L.M.P. (appellant) v. L.S. (respondent) and Women's Legal Education and Action Fund and Disabled Women's Network Canada (intervenor)
(33749; 2011 SCC 64; 2011 CSC 64)

Indexed As: L.M.P. v. L.S.

Supreme Court of Canada
McLachlin, C.J.C., Binnie, LeBel, Deschamps, Abella, Rothstein and Cromwell, JJ.
December 21, 2011.

Summary:

Shortly after the parties married in 1988, the wife learned that she had multiple sclerosis. The wife did not work outside the home after her diagnosis and received disability benefits. When the parties divorced in 2003, their separation agreement was incorporated into a court order, which included a provision for indexed spousal support payable by the husband. In 2007, the husband sought a variation of spousal support (Divorce Act, s. 17).

The Quebec Superior Court, in a decision with neutral citation 2009 QCCS 3389, conducted a de novo hearing respecting the wife's ability to work and concluded that she was capable of working outside the home and that she should seek to become economically self-sufficient. The court varied the initial support order without making a finding about whether there had been a material change in the wife's circumstances since the 2003 order was made. The wife appealed.

The Quebec Court of Appeal, in a decision with neutral citation 2010 QCCA 793, dismissed the appeal. The court concluded that the trial judge's factual determination of the wife's capacity to work, coupled with the passage of time, amounted to a material change of circumstances. The wife appealed again.

The Supreme Court of Canada allowed the appeal and restored the initial order for indexed spousal support. The court stated that in light of the circumstances at the time the original order was made, the findings below were unsustainable. Here, there had been no change, let alone a material one, since the initial order. As a result, the husband's application for variation could not succeed as he has failed to meet the threshold required by s. 17(4.1) of the Divorce Act. The court set out the proper analysis to be conducted on an application to vary under s. 17 of the Divorce Act and discussed how the court should handle a variation application where the initial order for support under s. 15.2 incorporated a separation agreement.

Family Law - Topic 3997

Divorce - Corollary relief - General - Economic self-sufficiency - The Supreme Court of Canada stated that "Neither does the Divorce Act impose a duty upon ex-spouses to become self-sufficient. As this Court affirmed in Leskun [2006], the '[f]ailure to achieve self-sufficiency is not breach of 'a duty' and is simply one factor amongst others to be taken into account" (para. 27). Section 15.2(6)(d) of the Divorce Act simply states that the order should 'in so far as practicable, promote the economic self-sufficiency' of the parties" - See paragraph 59.

Family Law - Topic 4000

Divorce - Corollary relief - Maintenance and awards - General principles - [See first **Family Law - Topic 4017**].

Family Law - Topic 4017

Divorce - Corollary relief - Maintenance awards - Variation of periodic payments or lump sum award - The Supreme Court of Canada noted that there were differences between what a court was directed to consider in making an initial support order under s. 15.2 of the Divorce Act and a variation of that order under s. 17 - While s. 15.2 set out a number of factors to be considered, s. 17(4.1) provided that "a change in the ... circumstances" of the parties was the sole factor - Because of those differences in language, the court stated it was important to keep the s. 15.2 and s. 17 analyses distinct - See paragraph 23 - Therefore, the approach developed in Miglin (SCC 2003) was responsive to the specific statutory directions of s. 15.2 of the Divorce Act and should not be imported into the analysis under s. 17 - See paragraph 28.

Family Law - Topic 4017

Divorce - Corollary relief - Maintenance awards - Variation of periodic payments or lump sum award - The Supreme Court of Canada stated that the threshold that had to be met before a court could vary a prior spousal support order was articulated in s. 17(4.1) of the Divorce Act - A court had to consider whether there had been a change in the conditions, means, needs or other circumstances of either former spouse "since the making of the spousal support order" - See paragraph 29.

Family Law - Topic 4017

Divorce - Corollary relief - Maintenance awards - Variation of periodic payments or lump sum award - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - Willick (in dealing with child support) described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" - In determining whether the conditions for variation existed, the court had to be satisfied that there had been a change of circumstance since the making of the prior order or variation - The onus was on the party seeking a variation to establish such a change - According to the majority in Willick, the "change of circumstances" had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" - L.G. confirmed that this threshold also applied to spousal support variations - See paragraphs 30 to 32.

Family Law - Topic 4017

Divorce - Corollary relief - Maintenance awards - Variation of periodic payments or lump sum award - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - The court stated that the focus of the analysis was on the prior order and the circumstances in which it was made - Willick clarified that a court

ought not to consider the correctness of the prior order, nor was it to be departed from lightly - The test was whether any given change "would likely have resulted in different terms" to the order - It was to be presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6) - In that way, the Willick approach to variation applications required appropriate deference to the terms of the prior order, whether or not that order incorporated an agreement - See paragraph 33.

