

*“The search for a final, final agreement, seems like a search for a rounder circle.”*

TWFL, April 26, 2005.

*“Consents, like agreements, can be dangerous to your wealth.”*

TWFL, March 15, 2005.

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## **The End of Finality<sup>1</sup> – Dismissals of Support and *Res Judicata***

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### **1. INTRODUCTION**

Spousal support decisions consume a considerable portion of the paper churned out by courts and commentators grappling with a difficult and unstable jurisprudence. The development of the jurisprudence catches the interest of practitioners because it has consistently followed an inconsistent path creating an ever present risk of tactical and substantive errors. For legal analysts spousal support jurisprudence has a fascination as its very instability arises because the conflict of values is so intense in this area. As a society do we want to encourage private settlement of matrimonial disputes? Are we willing to risk permitting citizens to choose how to structure their financial relationships independently of the courts after marriage breakdown? Or do we want to maintain a role for the courts to review and, if necessary, interfere in final judgments or private contracts? How far will we permit spouses to shed their financial responsibility for one another, even if that means that the state must pick up the burden?

With the release of the Ontario Court of Appeal decision in *Tierney-Hynes v. Hynes* in the summer of 2005, Jay McLeod quipped: “Is this the end of finality as we know it?” Part of the joke, of course, is the highly limited nature of “finality” in spousal support jurisprudence even before the Ontario Court of Appeal affirmed a new interpretation of the *Divorce Act* permitting courts to vary final orders dismissing spousal support claims. The *Tierney-Hynes* decision is the most recent in a long line of decisions on the issue.

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<sup>1</sup> McLeod, “Jay McLeod’s This Week in Family Law” FAMLNWS 2005-31, August 9, 2005. McLeod commented on *Tierney-Hynes v. Hynes* (2005), 2005 CarswellOnt 2632 (Ont. C.A.), leave to appeal refused (2005), 2005 CarswellOnt 7437 (S.C.C.) “If you somehow missed it, read it. BCCA [British Columbia Court of Appeal] one; OCA [Ontario Court of Appeal] zero. Is this the end of finality as we know it?”

This chapter reviews the evolution of spousal support jurisprudence on the question of finality and the role of *res judicata* principles. Is it possible for a court to terminate the spousal support obligation between parties when a spousal relationship ends? Our courts have tended to frame the issue as a narrow technical question of the interpretation of the *Divorce Act* in its various incarnations from the 1970 *Divorce Act* to the current legislation as amended in 1997. McLeod played an integral role in the development of this jurisprudence as a commentator, as a source for appellate analysis and at times as a frustrated observer of the shifting principles of spousal support law. The overarching objectives of spousal support have lurched in the last twenty years from a clean break analysis to the current more nuanced attempt to balance goals of certainty and autonomy with the desire to enforce private obligations of support. McLeod participated in, and contributed to, that development. McLeod's experience as an academic/practitioner allowed him a special vantage point to contribute to this debate of how far the law should move along the spectrum towards finality and certainty in the disposition of spousal support claims. His views evolved over time, influenced no doubt by the rethinking of the threshold to set aside spousal support releases which has occurred over the same time period. Judicial acceptance of McLeod's views was not particularly synchronized to his changing ideas. His analysis continues to provide a helpful context to understand the issues both conceptually and in their practical impact on families and counsel.

## 2. THE EVOLUTION OF MCLEOD'S COMMENTARY

In the ebb and flow of judicial deference to finality the Ontario Court of Appeal decision in *McCowan v. McCowan*<sup>2</sup> represents one of the high water marks for the principle. As is often the case, I suggest that the particular facts of this dispute encouraged a result in favour of finality. Mr. and Mrs. McCowan were married for two years. They had a marriage contract. The marriage caused Mrs. McCowan to lose rights to a pension benefit that she had previously enjoyed. When the parties separated litigation ensued. The litigation was resolved by a consent judgment providing for the dismissal of Mrs. McCowan's spousal support claim and, *inter alia*, an order that Mr. McCowan pay to his wife \$800/month as a "pension replacement." Mr. McCowan breached the latter term of

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<sup>2</sup>*McCowan v. McCowan* (1995), 1995 CarswellOnt 435 (Ont. C.A.) at 9.

the judgment, stopping payment of the pension replacement. Mrs. McCowan brought a second proceeding seeking an order for spousal support of \$3500/month in a corollary relief application and, within that application, seeking an order to set aside that part of the consent judgment which dismissed her claim for support. Mrs. McCowan was successful at first instance on the motion to set aside the consent.

