement is a final agreement in which spousal support has been waived or time-limited. (Ch. 14, p. 142)
>
> [Emphasis added]

[22] In *Van Steinburg,* Justice Jenkins considered two possible interpretations of the variation clause at issue. The first was that the clause merely incorporated into the parties' agreement the common law requirement of a material change in circumstances which is required in a variation application under s. 17 of the *Divorce Act.* The second was that the clause was intended to be interpreted more broadly to apply to a situation where one party was seeking an initial order to determine spousal support under s. 15.2. Justice Jenkins decided, based on all of the evidence in that case that the later interpretation was more plausible.

[23] In this case, Recitals W and AA of the Settlement Agreement indicate that the parties agreed that the question of entitlement to spousal support in the first instance was settled. The Settlement Agreement explicitly provides at para. 46 that the parties could apply to vary spousal support on the occurrence of a material change in the financial circumstances of either party. As well, I note that para. 47 required the parties to provide income documents annually on request and also set out a non-exhaustive list of material changes in financial circumstances. Finally, the Settlement Agreement described certain circumstances, which if they occurred, would constitute a material change for the purposes of an application to vary spousal support.

[24] I find that when they concluded the Settlement Agreement the parties did not agree that an initial application could be brought for spousal support under s. 15.2

engaging a full *Miglin* analysis – but rather intended that an application to vary the terms of the Settlement Agreement, in the nature of a review application, could be brought on the occurrence of a material change in the financial circumstances of either party.

Position of the Parties

[25] Both parties agree that an issue to be decided in this case is whether a material change in the parties' financial circumstances has occurred, different from what they contemplated at the time that they concluded the Separation Agreement. Both refer to *Dedes v. Dedes*, 2015 BCCA 194, at para. 25 in which the Court of Appeal stated that "the test for material change is based not on what one party knew or reasonably foresaw, but rather what the parties actually contemplated at the time". They disagree on what date should be used to determine the parties' initial circumstances and corresponding expectations. As well they disagree whether a material change in their financial circumstances has occurred at all.

[26] Mr. Proust contends that two material changes have occurred. The first is a reduction of his dividend income in 2024 from what he expected it would be in July 2023, the time that the parties concluded negotiation of the majority of the terms which were then included the executed Settlement Agreement. He submits that his income in 2022 ($574,722) and 2023 ($433,000) dropped to $276,000 in 2024, which was not contemplated in July 2023. He has provided a DivorceMate calculation which shows that the agreed upon $18,500 per month spousal support amount corresponds to earnings of approximately $574,722 which he submits suggests that at the relevant time he expected to earn income of around that amount.

[27] Second, Mr. Proust contends that Ms. Proust's income as a realtor, if business expense deductions are added back, plus potential income from renting out time share units and a basement suite and taking in boarders, indicate that she is capable of earning $75,000, and that this income should be imputed to her. He

contends, in my understanding, that her ability to earn this income constitutes a material change in her financial circumstances.

[28] Mr. Proust submits that even a material change in either of the parties' financial circumstances is not found by this Court that it is still necessary to determine whether the Settlement Agreement should be varied on the basis that a continuing requirement that Mr. Proust pay $18,500 in support, given his current income and expenses, results in a "significantly unfair practical effect".

[29] Ms. Proust contends that the parties' initial financial circumstances and what they contemplated should be considered as of the fall of 2023, or perhaps December 2023 or when the Separation Agreement was signed and not June 2023. She says that Mr. Proust was aware by the fall of 2023 that his income could decrease to $267,000 in 2024 and therefore the actual drop to $276,000 does not constitute a material change to his financial circumstances which the parties did not contemplate at the relevant time. As evidence Ms. Proust seeks to rely on without prejudice communication from Mr. Proust's counsel sent in November 2023, prior to the execution of the Settlement Agreement.

