IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Grady v. Grady, 2009 NSSC 364

Date: 20091210
Docket: 1201-060920
Registry: Halifax

Between:

Nicolas Grady

Applicant

and

Daiga Grady

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: October 13 and November 2, 2009, in Halifax, Nova Scotia

Counsel: Terrance Sheppard, for the Applicant
Timothy Gabriel, for the Respondent

By the Court:

Introduction

[1] This is a decision in the matter of Nicolas Grady and Gallegos Grady. A divorce hearing was held on October 13, 2009 and November 2, 2009. Through the evidence of Mr. Grady, the parties marriage was established; the court's jurisdiction to grant a divorce was established, the grounds for the divorce were established and there being no bars to the divorce, the divorce was granted. The parties have effected a division of their former matrimonial property. They concluded an agreement, described in its body as a "separation agreement/minutes of settlement" on October 22, 2008. Herein, the document will be referred to as a separation agreement. The agreement was registered with the Supreme Court of Nova Scotia on June 17, 2009.

Background to the Relationship

[2] The parties were married August 19, 1995 and separated May 15, 2006. They have four children born November 25, 1996; April 28, 1998; July 3, 2001 and February 4, 2003.

[3] The parties entered a parenting agreement, which is exhibit "B" to the affidavit of Ms. Grady, filed October 2, 2009, being exhibit 4 in this proceeding. It provided for a shared parenting arrangement. It is agreed, however, that since May of 2009, the children have been primarily resident with the Respondent mother.

Issues

[4] The main issues for the court's consideration are the spousal and child support obligations of the Petitioner, Mr. Grady and whether they are to be incorporated into the corollary relief judgment.

[5] Mr. Grady now seeks to have the spousal support obligation reflected in paragraph 9 of the October 22, 2008 separation agreement changed in as much as he seeks a corollary relief judgment that would not contain this obligation. The principal basis for the argument is (1) a significant reduction in his income, and (2) a loss of income tax deductibility for his payment under clause 9 of the separation agreement because he is no longer in a shared parenting arrangement . Ms. Grady argues that Mr. Grady has not met the obligation to pay spousal support of $2,000

per month as required by clause 9 of the separation agreement and he must continue to pay this amount as combined child and spousal support.

[6] Ms. Grady filed an Answer to the Petition for Divorce on September 15, 2009. At paragraph 1 it states:

> 1. I admit the facts and allegations in paragraphs 3 to 10 of the Petition for Divorce with the exception of:
>
> > Paragraph 9 - I state that the parties entered into a comprehensive settlement of all corollary relief issues in this proceeding, which agreement has been registered with this Honorable Court.

Evidence of Mr. Grady

[7] Mr. Grady's direct evidence is contained in Exhibit 3, his affidavit dated September 21, 2009. He also gave oral evidence.

[8] Mr. Grady has worked as a financial advisor, under the supervision of his father. They both represent Assante Capital Management Ltd., an investment firm. He describes his work as creating retirement plans and managing investment portfolios with clients through to their retirement. The office has consisted of the Petitioner and his father as financial advisors and several support staff. Mr. Grady, Sr. took his son, the Petitioner, into the business and they have worked together for seventeen years.

[9] Mr. Grady states his maximum earnings in 2009 will not exceed $40,000, and more realistically, will be $30,000. (see para 15 of his affidavit, being exhibit 3). He explains the decline in his earnings as follows (para 8, 9 and 11 of exhibit 3):

> 8. During 2007, the Fall of 2008 and the Winter of 2009, global capital markets fell as a result of among other things, the financial crisis in the United States. Along with the markets, the value of my assets under administration fell, dragging with it the service fees that I earn. Further exacerbating the drop in income was the reluctance of retail clients to invest new money. Revenue dropped dramatically while expenses stayed the same causing my net income to fall.
>
> 9. Below is a list of my earnings and expenses from January 1, 2009 to September 15, 2009. So far my net income for the last nine months is just a little over $8,000.00 dollars. I have fixed expenses such as wages for

staff, rent, telephones, postage and other overhead expenses, which need to be paid to keep the business running. I am paid last.

