Citation: Bernard v Bernard, 2026 MBCA 47
Date: 20260528
Docket: AF25-30-10188

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Jennifer A. Pfuetzner
Madam Justice Anne M. E. Turner

***B E T W E E N**:*

	)	***A. Choudhary***
PATRICIA LISE CLAIRE BERNARD	)	*for the Appellant*
	)	
(Petitioner) Appellant	)	***C. J. Bernard***
	)	*on their own behalf*
- and -	)	
	)	*Appeal heard:*
COLIN JEFFREY BERNARD	)	***February 23, 2026***
	)	
(Respondent) Respondent	)	*Judgment delivered:*
	)	***May 28, 2026***

RIVOALEN CJM

[1] This appeal involves an application to vary a final order of spousal support arising from a termination, by consent, of the obligation to pay child support.

[2] The quantum of spousal support was reviewable in the event child support was no longer payable, in accordance with the terms of the parties' separation agreement. Those terms were incorporated in the final order pronounced at the time of the divorce judgment.

[3] The appellant appeals the variation order in which a judge of the Court of King's Bench (Family Division) (the application judge) varied the

amount of spousal support payable under the final order on a gradually decreasing basis that would result in payments of $1 per month.

[4] For the reasons that follow, I would allow the appeal, set aside the variation order, reinstate the interim order and remit the matter back to the Family Division for determination.

Background

[5] The parties married in 2000 and have two children of the marriage. They separated in 2010. The appellant filed a petition for divorce in 2011.

[6] The parties entered into a comprehensive separation agreement (the agreement) in 2012 and each received independent legal advice.

[7] The salient provisions of the agreement regarding spousal support are as follows:

(1) The preamble and paragraph 5.02 set out that the appellant was unemployed at the time the agreement was signed.

(2) The preamble sets out the respondent's income as being $55,631.72 in 2010.

(3) Paragraph 9.01 provides that the respondent or his estate will pay $1,000 per month in spousal support (increasing to $1,200), which amount is reduced to $590 per month based on his obligation to pay child support for one child of the marriage.

(4) Paragraph 9.03 provides that spousal support shall cease if the appellant remarries, lives in a common-law relationship for three years or dies.

(5) Paragraphs 9.04 and 9.05 provide that neither party can claim the right to further support from the other.

(6) Paragraph 9.07 provides that the parties are each aware of the provisions set out in the *Divorce Act*, RSC 1985, c 3 (2nd Supp), relating to spousal support and, in particular, sections 15 and 17 (which include provisions addressing economic self-sufficiency).

(7) Paragraph 9.08 provides a full release of any claim for further spousal support.

(8) Paragraph 13.01 provides for a review of spousal support. It states:

> In the event that child support is no longer payable for [the child], the parties agree to review the quantum of spousal support. The parties agree to use the framework set out in the Spousal Support Advisory Guidelines by imputing the relevant details including the parties' incomes. The parties agree to renegotiate the quantum of spousal support taking into account the range of support pursuant to the advisory guidelines.

[8] The divorce judgment and final order were pronounced on March 5, 2015. As mentioned, the final order incorporated the terms of the agreement. The respondent was ordered to pay monthly child support of $498.94 and monthly spousal support of $701.06 (for a total of $1,200 in support).

[9] The validity of the agreement was never challenged.

[10] In 2022, the respondent applied under section 17 of the *Divorce Act* to terminate both his child support obligation and his spousal support obligation. The respondent argued that his spousal support obligation should be terminated on the basis that (1) the appellant was then capable of working full-time and earning an income sufficient to support herself, and (2) he had been paying spousal support for nearly eleven years. The respondent did not rely on any of the three conditions outlined in paragraph 9.03 of the agreement.

[11] The appellant filed a motion to vary the spousal support, seeking a retroactive increase in the monthly amount effective October 1, 2023. She agreed to terminate child support. However, the appellant opposed the notice of motion to terminate spousal support and argued that the quantum of spousal support should be increased because of the cessation of child support payments and the increase in the respondent's income. She asserted that she was disabled and was capable of only "minimal employment".

[12] In September 2023, the parties entered into an interim order by consent with the benefit of counsel, confirming that the respondent's obligation to pay child support for the child of the marriage terminated in September 2023 and that the respondent would pay spousal support in the amount of $1,200 per month to the appellant starting on October 1, 2023. The order was made without prejudice to either party's claim for an increase or decrease in spousal support.

[13] In October 2024, the competing variation applications proceeded before the application judge over a period of multiple days. The application

judge had before her affidavit evidence and heard oral testimony and cross-examinations of the parties, the appellant's family doctor and the witnesses for the respondent.

[14] In her oral reasons delivered on October 16, 2024, the application judge made the following findings of fact:

(1) At no time did either party try to set aside the agreement and start afresh.