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Family Law - Topic 4017

Divorce - Corollary relief - Maintenance awards - Variation of periodic payments or lump sum award - The Supreme Court of Canada discussed the appropriate variation once it has been established that there has been a material change of circumstances justifying a variation of a prior order (Divorce Act, s. 17) - The court stated that "... once a material change in circumstances has been established, the variation order should 'properly reflect[] the objectives set out in s. 17(7), ... [take] account of the material changes in

circumstances, [and] consider [] the existence of the separation agreement and its terms as a relevant factor' ... 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" - See paragraph 50.

Family Law - Topic 4017

Divorce - Corollary relief - Maintenance awards - Variation of periodic payments or lump sum award - Shortly after marrying in 1988, a wife was diagnosed with multiple sclerosis - Thereafter, she was not employed and received disability benefits - Upon divorcing in 2003, the parties' separation agreement was incorporated into a court order (Divorce Act, s. 15.2), providing for indexed spousal support payable by the husband - There was no provision for variation and no reference to the wife seeking employment - In 2007, the husband sought a variation (Divorce Act, s. 17) - The trial judge, after conducting a de novo hearing respecting the wife's ability to work concluded that she was able to do so, and without making a finding of a material change in the wife's circumstances, varied spousal support - The Court of Appeal concluded that the trial judge's factual determination of the wife's capacity to work, coupled with the passage of time, amounted to a material change of circumstances - The wife appealed - The Supreme Court of Canada stated that in light of the circumstances at the time the original order was made, the findings below were unsustainable - Instead of determining whether there had been a material change of circumstances, the trial judge conducted a de novo assessment of the wife's ability to work as if this was an original application for support under s. 15.2 - In relying on that assessment to infer a material change of circumstances, the Court of Appeal fell into the same error - There had been no change, let alone a material one, since the initial order - Therefore, the husband's variation application failed because he did not meet the threshold required by s. 17(4.1) (i.e., material change of circumstances) - The court restored the initial order for indexed spousal support - See paragraphs 51 to 61.

Family Law - Topic 4195

Divorce - Practice - Judgments and orders - Variation of - [See all **Family Law - Topic 4017**].

Quebec Family - Topic 6497

Divorce - Support obligation - Variation - [See all **Family Law - Topic 4017**].

Cases Noticed:

Moge v. Moge, [1992] 3 S.C.R. 813; 145 N.R. 1; 81 Man.R.(2d) 161; 30 W.A.C. 161, refd to. [para. 17].

Pelech v. Pelech, [1987] 1 S.C.R. 801; 76 N.R. 81, refd to. [paras. 17, 70].

Richardson v. Richardson, [1987] 1 S.C.R. 857; 77 N.R. 1; 22 O.A.C. 1, dist. [paras. 17, 70].

Caron v. Caron, [1987] 1 S.C.R. 892; 75 N.R. 36; 2 Y.R. 246, dist. [paras. 17, 70].

Miglin v. Miglin, [2003] 1 S.C.R. 303; 302 N.R. 201; 171 O.A.C. 201; 2003 SCC 24, dist. [paras. 17, 62].

Willick v. Willick, [1994] 3 S.C.R. 670; 173 N.R. 321; 125 Sask.R. 81; 81 W.A.C. 81, appld. [paras. 30, 66].

L.G. v. G.B., [1995] 3 S.C.R. 370; 186 N.R. 201, appld. [paras. 30, 66].
G.(L.) v. B.(G.) - see L.G. v. G.B.
Marinangeli v. Marinangeli (2003), 174 O.A.C. 76; 66 O.R.(3d) 40; 38 R.F.L.(5th) 307 (C.A.), refd to. [para. 35].
S.P. v. R.P. (2011), 281 O.A.C. 263; 332 D.L.R.(4th) 385; 2011 ONCA 336, refd to. [para. 35].
Leskun v. Leskun, [2006] 1 S.C.R. 920; 349 N.R. 158; 226 B.C.A.C. 1; 373 W.A.C. 1; 2006 SCC 25, refd to. [para. 36].
Hickey v. Hickey, [1999] 2 S.C.R. 518; 240 N.R. 312; 138 Man.R.(2d) 40; 202 W.A.C. 40, refd to. [para. 40].
Oakley v. Oakley (1985), 48 R.F.L.(2d) 307 (B.C.C.A.), refd to. [para. 69].
Kehler v. Kehler (2003), 177 Man.R.(2d) 135; 304 W.A.C. 135; 39 R.F.L.(5th) 299; 2003 MBCA 88, refd to. [para. 91].
H.L. v. M.H.L. (2003), 186 B.C.A.C. 264; 306 W.A.C. 264; 19 B.C.L.R.(4th) 327; 2003 BCCA 484, refd to. [para. 91].
Ambler v. Ambler, [2004] B.C.A.C. Uned. 180; 5 R.F.L.(6th) 229; 2004 BCCA 492, refd to. [para. 91].
Spencer v. Spencer (2005), 261 Sask.R. 150; 2005 SKQB 116 (Fam. Div.), refd to. [para. 91].
Turpin v. Clark (2009), 278 B.C.A.C. 220; 471 W.A.C. 220; 2009 BCCA 530, refd to. [para. 91].
Droit de la famille 103038, [2010] R.D.F. 647; 2010 QCCA 2074, refd to. [para. 91].
Templeton v. Templeton (2005), 363 A.R. 392; 343 W.A.C. 392; 2005 ABCA 133, refd to. [para. 91].
Kemp v. Kemp, [2007] O.J. No. 1131 (S.C.), refd to. [para. 91].
Stones v. Stones (2004), 195 B.C.A.C. 41; 319 W.A.C. 41; 48 R.F.L.(5th) 223; 2004 BCCA 99, refd to. [para. 92].
Innes v. Innes (2005), 199 O.A.C. 69, refd to. [para. 92].