Accrual Basis January 1, 2009 to September 15, 2009

Year to date commission income	$188,407.08
Interest Income RBC Daily Banking	$ 0.07
Total Income	**$188,407.15**
Expenses:	
Advertising Co-Op	($450.00)
Charitable Expense	($25.00)
Commission Charge Backs	($22,876.20)
IT-Advertising/Promotion	($7,742.70)
IT-Bus, Tax, fees, lic., dues	($3,133.86)
IT-Insurance	($590.00)
IT-Interest - Bank Ser. Chg.	($2,627.12)
IT-Legal, account. Prof Fees	($429.40)
IT-Meals & Entertainment	($1,649.06)
IT-Office Expenses	($8,374.91)
IT-Property Taxes	($822.10)
IT-Rent Expenses	($33,575.59)
IT-Salaries, Wages, Expenses	($88,307.86)
IT-Supplies	($3,404.23)
IT-Telephone/Internet	($3,071.88)
IT-Travel	($27.12)
IT-Vehicle Expense	($3,272.21)
Total Expense	**($180,379.24)**
Total net Ordinary Income from	**$8,027.91**

. . . . .

11. Then the finance world plummeted. I did not anticipate a stock market downturn of this magnitude or duration. I have had to withdraw most of my RRSP's, over $23,000.00, in order to meet expenses.

[10] In addition, he has filed financial statements identified as Exhibit 7, 8 and 9 being his income tax returns for 2006; 2007 and 2008 respectively. He has also filed Exhibit 10 and Exhibit 11, being his notices of reassessment for 2006 and 2007. On the subject of the Petitioner's earnings, the Respondent filed Exhibit 12 which is a two-page document purporting to summarize the business income of the Petitioner for the years 2005, 2006, 2007 and 2008.

[11] Mr. Grady testified that as a financial advisor he has two sources of income. One source is immediate commission income when new assets are brought under management and the other is an annual fee or commission that he receives for the ongoing management of assets once brought under his management.

[12] Mr. Grady testified that the world financial crisis resulted in a reduction in the total value of the assets he has under management and consequently, a significant reduction in the recurring commissions he receives by virtue of his management of the subject assets. New assets for management also became more difficult to attract, resulting in a reduction in earnings as well.

[13] Mr. Grady testified further that he has been working many additional hours outside the typical business day in an effort to gain new clients and new assets to manage. He testified that business pressures forced him to move away from the shared parenting arrangement to an arrangement whereby he sees his children less frequently. He offers this explanation for his no longer sharing the parenting of the children.

[14] He was cross examined at length about his business expenses. In the course of that cross examination, the Respondent learned that Mr. Grady is currently paying his father $3,000 per month, pursuant to a buy out agreement pertaining to his father's interest in the business.

[15] By way of background, Mr. Grady explained that in January 2009, he essentially agreed to buy his father's interest in the business by paying him over seven years. Mr. Grady, Sr. will continue to attend at the office but will not to be expected to bring new investments under the management of this company. Mr. Grady, Jr. explained that he will be paying his father slightly in excess of 17% of the recurring commission on the funds his father had under his management at the time the father and son entered the agreement. In addition, if Mr. Grady, Sr. attracts additional investments to the firm, he and his son will equally split any commissions payable for having acquired the new assets for management.

[16] Mr. Grady, Jr. explained that regulations governing his industry require that every office have a manager and that his father's presence as a manager is required. He did explain that a system of remote management is now available and would be an expense equivalent to 2% of commissions and management fees. He has not opted for that arrangement.

[17] As stated, the essence of Mr. Grady's argument that he should not be bound by clause 9 of the separation agreement is that his income (1) has taken a dramatic and unanticipated drop; and (2) forced him to abandon the parties' shared parenting arrangement with resulting tax consequences for him.

Evidence of Ms. Grady

[18] Ms. Grady was the primary caregiver of the parties' children, while they lived together. She is now in the second year of study at a local community college. Several years ago she wanted to be trained as a license practical nurse but because there were no openings in the program she began a technology program. Subsequently a position in the nursing program became available and she switched to the licensed practical nursing program. It is a one year program and will be completed in June 2010. Her counsel advises that she expects to quickly obtain full-time employment. The separation agreement contemplated the foregoing. At paragraphs 1(e) and 9(b) it provides:

> 1.(e) Daiga is currently unemployed and is attending a full time 2-year program at a post-secondary institution for Electronic Engineering Technology. It is anticipated that she will graduate in May/June of 2010.
>
> . . . . .
>
> 9.(b) The parties agree that the spousal support shall be reviewed on or after September 1, 2010. Daiga acknowledges her obligation to become economically self-sufficient, to complete her post-secondary education, and to obtain full-time employment regardless of whether in her chosen occupation and to make all diligent and reasonable efforts in this regard.