[30] With respect to her income, Ms. Proust disputes that income of $75,000 should be imputed to her for 2024 and submits that at most her income from all sources for that year was approximately $31,000, which is below the material change threshold for her income set out in the Settlement Agreement.

[31] Finally, Ms. Proust submits that it would be unfair to revisit the issue of spousal support as she agreed to a largely equal division of family property and debt on the understanding and agreement that Mr. Proust would pay her monthly spousal support of $18,500 per month.

Analysis

[32] I will first address the question of what date should be used in determining what the parties actually contemplated regarding their future financial circumstances.

[33] The Settlement Agreement states at Recital W that the parties settled all financial issues, with an effective date of July 1, 2023. In submissions before me counsel for Ms. Proust conceded that the parties had settled most of the financial issues between them by July 2023, but maintained that some issues remained outstanding including the division of a warranty refund, corporate property division and the sale of the family residence. Although I am satisfied that the parties had negotiated most of their financial issues this does not establish what the parties actually contemplated regarding their future earnings before the Settlement Agreement was finalized in December 2014.

[34] In October 2023, the parties had a meeting to discuss outstanding issues. At that time Mr. Proust's counsel provided letters indicating that his projected income had dropped to $20,222 per month – or approximately $243,000 per year. In correspondence dated November 23, 2023, marked without prejudice, counsel for Ms. Proust responded advising that if Mr. Proust was going to resile from the $18,500 spousal support payment the parties had previously negotiated, Ms. Proust would either sue to enforce this term or accept the repudiation and seek an unequal division of property to address "the unaddressed portion of her claim to compensatory support".

[35] With respect to what future earnings Mr. Proust contemplated, Ms. Proust seeks to rely upon without prejudice correspondence from counsel for Mr. Proust dated November 29, 2023, and in particular, a spreadsheet prepared by Mr. Proust's accountant setting out a forecasted reduction in his business revenue. As a result it is necessary to determine whether this correspondence is admissible.

[36] In bringing this application Mr. Proust has put the parties' actual contemplation regarding their future financial circumstances squarely in issue. As a result, I find that the November 2023 without prejudice correspondence from his counsel is admissible as it is helpful in determining the parties' actual expectations regarding their financial circumstances at the time the Settlement Agreement was made.

[37] In the November 29 correspondence Mr. Proust sought to renegotiate the previously agreed upon $18,500 per month in spousal support, proposing that he pay $10,000 per month based on an income projection of $276,000 per year starting in 2024. Along with this correspondence counsel for Mr. Proust included a draft separation agreement which he stated was what they hoped would be the final form. The draft agreement included a change made by Mr. Proust to threshold for Mr. Proust's income which would constitute a material change – decreasing the threshold from $600,000 to $300,000.

[38] Ms. Proust declined to renegotiate the agreed upon $18,500 in monthly spousal support. On December 14 and 15, 2023 the parties signed the Separation Agreement.

[39] Although there is no evidence that in July 2023 the parties actually contemplated that Mr. Proust's income could drop to $276,000 in 2024, this was not the case by approximately October 2023. The exchanges of communication between the parties in October and November 2023 and the $300,000 material change threshold for Mr. Proust's income, proposed by Mr. Proust and included at Clause 48 b. of the Settlement Agreement, satisfies me that when the Settlement Agreement was made the parties actually contemplated that Mr. Proust's earnings in 2024 would be less than $300,000.

[40] Mr. Proust's actual dividend earnings in 2024 were approximately $24,000 less than $300,000, which I do not find to be material. Ultimately, I am not satisfied that Mr. Proust has proven the occurrence of a material change to his financial circumstances that was not contemplated at the time that the Settlement Agreement was made, justifying a variance to spousal support.