Statutes Noticed:

Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, sect. 15.2 [para. 22]; sect. 17 [para. 21].

Authors and Works Noticed:

D.-Castelli, Mireille, and Goubau, Dominique, Le droit de la famille au Québec (5th Ed. 2005), p. 485 [para. 91].
Hovius, Berend, and Maur, Mary-Jo, Hovius on Family Law: Cases, Notes and Materials (7th Ed. 2009), p. 783 [para. 14].
McLeod, J.G., Annotation to Ambler v. Ambler (2004), 5 R.F.L.(6th) 229, generally [para. 92].
McLeod, J.G., Annotation to Dolson v. Dolson (2004), 7 R.F.L.(6th) 25, pp. 29-30 [paras. 91, 92].
Mnookin, Robert H., Divorce Bargaining: The Limits on Private Ordering (1985), 18 U. Mich. J.L. Ref. 1015, pp. 1018-1019 [para. 14].
Payne, Julien D., and Payne, Marilyn A., Canadian Family Law (3rd Ed. 2008), pp. 284 [para. 91, 92]; 285 [para. 92]; 286 [paras. 91, 92]; 298 [para. 69].
Pineau, Jean, and Pratte, Marie, La famille (2006), p. 463 [para. 91].

Counsel:

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Donald Devine and Tamar Ajamian, for the respondent;
Anne-France Goldwater and Robert Leckey, for the intervenors.

Solicitors of Record:

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Devine, Schachter, Polak, Montréal, Québec, for the respondent;
Goldwater, Dubé, Westmount, Québec, for the intervenors.

This appeal was heard on April 20, 2011, before McLachlin, C.J.C., Binnie, LeBel, Deschamps, Abella, Rothstein and Cromwell, JJ., of the Supreme Court of Canada. The decision of the court was delivered in both official languages, on December 21, 2011, including the following opinions:

Abella and Rothstein, JJ. (Binnie, LeBel and Deschamps, JJ., concurring) - see paragraphs 1 to 61;
Cromwell, J. (McLachlin, C.J.C., concurring), concurring in the result - see paragraphs 62 to 100.

Appeal allowed.

Editor: Elizabeth M.A. Turgeon

Family Law - Topic 4000

Divorce - Corollary relief - Maintenance and awards - General principles - The Supreme Court of Canada noted that there were differences between what a court was directed to consider in making an initial support order under s. 15.2 of the Divorce Act and a variation of that order under s. 17 - While s. 15.2 set out a number of factors to be considered, s. 17(4.1) provided that "a change in the ... circumstances" of the parties was the sole factor - Because of those differences in language, the court stated it was important to keep the s. 15.2 and s. 17 analyses distinct - See paragraph 23 - Therefore, the approach developed in Miglin (SCC 2003) was responsive to the specific statutory directions of s. 15.2 of the Divorce Act and should not be imported into the analysis under s. 17 - See paragraph 28.

Family Law - Topic 4195

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Quebec Family - Topic 6497

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Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - Willick (in dealing with child support) described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" - In determining whether the conditions for variation existed, the court had to be satisfied that there had been a change of circumstance since the making of the prior order or variation - The onus was on the party seeking a variation to establish such a change - According to the majority in Willick, the "change of circumstances" had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" - L.G. confirmed that this threshold also applied to spousal support variations - See paragraphs 30 to 32.

Quebec Family - Topic 6497

Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - The court stated that the focus of the analysis was on the prior order and the circumstances in which it was made - Willick clarified that a court ought not to consider the correctness of the prior order, nor was it to be departed from lightly - The test was whether any given change "would likely have resulted in different terms" to the order - It was to be presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6) - In that way, the Willick approach to variation applications required appropriate deference to the terms of the prior order, whether or not that order incorporated an agreement - See paragraph 33.