(2) The respondent's current income was approximately $92,000.

(3) The final order had the following payments starting on April 1, 2015: $498.94 of child support and $701.06 of spousal support per month.

(4) The Court had significant concerns about all the evidence, taken together with respect to the appellant's efforts to become self-sufficient and whether she was taking that obligation seriously.

(5) The Court did "not have the ability to find that after 14 years of paying support, that [the appellant's] income at zero dollars with no ability to earn an income [was] reasonable in the circumstances."

(6) The Court rejected the respondent's contention that the appellant and her boyfriend were in a common-law relationship.

[15] The application judge made the following determinations leading to her conclusion that spousal support should be continued but on a decreasing scale:

(1) The Spousal Support Advisory Guidelines (SSAG) printout provided by the appellant's counsel suggested a range of $1,900 to $2,600 per month, rounded.

(2) The Court stated that it would not, in this case or in any case, look at the numbers in a vacuum and that it had to consider all of the circumstances overall. The respondent had children who were dependent in his household.

(3) This caused the Court concern with respect to a number of things. First, the appellant's efforts to become self-sufficient. Second, when she considered the appellant's activities, including vacations and efforts to support herself through gambling at a casino, she found those efforts to be misplaced. She further found, based on the evidence, that the medical evidence before the Court was lacking.

(4) The Court found that what was appropriate in the circumstances was for the respondent to continue to pay spousal support because the agreement contemplated that outcome.

[16] The application judge stated:

> Taking into account the various factors, what is appropriate in the circumstances is an amount that I am going to start at, and it is going to gradually decrease each year. And the reason for that is, I want to afford you, [the appellant], an opportunity to make some

> choices to try and become self-sufficient or put a different way, I am putting greater emphasis on that factor in the *Divorce Act* of self-sufficiency or objective in the *Divorce Act* of self-sufficiency.

[17] The application judge then proceeded to order spousal support payments on a decreasing scale as of January 1, 2025:

- $400 per month from January 1, 2025 to December 31, 2025;
- $150 per month from January 1, 2026 to December 31, 2026;
- $75 per month from January 1, 2027 to December 31, 2027; and
- $1 per month from January 1, 2028 and continuing until further order of the Court or agreement.

[18] This variation order is the subject of this appeal.

Standard of Review

[19] When the objectives and factors set out in the *Divorce Act* are considered and balanced, decisions of a judge must be given considerable deference by appellate courts because such decisions are fact-based and discretionary in nature. Discretionary decisions of this kind should not be disturbed absent an error of law, a material error or a serious misapprehension of the evidence, or unless the decision is clearly wrong (see *Hickey v Hickey*, 1999 CanLII 691 at paras 10-12 (SCC)).

The Appellant's Arguments

[20] The appellant advances two arguments. Both are tied to the application judge's interpretation of the agreement.

[21] First, the appellant submits that the application judge erred when she did not give adequate weight to paragraph 9.03 of the agreement. The agreement specifically contemplated that the obligation to pay spousal support would cease if one of three conditions were met: the appellant remarried, the appellant lived in a common-law relationship for three years or the appellant died. None of these conditions were met.

[22] The appellant submits that, by reducing spousal support to $1 per month from January 1, 2028 onwards, the application judge effectively terminated spousal support.

[23] Next, the appellant submits that the application judge erred when she arbitrarily reduced spousal support on a graduating scale without taking into consideration the SSAG and without providing any analysis as to how she came to such determination. The appellant argues that the application judge must have effectively imputed an income to her equivalent to that of the respondent in order for his spousal support obligation to be reduced to near zero.

[24] For the following reasons, I agree with the appellant's submissions.

Analysis

Spousal Support Under the Divorce Act

[25] Generally speaking, there are three routes to court determinations regarding spousal support: (1) initial applications for court-ordered spousal support under section 15.2 of the *Divorce Act*, (2) applications to vary spousal support orders under section 17 of the *Divorce Act*, and (3) review proceedings triggered by a term or condition contemplated in a separation agreement or court order between the parties.

[26] When proceedings are brought through any of the above-mentioned routes, the court must consider any separation agreements previously reached between the parties in coming to decisions regarding support. The major principles that govern this requisite consideration are derived from *Miglin v Miglin*, 2003 SCC 24 [*Miglin*] and *LMP v LS*, 2011 SCC 64 [*LMP*].

[27] In *Miglin*, the Supreme Court of Canada established a two-stage test to determine when a court may grant an initial order of spousal support under section 15.2 of the *Divorce Act*. It remains the leading case on the treatment of spousal support agreements in determinations of an initial application for spousal support under section 15.2(1) of the *Divorce Act.*

[28] While *Miglin* relates to initial applications for spousal support, the Court reminds us that "judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order" (at para 62).