[19] She has been financing her education by managing her spousal support; other child related government income; and student loan income. She lives in the parties' former matrimonial home.

[20] In her direct evidence and on cross examination, she confirmed that there are arrears on the mortgage on the home and that she is at risk of losing her program of study, as well as her home, if Mr. Grady discontinues or does not resume payment of the spousal support in the amount of $2,000 per month.

Registration of the Separation Agreement

[21] The parties' agreement was registered on June 17, 2009. The effect of registration of the agreement is described in s.52 of the *Maintenance and Custody Act*, R.S.N.S. c.3, s.52. It reads as follows:

> 52(1) A judge may, with the consent of either party, register in the court an agreement entered into between the parties respecting maintenance or respecting care and custody or access and visiting privileges or any amendment made to the agreement.
>
> (2) Before registering an agreement pursuant to subsection (1), a judge may inquire into the merits of the agreement and, after giving the parties an opportunity to be heard, may vary its terms as he deems fit.
>
> (3) An agreement, including amendments registered pursuant to this section, shall for all purposes have the effect of an order for maintenance or respecting care and custody or access and visiting privileges made under this *Act*.

[22] Registration of the separation agreement resulted in the obligations therein becoming an order enforceable by the Maintenance Enforcement office. (see exhibit "c" to the affidavit of Ms. Grady, filed October 2, 2009, being exhibit 4 in this proceeding).

[23] There is no previous order under the *Divorce Act*. A corollary relief order will result from this hearing. I am therefore, dealing with a situation where the agreement was made and an order issued under the *Maintenance and Custody Act* on June 17, 2009, when registration of the agreement was effected by a Judge of the Supreme Court, Family Division.

[24] The *Divorce Act* proceeding prevails over proceedings initiated pursuant to Provincial legislation in matters of support. However, the existence of a divorce proceeding is not a bar to proceedings under Provincial legislation. The registration of the separation agreement herein is a case in point. The order that flows from that process fills a void until, if and when an order is issued, pursuant to the provisions of the *Divorce Act*. There is a concurrence of jurisdiction with Federal paramountcy when the *Divorce Act* is invoked.

[25] I am forced to ask whether the MCA order has the same status as an order under the *Divorce Act* and whether the application before me is, in essence, an application to vary as opposed to an application for an original order under the *Divorce Act*.

[26] Section 17(1) of the *Divorce Act* (as read with s.2(1)) dealing with variation of orders expressly provides that it is meant to apply to the variation of earlier orders under the *Divorce Act* in a corollary relief proceeding. In addition, a corollary relief judgment addresses a wider range of issues. I therefore conclude that this proceeding should not be treated as an application to vary under s.17. The governing section for this discussion is s.15.2 of the *Divorce Act*. Alternatively, and for reasons that follow, I am satisfied that my analysis is unaffected by the distinction.

Clause 9(a) of the Separation Agreement

[27] Clause 9(a) of the separation agreement describes the monthly obligation as follows:

> 9. Spousal Support
>
> (a) Nicolas agrees to pay to Daiga for spousal support the sum of $2,000.00 per month commencing October 1, 2008 and continuing on the 1st day of the month thereafter, less any payments made to Daiga as income or dividends from a family trust or corporation controlled by Nicolas. Both parties acknowledge and confirm the factors set out in the *Divorce Act* as it relates to spousal support.

[28] Mr. Gabriel, counsel on behalf of the Respondent, in his written and oral submissions, argued that the Supreme Court of Canada decision in *Miglin v. Miglin*, [2003] 1 S.C.R. 303, requires that Mr. Grady continue to pay the agreed-upon amount of $2,000 per month to Ms. Grady; regardless off any changes in his income. Mr. Shepherd, counsel on behalf of Mr. Grady, argues that the assumptions that gave rise to the agreement are no longer correct and therefore there has been a drastic change in the parties' circumstances that justify a movement away from the strict terms of the agreement. He argues, for example, that Mr. Grady will no longer be eligible to claim the $2,000 per month as spousal support because the children are no longer in a shared parenting arrangement and part of this amount must be reclassified as child support.