The Ontario Court of Appeal overturned the motions judge. Writing for the court, Mr. Justice Osborne addressed the basis for setting aside consent orders generally and the special case of support orders. He concluded that a consent judgment may only be set aside on the same basis as the underlying agreement, that is in the event of fraud, material misrepresentation or such other grounds going to the formation of the agreement.<sup>3</sup> In *McCowan*, the defendant husband had breached the terms of the consent judgment. No evidence was tendered sufficient to vitiate the underlying contract. For that reason, Osborne J. declined to set aside the consent judgment.

Osborne J. then considered Mrs. McCowan's spousal support claim in light of the pre-existing valid judgment dismissing that claim. He reviewed the Court of Appeal's decision in *Cotter v. Cotter*<sup>4</sup> which interpreted the spousal support provisions of the predecessor statute, the 1970 *Divorce Act*.<sup>5</sup> These provided:

11(1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

- (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
  - (i) the wife,
  - (ii) the children of the marriage, or
  - (iii) the wife and the children of the marriage;
- (b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
  - (i) the husband,
  - (ii) the children of the marriage, or
  - (iii) the husband and the children of the marriage, and

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<sup>3</sup>*Ibid.* at 3.

<sup>4</sup>(1986), 53 O.R. (2d) 449, 1986 CarswellOnt 268 (Ont. C.A.).

<sup>5</sup>*Divorce Act*, R.S.C. 1970, c. D-8, s. 11.

c) an order providing for the custody, care and upbringing of the children of the marriage.

In *Cotter*, Mr. Justice Morden of the Court of Appeal held that once a spousal support claim had been adjudicated and dismissed, the court had no jurisdiction to hear a later spousal support application. Further, Morden J.A. concluded that a dismissal of a spousal support claim differs in character from a positive spousal support order and, as a consequence, is not subject to the court's statutory power to vary. Morden J.A.'s statutory analysis was supported by the now quaint sounding statement that: "The policy of the "clean break," which has its legitimate place, will have been given effect."<sup>6</sup>

In *McCowan*, Osborne J.A. considered the language of the 1985 *Divorce Act*.<sup>7</sup> Osborne J.A. cited the relevant parts of the then s. 15 of the *Divorce Act*:

15. 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. . .

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. . .

Note that the *Divorce Act* defines "spousal support order" as "an order under subsection 15.2 [then s. 15]."

Finding no distinction between the language of the 1970 and the 1985 *Divorce Act*, Osborne J.A. concluded: "In the result because Mrs. McCowan's claim for spousal support has been dismissed, the court does not have jurisdiction to make an original support order under s. 15(2) of the *Divorce Act*."<sup>8</sup>

The entire carapace of this analysis rests on the assertion that an order dismissing a claim for spousal support pursuant to s. 15 is not a support order capable of variation pursuant to s. 17. The argument is based on the precedent set by *Cotter*, which reflected a policy of "clean break" that the Supreme Court of Canada has disavowed in the intervening years since *Cotter* was decided.

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<sup>6</sup>*Cotter*, *supra* at 460.

<sup>7</sup>*Divorce Act*, R.S. C. 1985, c. 3. (2nd Supp).

<sup>8</sup>*McCowan*, *supra* at 11.

An important factor is that the peculiar facts of *McCowan* allowed the Court of Appeal to provide Mrs. McCowan an avenue for personal recovery while upholding the validity of spousal support dismissals. The “pension replacement” payment in the original order was without doubt effectively spousal support as there was no legal basis other than the support obligation to ground it. Finding that the original consent judgment contained a support provision permitted variation. The Supreme Court of Canada denied an application for leave to appeal the decision.

McLeod wrote a lengthy and thoughtful commentary on the Ontario Court of Appeal decision in *McCowan* which was published as an annotation to the decision in *Reports on Family Law*.<sup>9</sup> In later years, McLeod’s views appeared to fall within the pro-finality camp. In 1995, however, he criticized the Court of Appeal with his characteristic bluntness. Describing the result as “unfortunate” McLeod suggested it might lead to a flood of nominal orders to protect entitlement. He foretold confusion as many judges had refused to make nominal orders in the past because of a belief that a dismissal of support did not permanently extinguish a support claim under the 1985 *Divorce Act*. McLeod expressed concern that the full financial impact of a division of labour during a marriage or the ability of a spouse to become self-sufficient might not become evident until after an original proceeding is resolved. He noted that in relying on *Cotter*, the Court of Appeal was drawing on a clean break analysis that by 1995 was distinctly out of favour. He also noted the risks in treating all dismissals of support as final without consideration of the basis for the dismissal. There is a certain logic to finality if a spouse has his or her claim dismissed for lack of entitlement. If a claim is dismissed simply because of lack of need or inability to pay at the time of trial, finality seems harsh.<sup>10</sup>