[29] Turning to variation applications, *LMP* is the leading Supreme Court case on the treatment of spousal support agreements in applications to vary spousal support orders under section 17(4.1) of the *Divorce Act* where the support terms of an agreement have been incorporated into the order. *LMP* indicates that the approach in variation applications differs from the *Miglin* approach for initial applications.

[30] In *LMP*, the majority stated that, once the threshold for variation has been met (material change in circumstances since the making of the order), a court must then consider the material change and "limit itself to making only the variation justified by that change" (at para 47). They explained (*ibid* at para 50):

> In short, once a material change in circumstances has been established, the variation order should "properly reflec[t] the objectives set out in s. 17(7), . . . [take] account of the material changes in circumstances, [and] conside[r] the existence of the separation agreement and its terms as a relevant factor" (*Hickey*, at para. 27). *A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the Divorce Act.*
>
> [emphasis added]

[31] I would also mention the Supreme Court's decision in *Leskun v Leskun*, 2006 SCC 25 [*Leskun*]. *Leskun* makes clear that an application for *review* of a spousal support order according to the terms of a court order or agreement permits parties to alter support awards without having to demonstrate a material change in circumstances as required under section 17 of the *Divorce Act*. Rather, it indicates that a party must only demonstrate the occurrence of the triggering event or circumstance set out in the review clause

that necessitates the review and that the court must then only reconsider the specific issue or issues to be reviewed according to the review clause (i.e., quantum, duration, entitlement, etc.).

[32] *Leskun* is referenced by the British Columbia Court of Appeal in *Jordan v Jordan*, 2011 BCCA 518 at paras 33-34, in which the Court stated:

> By comparison, the right to a review of a support order is created by a term or condition of an agreement (see *Scott v. Scott*, 2008 BCCA 457 at para. 24, *McEachern v. McEachern*, 2006 BCCA 508 at para. 32) or court order (see *Schmidt v. Schmidt*, 1999 BCCA 701 at paras. 8-9, *Domirti v. Domirti*, 2010 BCCA 472 at paras. 32-34). *A review hearing does not require a preliminary threshold finding of a change of circumstances, but the agreement or order will usually define a period of time that must pass or an event or condition that must occur before the right to a review is triggered. If the condition is met, the court moves directly into a consideration of the issue(s) to be reviewed and whether the evidence supports a change in the earlier order.*
>
> It is therefore important to clearly identify the issue to be reviewed so that the party seeking a change in the order does not interpret the review hearing as a right to reargue their position on the order sought to be changed. An ambiguous review provision may present difficulties, as occurred in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920[.]
>
> [emphasis added]

[33] I will end my discussion of some of the relevant leading jurisprudence by concurring with the SSAG *User's Guide's* caution regarding reviews (see Canada, Department of Justice, *Spousal Support Advisory Guidelines: The Revised User's Guide* by Carol Rogerson & Rollie Thompson (Ottawa: DOJ, April 2016) online: <justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/> [SSAG *User's Guide*]).

[34] Chapter 13 of the SSAG *User's Guide* warns that, while a review hearing is often described as a hearing *de novo*, as in *SAH v KAH*, 2022 NBCA 17, this description "is somewhat misleading" (SSAG *User's Guide* at 73). The SSAG *User's Guide* explains (*ibid*):

> [F]ollowing *Leskun v. Leskun*, 2006 SCC 25, *the issues to be reviewed may, and indeed should be, delineated by the terms of the review*: see *Westergard v. Buttress*, 2012 BCCA 38 (review only re self-sufficiency, not *de novo* assessment) and *MacCarthy v. MacCarthy*, 2015 BCCA 496 *(order permitting review properly interpreted to apply only to quantum and not entitlement*; not allowing for re-litigation of entitlement one year after trial).
>
> [emphasis added]

Application of the Case Law to the Present Appeal

[35] The variation of spousal support in the present appeal should have been delineated by the terms of the review provision found in paragraph 13.01 of the agreement, keeping in mind the parameters of the spousal support agreed upon by the parties in paragraphs 9.01, 9.03, 9.04, 9.05, 9.07 and 9.08.

[36] As mentioned above, paragraph 9.01 of the agreement sets out that a sum equal to $1,200 in monthly spousal support would be paid, less the child support obligation. From the moment the agreement was signed, a total of $1,200 per month (a combination of spousal and child support) was paid until the child support obligation was terminated. In 2023, the interim order maintained the monthly spousal support of $1,200.

[37] Paragraph 9.03 of the agreement relates to the appellant's entitlement to receive spousal support. Her entitlement to receive spousal

support terminates only once one of three enumerated conditions is met. The application judge found that none of those conditions were met.