[29] Mr. Shepherd is asking the court to order that Mr. Grady now, pay only child support based on the tables reflecting an income of approximately $30,000 per year. The child support obligation in that circumstance would be $750 per month. Mr. Shepherd observes that this obligation would be met with after-tax income by

Mr. Grady and leaves Mr. Grady with no resources for spousal support and no spousal support should be ordered.

The Interaction of the Separation Agreement and the *Divorce Act*

[30] The Petition for Divorce was issued August 2, 2006 and served September 7, 2006. As stated, an Answer was filed September 15, 2009.

[31] In the case of an original order, an application may be made for a corollary relief judgment that is at variance with the parties' separation agreement. In the case of a proceeding pursuant to the *Divorce Act*, the governing legislative provision is s.15.2. It provides:

> Spousal support order
>
> 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.
>
> . . . . .
>
> Terms and conditions
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
>
> Factors
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> . . . . .
>
> Objectives of spousal support order

> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[32] In contrast, once the agreement is incorporated in a corollary relief judgment, an application seeking to, in essence, vary the agreement is an application to vary the corollary relief judgment. The governing provision of the *Divorce Act* is then s.17.

[33] The provision reads as follows:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> > (a) a support order or any provision thereof on application by either or both former spouses; or
> >
> > (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> . . . . .

> Terms and conditions
>
> (3) The court may include in a variation order any provision that under this *Act* could have been included in the order in respect of which the variation order is sought.
>
> Factors for child support order
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> Factors for spousal support order
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, 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.

[34] The court's authority to decide upon a corollary relief judgment at variance with the parties' separation agreement must be reviewed when the court is called upon to issue an original corollary relief judgment or to vary an existing corollary relief judgment.

[35] Justice MacDonald in the recent decision of *MacLean v. MacLean* [2009] N.S.J. No. 328 considered whether a separation agreement should be set aside. She identified eight factors relevant to determining the validity of the agreement. This is often the first determination a court is called upon to make when a party seeks to set aside a separation agreement in part or in its entirety. Justice MacDonald went on to find the subject agreement invalid and set it aside.

[36] There is no suggestion herein that the parties did not enter a binding agreement or that the agreement was not binding at the time it was entered. Faced with a similar issue, the Supreme Court of Canada in *Rick v. Brandsema* [2009] S.C.J. 10 also assessed the circumstances at the time the separation agreement was negotiated and signed. Justice Abella, on behalf of the court, overturned an agreement because of incomplete disclosure by the husband. In the course of her discussion of the principles to be applied when the court is asked to set aside a

separation agreement, Justice Abella referenced the *Miglin* decision and the guidance lower courts must take from it.

[37] At paragraph 48, she stated:

> 48 . . . . . An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. . . . .

[38] There is authority for the proposition that the court's considerations are the same when called upon to set aside a separation agreement regardless of whether the application arises at the time the original corollary relief judgment is being issued, or in the context of an application to vary a corollary relief judgment. At para. 91 in *Miglin supra*, the court stated:

> 91 Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. 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 *Act*, that the court may be persuaded to give the agreement little weight. As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. In our view, the *Act* does not create such inconsistency. We do not agree with the Ontario Court of Appeal when it suggests at para. 71, that once a material change has been found, a court has "a wide discretion" to determine what amount of support, if any, should be ordered, based solely on the factors set out in s. 17(7). As La Forest J. said in his dissent in Richardson, supra, at p. 881, an order made under the *Act* has already been judicially determined to be fit and just. The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs. Consideration of the overall objectives of the *Act* is consistent with the non-exhaustive direction in s. 17(7) that a variation order "should" consider the four objectives listed there. More generally, a contextual approach to interpretation, reading the entire *Act*, would indicate that the court would apply those objectives in light of the entire statute. Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.

[39] Justice Dellapinna in *Stening-Riding v. Riding*, 2006 NSSC 221 at para 22 observed that *Miglin* applied to variation proceedings. In a helpful analysis,

Justice Dellapinna systematically applied principles enunciated in *Miglin* to the evidence before him and factual conclusions he reached.

[40] Beginning at paragraph 37 he paraphrases the test he is applying as, "the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the *Act*".

[41] Obstacles to performance by either party should not be confused with a determination of the original intentions of the parties. In my view, care must be taken to distinguish between circumstances giving rise to the agreement and those which make compliance with the agreement difficult, assuming substantial compliance with the objectives of the *Divorce Act*.