A year later, McLeod commented on *Irvine v. Irvine*, a trial division decision in the Manitoba Court of Queen’s Bench. In this decision the court dismissed a claim from a former spouse to vary an order terminating her spousal support, relying on the *McCowan* analysis of the Ontario Court of Appeal. The applicant spouse suffered from multiple sclerosis and had remained unemployed since the variation which terminated her support. Indicative of McLeod’s influence on the family law bar, while the respondent spouse relied on the decision in *McCowan* which was persuasive, but not binding, the applicant spouse expressly

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<sup>9</sup> J. McLeod, Annotation, *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325.

<sup>10</sup> *Irvine v. Irvine* (1996), 25 R.F.L. (4th) 401 (Man. Q.B.).

relied on McLeod's own critique of *McCowan*. The trial judge devoted as much space in the written decision to the McLeod critique as to the appellate authority. The trial judge held that the case turned on the wording of s. 17(7) which before the 1997 amendments read: "A variation order varying a support order that provides for the support of a former spouse should. . .". The court found no jurisdiction to vary a dismissal of a support order rather than one that "provides for" support. Not to be so easily deterred, McLeod commented on *Irvine* that if a termination or denial of support cannot be varied pursuant to s. 17(7) it should be possible to renew an application under s. 15. Absent that, McLeod suggested that courts must routinely make nominal orders.<sup>11</sup>

When McLeod wrote his annotations to *McCowan* and *Irvine* in 1995/96, the shift in spousal support cases from a clean break approach to the compensatory analysis formulated by Madam Justice L'Heureux-Dubé' in *Moge v. Moge*<sup>12</sup> was relatively recent. Individual injustices for women granted inadequate terminating awards after long term marriages were not uncommon. Yet with ten years' hindsight, the potential harms McLeod identified as consequences of the decision in *McCowan* appear manageable. Careful determinations of support at the first instance and the use of review orders to deal with future unanticipated changes can make the risk of a dependant spouse's economic disadvantage being overlooked less likely. The use of nominal orders to preserve entitlement seems a minor inconvenience. McLeod's distinction between claims dismissed because of entitlement and ones dismissed because of circumstances such as inability to pay or lack of need is a sensible one. It is a problem for which nominal orders provide a perfectly workable solution. Indicative of the trenchant nature of McLeod's criticisms, all of his complaints about the resolution in *McCowan* have resurfaced over the intervening years as the jurisprudence has evolved, if not turned on its head.

Eight years later, Madam Justice Southin, writing for the British Columbia Court of Appeal in *Gill-Sager v. Sager*,<sup>13</sup> commented with favour on McLeod's critique of *McCowan*. At trial, Mr. Sanger had sought an order dismissing Ms. Gill-Sanger's claim for support, arguing that at that time Ms. Gill-Sanger had no need and that she had greater financial resources than he did. Ms. Gill-Sanger, however, suffered from health problems which could undermine her future self-sufficiency. Mr.

<sup>11</sup> McLeod, "Annotation" *Irvine v. Irvine* (1996), 25 R.F.L. (4th) 401.

<sup>12</sup> [1992] 3 S.C.R. 813 (S.C.C.).

<sup>13</sup> (2003), 2003 CarswellBC 104 (B.C. C.A.).

Sanger's application for a dismissal succeeded at the first instance. Ms. Gill-Sanger appealed, voicing her concern that any future claim would be barred as *res judicata*.

Southin J.A. held that the issue was one of statutory interpretation and did not concern the doctrine of *res judicata*. After reviewing the arguments outlined in *McCowan* and the language in both the 1970 *Divorce Act* and the 1985 *Divorce Act*, she concluded, unusually, that she could not resolve the issue which would require intervention by the Supreme Court of Canada to clarify the law. Southin J.A.'s reticence in making a finding on the legal point may have been motivated by the fact that the case before her was hypothetical in nature. Ms. Gill-Sanger might never have need nor seek spousal support from her former spouse. Southin J.A. dealt with the problem by amending the terms of the order to deny the husband's claim for a dismissal. She noted that had the claim have been made by the wife at first instance she would have ordered that spousal support be dismissed, with liberty to apply. In both cases, the language keeps open the ability to seek a further spousal support order which is entirely appropriate to a case in which the reasons for the dismissal are lack of present need or current inability to pay.