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Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in

Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - According to those decisions the threshold to variation was a material change in circumstances - Willick and L.G. made it clear that what amounted to a material change would depend on the actual circumstances of the parties at the time of the order - The court in the case at bar stated: "In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances ... Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material ... " - See paragraph 35.

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Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - The court stated that "The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order? ... This does not mean that the incorporated agreement is irrelevant. As Sopinka J. observed in *Willick*, '[W]here. . . the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact' ... " - See paragraphs 36 and 37.

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Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - The court discussed the relevance of an incorporated agreement on an application to vary a prior order under s. 17 - The court stated that "an agreement incorporated into a s. 15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied. But even where an agreement incorporated into an order includes a term providing that it is final, the court's jurisdiction under s. 17 cannot be ousted ... A provision indicating that the order is final merely states the obvious: the order of the court is final subject to s. 17 of the Divorce Act. Courts will always apply the Willick inquiry to determine if a material change of circumstances exists" - See paragraph 41.

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Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - The court discussed the relevance of an incorporated agreement on an application to vary a prior order under s. 17 - The court stated that the general proposition that spousal support agreements should be accorded "significant weight" in the search for a material change under s. 17 was problematic - The court stated that "... while a term stating that a specific type of change will — or will not — give rise to variation will constitute such 'evidence' and will inform the court's application of the Willick test, an agreement containing only general terms, such as a general statement of finality, provides little guidance in practice on whether or not a particular event or circumstance was contemplated by the parties or on the

consequences the parties would have ascribed to it. The court will of necessity interpret any such general provision by reference to the parties' circumstances at the time of the s. 15.2 order. These circumstances may or may not lead the court to conclude that the parties have contemplated the event and, consequently, that a material change warranting a variation has occurred: the court must find a 'change, such that, if known at the time, would likely have resulted in different terms'" - See paragraph 45.

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Divorce - Support obligation - Variation - The Supreme Court of Canada stated that the proper approach to variation applications under s. 17 of the Divorce Act was found in Willick v. Willick (SCC 1994) and L.G. v. G.B. (SCC 1995) - The court discussed the relevance of an incorporated agreement on an application to vary a prior order under s. 17 - The court stated that the general proposition that spousal support agreements should be accorded "significant weight" in the search for a material change under s. 17 was problematic - The court stated that "The examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as for one that does. A general statement that the agreement must be accorded 'significant weight', even though its implications in a concrete case are unclear, in effect raises the threshold necessary to establish a 'material change' under s. 17 when there is an agreement, and emphasizes legal certainty and finality at the expense of the statutory requirements of s. 17. Such a result is reminiscent of the 'clean break' approach of the Pelech trilogy, rejected in Moge and Miglin because it was held to be inappropriate in the context of the current Divorce Act" - See paragraph 46.

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Divorce - Support obligation - Variation - The Supreme Court of Canada discussed the appropriate variation once it has been established that there has been a material change of circumstances justifying a variation of a prior order (Divorce Act, s. 17) - The court stated that "... once a material change in circumstances has been established, the variation order should 'properly reflect[] the objectives set out in s. 17(7), ... [take] account of the material changes in circumstances, [and] consider [] the existence of the separation agreement and its terms as a relevant factor' ... 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" - See paragraph 50.

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Divorce - Support obligation - Variation - Shortly after marrying in 1988, a wife was diagnosed with multiple sclerosis - Thereafter, she was not employed and received disability benefits - Upon divorcing in 2003, the parties' separation agreement was incorporated into a court order (Divorce Act, s. 15.2), providing for indexed spousal support payable by the husband - There was no provision for variation and no reference to the wife seeking employment - In 2007, the husband sought a variation (Divorce Act, s. 17) - The trial judge, after conducting a de novo hearing respecting the wife's ability to work concluded that she was able to do so, and without making a finding of a material change in the wife's circumstances, varied spousal support - The Court of Appeal

concluded that the trial judge's factual determination of the wife's capacity to work, coupled with the passage of time, amounted to a material change of circumstances - The wife appealed - The Supreme Court of Canada stated that in light of the circumstances at the time the original order was made, the findings below were unsustainable - Instead of determining whether there had been a material change of circumstances, the trial judge conducted a de novo assessment of the wife's ability to work as if this was an original application for support under s. 15.2 - In relying on that assessment to infer a material change of circumstances, the Court of Appeal fell into the same error - There had been no change, let alone a material one, since the initial order - Therefore, the husband's variation application failed because he did not meet the threshold required by s. 17(4.1) (i.e., material change of circumstances) - The court restored the initial order for indexed spousal support - See paragraphs 51 to 61.