[42] Counsel for Mr. Grady argues that the extent of the change in Mr. Grady's circumstances impacts on the integrity of the bargain the parties reached. As earlier stated, he argues that (1) Mr. Grady has suffered a dramatic drop in income, and (2) he is no longer in a shared parenting arrangement.

[43] He is not arguing that the original agreement was unfair when it was made, or that the agreement, when reached, did not promote the relevant support objectives outlined in the *Divorce Act*. In any case, I find the agreement to be fair when made and that it promoted the objectives of the *Divorce Act*.

[44] The terms of the separation agreement must be given great deference. The leading authority dealing with when a separation agreement may be subject to change is *Miglin, supra*.

[45] The Supreme Court of Canada, in *Miglin supra*, rejected the requirement that a "radical, unforeseen" change had to be shown before an agreement could be varied. It also rejected a "material change" test. As discussed in McLeod and Mamo (2008, Carswell) at page 570, the court enunciated a two step process:

> (i) determining whether the agreement was fairly negotiated and reflected the support objectives set out in the *Divorce Act*, as well as the overarching objectives of finality and certainty to enable the parties to move on with their lives; and
>
> (ii) whether anything outside the parties' reasonable contemplation had occurred since the date of the agreement to undermine the integrity of the settlement.

[46] We are concerned with the second branch of the test.

Other Clauses of the Separation Agreement

[47] The parties' separation agreement speaks to both of these issues. Paragraph 2(a), (b), (c) and (d), 6(a) and 12 provide:

. . . . .

2. Agreement and Intention

(a) Both parties covenant and agree that they have negotiated the Agreement in good faith. Both parties covenant and agree that this Agreement is executed voluntarily and that neither party has been subject to oppression, pressure or any other vulnerabilities.

(b) Both parties covenant and agree that this Agreement complies with all applicable relevant legislation including but not limited to the factors set out in the *Divorce Act* relating to spousal support. Both parties recognize that there may be changes in circumstances in the future. These changes (no matter how radical or unforeseen) will not have the effect of setting aside the terms of this Agreement as the terms relate to division of property and debt and any and all spousal support obligations except as set out herein.

(c) Both parties agree that the intention of this Agreement is to recognize the contribution of each of them to the marriage and provide an equitable resolution on a full and final basis of all matters relating to the marriage and its breakdown, including but not limited to their parenting responsibilities, financial support and division of property and debt.

(d) Both parties agree that any divorce proceedings between them shall be uncontested and that either of them may proceed with an uncontested divorce based on the ground of living separate and apart and that an Answer, if filed by either of them, shall be withdrawn.

. . . . .

6. Child Support

(a) Child Support

The parties, after considering the totality of their agreement and the best interest of the children, have agreed to opt out of the Federal Child Support Guidelines. This may be varied if there is a change of circumstances in the future.

. . . . .

12. Releases

(a) Each of the parties hereto releases and discharges the other from any right, title, or interest in and to the property of the other, whether real or personal, legal or equitable.

(b) Each of the parties hereto agrees that this Agreement and Minutes of Settlement may be pleaded by either party as an estoppel in respect of any claim or application whatsoever which may be made pursuant to the provisions of the *Matrimonial Property Act*, and *Divorce Act*, or any other similar legislation in Nova Scotia or any other jurisdiction by the other party in respect of any matter dealt with by this Agreement which is a full and final settlement between the parties and may be pleaded as a complete defence to any action brought by either party to assert a claim in respect of any matter dealt with by this Agreement, except where:

(i) this Agreement expressly provides for review or variation of a particular term or condition; or

(ii) where a party has failed to disclose a significant circumstance with respect to his or her financial or asset position which should have been raised during negotiation of this Agreement; or

(iii) the matter deals with support or parenting of or access to a child.

(c) The parties agree that no property, which either owns or hereafter acquires shall be considered a matrimonial asset or an asset subject to division within the meaning of the *Matrimonial Property Act*, or any other similar legislation in Nova Scotia or any other jurisdiction, or any successors thereto.

(d) All rights and obligations of Nicolas and Daiga, whether arising during the marriage, either before or after separation, or upon and after a divorce or annulment, including the rights and obligations of each of them with respect to:

(i) Possession of property;

> (ii) Ownership in or division of property, and
>
> (iii) Spousal maintenance or support
>
> are governed by this Agreement which prevails over all provisions of the **Matrimonial Property Act**, and the *Divorce Act*, 1985, or any successor or similar legislation thereto, whether in existence or in force on the date of execution of this Agreement.

