TAB 5

Miglin's Effect on Interim Support Motions

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Continuing Legal Education

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The test outlined in *Miglin* to determine whether or not a spousal support release (or limitation) should be adhered to by the Court under the Divorce Act, is obviously best applied, and the answer most fairly determined, at trial. All of the evidence necessary for a full determination is available, including the evidence of the lawyers who assisted with the negotiations and preparation of the contracts. Of course, most often, these lawyers will not be testifying in relation to a separation agreement because the privilege attaching to their services will not be waived. It seems, however, that it is more often waived and thus the solicitors permitted to testify where the support release/limitation is contained in a marriage contract. In addition, the credibility of the parties under cross examination can be determined by the judge.

However, there is nothing in *Miglin* which limits its application to trials or final determinations; it is also apparently applicable to interim motions for support. Several courts have addressed this issue and found that they really have no choice but to try to apply it, if at all possible, in an interim motion.

With respect, there is also nothing in *Miglin* which specifically mandates interim determinations. The better course, in my view, would be for the motion court judge to direct a speedy trial, with whatever directions are required to accomplish this. Unless there is urgency the Court should make this its rule of thumb. Where there is urgency the Court will have to grapple with the application of the *Miglin* test as best it can, as Madame Justice Sachs did in *Chaitas v. Christopoulos* (unreported decision January 19, 2004). In that case a marriage contract had been entered into two days before the wedding containing complete support and property releases. Her Honour reviewed the decision of the Saskatchewan Court of Queen's Bench in *Palmer v. Palmer* [2003] S.J. No. 671 where the Court stated ..."on interim applications it is perfectly difficult, **if not impossible**, to assess the appropriate weight to be given to an agreement...while a Court can order interim spousal support where there is an agreement, it should be hesitant to do so...except in exceptional circumstances, agreements should be respected and upheld until trial when the circumstances surrounding the agreement can be fully canvassed. It is only in rare cases that a court should vary from this principle." (Emphasis added)

Her Honour also canvassed pre *Miglin* cases and the purpose of interim support and found that as a matter of law she was *required* to conduct the Miglin analysis.

> "If on the evidence filed, a serious issue to be tried has been raised with respect to the circumstances under which the contract was negotiated and executed, then the contract will not act as a bar to the application."

Her Honour went on to review the evidence contained in affidavits and cross examination transcripts and found that the economic advantages and disadvantages arising from the marriage or its breakdown were not met by the release in the marriage contract and awarded interim spousal support this, however, was couched in cautious language, as she pointed out that if the release were upheld at trial when all the evidence was available, there were joint assets out of which the support could be repaid. She also declined to award costs, reserving those to the trial judge who would determine the issue on a final basis.

The Court of Appeal tackled this point from a somewhat different perspective in *Kelly v. Kelly* (decision of the Court of Appeal released July 23, 2004). A motion for summary judgment was brought based upon a release of spousal support contained in a separation agreement. The wife's evidence (the releasor of spousal support rights) had independent legal advice with respect to two agreements but also alleged that she had a mental illness which made her particularly vulnerable so that the legal advice was not understood. The Court of Appeal found that this was an issue which should be left to the trial judge to determine. The motions court judge was also criticized for not looking at the substance of the agreement and determining whether they substantially complied with the objectives of the *Divorce Act*. This raised genuine issues for *trial*. There did not appear to be an issue of interim support be raised. That was, in my submission, the correct approach.

Kelly emphasizes the difficulty that the Court has in applying the *Miglin* test short of a trial. This may be considered unfortunate, because it will oblige more cases to proceed to trial, often on an expedited basis, but that is better than attempting to apply this complicated and fact driven test on paper evidence alone.

In the recent decision of *Lawrence v. Lawrence* (unreported decision April 16, 2004) Madame Justice Backhouse granted summary judgment dismissing an application to vary based upon

repeated releases of the right to claim additional spousal support beyond that contained in the last separation agreement. While this was not a release or time limited order, but an indefinite support arrangement, it was specifically agreed by the parties that they would never apply to vary. This was a final determination, but one on the husband's cross motion for dismissal (summary judgment) in accordance with a domestic contract in the face of the wife's interim support motion. While this predated *Kelly*, it demonstrates that the language of the separation agreement is crucial. Not only was there a specific release of the right to ever apply to vary but an acknowledgement by the solicitor (and the wife's psychiatrist) that she understood the meaning of this quite clearly. The wife could not raise any issue about impeachability and had expressly acknowledged that the agreement met the objectives of the *Divorce Act*. This can distinguish *Lawrence* from *Kelly* and emphasizes the importance of clear and careful drafting.

ARGUING *MIGLIN* IN AN INTERIM MOTION

When you are seeking interim spousal support, you should seriously consider offering to mutually waive solicitor client privilege and get both solicitors' files. The information they contain may bolster the case that the circumstances were not unimpeachable. Obviously questioning will also be necessary for the same reason and perhaps insisting on affidavit of documents under Rule 19 to ensure that the Court has as full a documentary record as the trial judge will. In the actual argument at the motion the emphasis should be on the absence of real negotiations, inadequate financial disclosure, and failure to meet the objectives of the *Divorce Act* (which are vague enough to allow virtually anything to constitute and support this).

When arguing against interim support in a *Miglin* situation you should emphasize the credibility issues that must be determined, the conflicting evidence, and the examples the Supreme Court of Canada gave in *Miglin* that would not constitute changes which would justify overriding a release or limitation of support rights in a domestic contract.

Tactically you should consider whether or not to waive the privilege in relation to the files and evidence of the solicitors participating in the negotiating and drafting of the domestic contract in question. You should also consider moving to sever the issues although this is unlikely to be granted in all but the rarest of cases. If the party seeking interim support is also seeking to set

aside the entire agreement and the property settlement you stand a better chance of succeeding because of the valuation issues which would flow from the latter.

If you are opposing the granting of interim support you must be ready to proceed expeditiously through producing, questioning and trial. These can and should take place over a matter of months rather than years.