[38] The other paragraphs forming part of 9.00 all specifically relate to the treatment of spousal support.

[39] Paragraph 13.01 of the agreement provides for a review of the quantum of spousal support. Here, the application judge properly found that the review mechanism was triggered because the respondent's obligation to pay child support was terminated. It was also correct for the application judge to find that the cessation of the payment of child support would have been considered a material change in circumstances that would then allow for the Court to consider a variation in the quantum of spousal support. Even so, the application judge was confined to reviewing spousal support through the lens of the agreement.

[40] In conducting her review, the application judge recognized that the agreement does not contemplate a termination of spousal support unless one of three conditions were met pursuant to paragraph 9.03 of the agreement and that those conditions were not met. Nonetheless, the application judge effectively terminated spousal support starting in 2028.

[41] Put another way, by reducing the spousal support to $1, the application judge terminated spousal support; that is, she determined that the appellant was no longer entitled to spousal support notwithstanding paragraph 9.03 of the agreement. As stated by the Ontario Court of Appeal in *Haworth v Haworth*, 2018 ONCA 1055 [*Haworth*], this reduction "effectively amounted to a rescission of the support order" (at para 16).

[42] Despite recognizing that she ought to respect the agreement and only review the quantum of spousal support as stipulated in paragraph 13.01, and even though she found no facts that would justify overriding the agreement between the parties altogether, the application judge essentially granted the respondent's motion to terminate the appellant's entitlement to spousal support under the guise of a variation order that gradually decreased the quantum of spousal support.

[43] Next, it is not possible to discern from the reasons, read in light of the record and the submissions, how the application judge came to her findings on quantum. That is, the $400 per month ordered from January 1, 2025 to December 31, 2025; the $150 per month ordered from January 1, 2026 to December 31, 2026; and the $75 per month ordered from January 1, 2027 to December 31, 2027.

[44] Nowhere in the application judge's reasons does she provide an analysis of the SSAG when calculating the appropriate amount of spousal support, contrary to the specific wording of paragraph 13.01. The application judge accepted that the respondent's income was approximately $92,000. She stated the range of spousal support recommended by the SSAG at this level of income was $1,900 to $2,600 per month. That was the end of her analysis.

[45] She made no findings or imputations of income to the appellant. She simply did not accept that it was reasonable for the appellant to be unemployed. Indeed, the application judge emphasized the appellant's unsuccessful efforts at becoming self-sufficient. It was her sole focus; the application judge treated the review of the quantum of spousal support as the opportunity to terminate spousal support.

[46] By doing so, it appears implicit that the application judge imputed the respondent's quantum of income ($92,000) to the appellant, leaving her with the amount of $1 per month in spousal support.

[47] Moreover, there was no discussion regarding the appellant's age and the fact that she was unemployed at the time the agreement was signed. There was no mention of paragraph 9.01 of the agreement requiring a continual payment of $1,200 per month in support; paragraph 9.04 in which the parties accepted the terms of the agreement in full satisfaction of all claims for spousal support; or paragraph 9.08 in which the parties agreed that, with the payment as contemplated in the agreement, the parties were both self-sufficient and had no need for financial support from the other.

[48] Having found that there were two material changes in circumstances that warranted variation (the cessation of child support payments and the increase in the respondent's income), noting that the cessation of child support was also the triggering event for the review and taking into account the constraints of the review clause, the application judge was then limited to making the variation that was appropriate in light of those changes, paying deference to the parties' agreement regarding spousal support that was reflected in the final order. She did not do this. Rather, she weighed all the factors in the *Divorce Act*, with a particularly narrow focus on the objective of economic self-sufficiency, to make a fresh order unrelated to the existing one, essentially rescinding the original order. In my view, just as the Court found in *Haworth* at para 21:

> The variation to spousal support had to be considered against the backdrop of the original order which was arrived upon in the context of a broader agreement. This was not a case that required

> a rescission of the original support order. Instead, the motion judge should have used the original support order and varied it only to the extent required by the change[.]

[49] Here, the application judge should have used the original support order and varied it only to the extent required by the change and limited to the parameters of the review set out in the agreement.

[50] In my view, the application judge's failure to do so amounted to a material error in principle in her approach to the review of the spousal support order. That, coupled with the lack of analysis indicating how she arrived at the gradually reduced amounts of spousal support, renders the decision so clearly wrong as to warrant appellate intervention.

Conclusion

[51] For these reasons, I would allow the appeal. The variation order should be set aside, the interim order should be reinstated and the determination of the review of spousal support should be returned to a judge of the Family Division, with costs to the appellant.

Rivoalen CJM

I agree: Pfuetzner JA

I agree: Turner JA