Conclusion

[48] I am satisfied that Ms. Grady cannot find more affordable housing for herself and her children if the home she currently occupies is foreclosed upon, or sold. In addition, the court views the need for Ms. Grady to become self-sufficient and fully employed as a licensed practical nurse as in the interests of both parties and an objective that was at the heart of the parties' separation agreement.

[49] The court accepts that Mr. Grady is in a financial bind. However, Mr. Grady should not be relieved of the essence of the obligations he accepted in the October 22, 2008 agreement. There are no attractive options for the parties.

[50] The court was struck by Mr. Grady's tendency to treat Ms. Grady's interest as secondary to his. He is prepared to accept that the home in which his children live might have to be sold and that Ms. Grady may have to discontinue her program because of Mr. Grady's business pressures.

[51] In my view that is an outcome of last resort.

[52] Mr. Grady must examine the operating costs of his business with a view to finding the money that is necessary to meet his obligations in whole or in large measure. He is the one most qualified to do so.

[53] He may need to make a reduction in the number of staff, the number of hours the staff work or to reduce the salaries for employees. Faced with the loss of employment, concessions from staff may be achievable. Mr. Grady was clear that he could not reduce his costs any further. I am not satisfied that this is so. His business can not sustain the overhead. He must therefore reduce it or face closure of his office. The financial pressure may also require him to find another or a second job.

[54] Within this financial context, Mr. Grady testified that he has a new domestic partner, a woman he met one year ago. In August or September the new partner was joined by her daughter, her daughter's boyfriend and her daughter's child. Mr. Grady expressed some optimism that his partner's daughter and her family would soon leave the home. Mr. Grady also testified that he had no knowledge of the financial circumstances of his new partner and was uncomfortable having a discussion of that nature with his new partner or seeking any financial contribution to the operation of the home from his new partner. Late in the proceeding, the court received financial information concerning the circumstances of Mr. Grady's new partner. I am satisfied that her presence in Mr. Grady's home should have no impact on my decision one way or the other. I am satisfied she has a modest income and this is directed to covering her medical and household expenses. The relationship with Mr. Grady has been of short duration and is of uncertain security and his partner has covered the incremental cost of her being in the home.

[55] The parties impressed the court as hard-working, bright and committed to their children. The court is satisfied that the Respondent is striving for independence and self-sufficiency. The Petitioner is also hard-working, bright and I believe, committed to his children.

[56] As stated, the Petitioner argues that because he is no longer in a shared parenting arrangement, a basis of the agreement is no longer present and therefore, this is a significant part of the reasons for changing it. This argument is not accepted by the court. Ms. Grady decided to discontinue the shared parenting arrangement. He should not be permitted to, in effect, unilaterally alter his separation agreement. The court acknowledges his explanation for doing so. It does not accept his choice in this respect, as either reasonable or fair, given all the circumstances, not the least of which has been to transfer the total parenting burden to Ms. Grady, who is also managing significant financial and professional challenges.

[57] In the context of this argument, Mr. Grady argues that he should now pay only child support based on the tables. I have considered clause 6(a), which arguably provides for Mr. Grady to opt in to the Federal Child Support Guidelines if there is a change of circumstances. I do not interpret the parties' contract to consequently permit Mr. Grady to opt out of his obligation in clause 9(a). I see his child support obligation, whatever it is, as subsumed in the global amount of $2,000 per month provided for in clause 9.

[58] One's parenting responsibilities are to be fulfilled, not transferred. Ms. Grady does not and has not taken the view that anyone else has the responsibility to meet her parenting obligations. Mr. Grady's position should not be different.

[59] In light of this ruling, for Mr. Grady's argument to succeed, I must conclude that notwithstanding the strong and clear language of the parties' separation agreement, I must find that something "outside the parties' reasonable contemplation" has occurred to undermine the integrity of the settlement. As stated in paragraph 88 in *Miglin*, I must *inter alia* conclude that "these new circumstances were not reasonably anticipated by the parties and have led to a situation that cannot be condoned". The burden is on the Petitioner to demonstrate that is so.