[41] With respect to Ms. Proust's financial circumstances, clause 48 e. of the Settlement Agreement sets out that an increase of her income over $60,000 would constitute a material change of circumstances for the purpose of an application to vary spousal support. This clause says nothing about changes to her earning potential. Ms. Proust's evidence is that she will earn approximately $75,000 gross in

real estate commissions and will incur business expenses of approximately $63,000 for 2024. As well her evidence is that she can generate between $14,000 and $17,000 in income from her timeshares. This results in a total income, with timeshare rental income grossed up for taxes, of approximately $31,000.

[42] Mr. Proust submits, without supporting evidence, that Ms. Proust's business expenses for 2024 are simply too high. He bears the onus of proving that a higher income should be imputed to Ms. Proust for 2024 and going forward, which includes proving that her 2024 business expenses are unreasonably high. There is no evidence on which this Court can conclude that this is the case. As set out immediately above Ms. Proust concedes that she is able to earn up to $17,000 annually from her time shares. With respect to Mr. Proust's submission that additional income should be imputed for potential rental income from renting spare rooms in her home, Mr. Proust does not offer any authority in support of this proposition and I do not find that it would be appropriate to do so. With respect to potential rental revenue from a basement suite in Ms. Proust's home for approximately $2,000 per month, as Mr. Proust submits is possible, adding this amount to her 2024 income of $31,000 does not put her over the $60,000 material change threshold set out in the Settlement Agreement.

[43] It may be that Ms. Proust had the capacity to earn more than $60,000 in income from all sources in 2024 and in years following. Again, clause 48 e. does not suggest that Ms. Proust's capacity to earn more income than she did in 2022 or 2023 could constitute a material change. There is no evidence that when the Settlement Agreement was negotiated and signed, the parties actually contemplated anything other than Ms. Proust's income remaining the same as it was in previous years. I note that the Settlement Agreement provides at Recital G that her income in 2022 was $0 and was estimated to be $6,000 for 2023. In my view, this assists in establishing what the parties actually contemplated Ms. Proust's income would be in the following years.

[44] I do not find that Ms. Proust's financial circumstances have changed in a manner which could be described as material since the Settlement Agreement was concluded in 2023. She was a realtor and arguably had the ability to earn more than $60,000 at that time. As well the parties were aware that Ms. Proust would be granted the parties' time shares as part of the division of family property.

[45] In summary, I am not satisfied that there has been a material change of either of the parties' financial circumstances which was not reasonably anticipated by the parties. As a result, the terms of the Settlement Agreement which provided for an open-ended spousal support payment to Ms. Proust of $18,500, and I note in particular, generally divided family property equally between the parties, should be given significant weight. Their current financial circumstances do not represent a significant departure from the range of reasonable outcomes which I have found were anticipated by the parties.

[46] As set out at para. 46 of *Miglin* "a court should be loathe to interfere with a pre-existing agreement unless it is concerned that the agreement does not comply with the overall objectives of the *Divorce Act* … particularly … when the pre-existing spousal support agreement is part of a comprehensive settlement of all issues related to the termination of a marriage" and "[s]ince the issues, as well as their settlement, are likely interrelated, the support part of the agreement would at times be difficult to modify without putting into question the entire agreement."

[47] The comments of the Supreme Court of Canada at para. 46 of *Miglin* apply here. I am not satisfied that the Settlement Agreement does not comply with the overall objectives of the *Divorce Act*, being relieving any economic hardship arising from the breakdown of the marriage and promoting economic self sufficiency (ss. 15.2(6)(c) and (d)). I note that at this time Mr. Proust has significantly more financial assets than Ms. Proust and earns a far larger salary. As well, I am not satisfied that Ms. Proust has not made efforts to achieve economic self-sufficiency. The evidence establishes that she continues to try to earn income as a realtor – but has not had substantial success in this respect to date.

[48] I conclude that it would be inappropriate to vary the requirement in this agreement that Mr. Proust pay monthly spousal support of $18,500. Mr. Proust's application is dismissed.

[49] If submissions on costs are necessary the parties are at liberty to request a further hearing date before me from Supreme Court Scheduling.

"Mayer J."