[60] The world economic crisis of 2008-2009 was more extreme than anticipated. However, I can and do take judicial notice of the concerns in this regard that were the subject of much public debate in October 2008, prior to the Federal general election held in October, 2008. I agree that the economic downturn was more extreme than anticipated at the time the parties concluded the separation agreement. The parties agreed, however, that such an event would not excuse compliance with the agreement by both parties.

[61] I have ruled that the change from shared parenting does not meet the test for disregarding the separation agreement. I am further satisfied that the test is not met in any other way. The agreement at clause 2(b) expressly provided that the parties would be required to honour the agreement.

[62] In coming to this conclusion, I have considered the:

> (1) strong, unambiguous language of the agreement arrived at after extensive negotiation and a judicial settlement conference;
>
> (2) the fact of legal representation by both parties at the time the agreement was signed;
>
> (3) the sophistication of the parties;
>
> (4) the value of this agreement to both parties;
>
> (5) a related issue, the consequences for Ms. Grady and the children if the agreement is not upheld; and

(6) the changes in circumstances identified.

[63] The parties herein were both represented by counsel. Their agreement was reached after significant effort and following a judicial settlement conference. Neither party is asserting that they were poorly served by their counsel or lacked an appreciation for the agreement reached. In fact, the agreement was designed to result in a short term spousal support obligation on the part of Mr. Grady. Ms. Grady had an identifiable plan to achieve self sufficiency. Given the history and circumstances of the parties' relationship, a failure on her part to do so could result in a spousal support obligation for a significantly longer period. The agreement also provided Mr. Grady with a tax benefit because his support is characterized as spousal support.

[64] It may be that Mr. Grady's concern about losing the deductibility aspect of the monthly payment can be addressed by his returning to the shared parenting arrangement the parties negotiated. That is for him to decide.

[65] Mr. Grady believes that saving his business must take precedence over the agreement, even if this means that Ms. Grady is forced to abandon her studies. The court does not agree.

[66] The opportunity for Ms. Grady to complete her education and gain qualification as a licensed practical nurse is in the best interests of the children. She is currently their primary care giver. Over the course of the parties' marriage, she sacrificed her employment opportunities in favour of her parenting responsibilities. This choice was undoubtedly a benefit to Mr. Grady in his work. As matters were explained by Mr. Grady, Ms. Grady's income prospects in the short term may be more positive than his. She is very confident of gaining self sufficiency by September 2010.

[67] Ms. Grady negotiated an agreement to ensure that she could become self sufficient. She is prepared to honour the agreement. Mr. Grady must be called upon to do the same. He is proposing that his dire circumstances be transferred to Ms. Grady. That is an outcome that (in the words of Justice Bastarache in *Miglin* at paragraph 88) cannot be condoned. Upholding the agreement is the only acceptable option.

[68] Mr. Grady describes her circumstances as follows in paragraph 17 of her affidavit (exhibit 4):

> 17. The Petitioner is more than aware, that I have no financial ability to go to the bank and get them to agree to remove him from this indebtedness. While I have a great deal of personal and financial difficulty caused by these developments. I am attempting to maintain my position at the Community College in order that I may graduate with my class and have a productive career. To be forced out in the workforce now, I would have no training or experience that would fit me for other than an entry level store clerk job somewhere which would pay (even if I could get it) minimum wage with no benefits. Our children, and I would never get out of our present circumstances if that happens.

[69] The court is not prepared to rewrite the parties' agreement or disregard it, given all of the circumstances and the jurisprudence. If both parties are ultimately going to suffer should changes not be made to the terms or implementation of the agreement, then they, of course, are free to amend the agreement.

[70] It is the parties who are best equipped to renegotiate the agreement if it is necessary that the renegotiation occur. Mr. Grady's continuing default is not in the interest of either party. His business failure would not be in Ms. Grady's short or long term interest. The accumulation of arrears does nothing to meet Ms. Grady's current financial needs. She has a significant interest in working with Mr. Grady to address the financial circumstances they both face.

[71] I do not conclude the circumstances described by Mr. Grady undermine the integrity of the agreement. I am more inclined to the view that Mr. Grady's proposal for changing/disregarding the agreement would bring about this result.

[72] A corollary relief judgement incorporating the support provisions of the parties' separation agreement will therefore issue. I understand the parties have agreed upon modifications to the parenting agreement and less significant issues. I reserve the jurisdiction to rule on any of these issues and others if I am advised that counsel wish that I do so.

J.