In 1995 when McLeod annotated *McCowan*, the validity of contractual releases of spousal support had not yet been directly challenged in the courts, although *Moge* had clearly dented the authority of the Trilogy of *Pelech*, *Richardson*, and *Caron*.<sup>14</sup> In the ensuing years, the efficacy of spousal support releases was directly challenged and resolved at least conceptually by the Supreme Court of Canada in *Miglin v. Miglin*.<sup>15</sup> The implications of that decision are still unfolding in the lower courts. The majority opinion held that spousal support releases may be set aside but established a complex multi-part test which an applicant must satisfy.

The *Miglin* test structures the exercise of judicial discretion to set aside separation agreements in two stages. In stage one, a court must first consider the circumstances of execution of the contract. Were the parties under any circumstances of oppression, pressure or other vulnerabilities not effectively compensated for by the presence of counsel or other professionals? Second, at this stage a court must determine if the agreement substantially complies with the factors and objectives

<sup>14</sup> *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), *Richardson v. Richardson* (1987), [1987] 1 S.C.R. 857 (S.C.C.) and *Caron v. Caron*, [1987] 1 S.C.R. 892 (S.C.C.).

<sup>15</sup> (2003), 34 R.F.L. (5th) 255 (S.C.C.).

prescribed by Parliament for spousal support in the *Divorce Act*. These are not only the criteria listed in s. 15.2(6) and s. 17(7) but they are also the principles encapsulated in s. 9 of the *Divorce Act*.<sup>16</sup> The majority found that Parliament expressly intended to foster negotiated settlements of family law disputes, as indicated by the requirement in s. 9 of the 1985 *Divorce Act* that counsel discuss with their clients the value of negotiating or mediating their dispute.<sup>17</sup> The majority wrote:

These objectives of the Act as a whole, as compared with the objectives set out in s.15.2(6), include the compelling policy goals of certainty, autonomy and finality. These legislative objectives require the trial judge to consider the extent to which the agreement represents a final settlement of the issues, negotiated under unimpeachable conditions, to which both parties agreed and on which each of them intended to rely.<sup>18</sup>

- <sup>16</sup> 15.2(6) Objectives of spousal support order – 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 to the support of any child or the marriage;
  - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
  - (d) in so far as is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- 17(7) Objectives of variation order varying spousal support order – A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouse arising from the marriage or its breakdown;
  - (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and
  - (d) in so far as is practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.
- <sup>17</sup> 9(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.
- <sup>18</sup> *Miglin, supra* at 293.

At stage two, a court must consider the extent to which the enforcement of the agreement at the time of the hearing still reflects the original intentions of the parties while remaining in substantial compliance with the objectives of the *Divorce Act*. The majority tempered the extent of judicial discretion to intervene at stage two by noting that some degree of change is usually foreseeable, citing in particular: changes to the job market, parenting responsibilities being more onerous than imagined, or that a transition to the workforce might be more challenging than anticipated. The majority held that parties could be presumed to realize that such factors may materialize, as well as the reality that health cannot be guaranteed, property values may fluctuate, businesses may fail, or a party may remarry.<sup>19</sup>

The discretionary nature of the *Miglin* test, some argue, leaves considerable room for courts to uphold or set aside spousal support releases.

The reference to agreements which have been negotiated in “unimpeachable conditions” might imply the unattainable counsel of perfection. In his initial comment on *Miglin*, McLeod did not take that view. While he criticized the majority opinion for its confusion and complexity, he suggested that in fact the result was to establish a test that is even higher than the radical, unforeseen, causally connected change threshold of the Trilogy.<sup>20</sup> Whether McLeod’s predictions are accurate remains to be seen but if the experience of spousal support jurisprudence over the last twenty years provides any guide, it is unlikely that this area of the law will remain static.

The British Columbia Court of Appeal has seen *Miglin* as confirming a broad authority for judicial intervention. In *D. (B.G.) v. D. (R.W.)*,<sup>21</sup> Smith J.A. and Lambert J.A. made a strong statement against finality in spousal support law reaching beyond what was required to decide the case at bar. This case originated in a standard arrangement terminating spousal support which the parties attempted to dress up in the original order as a spousal support dismissal. The parties entered into an agreement following their separation in which the husband agreed to pay support to the wife for a short period with a termination provision. The parties incorporated their agreement into a consent order which included both the terminating spousal support terms and added this provision: “This court further orders that after the foregoing payments are made, the petitioner’s claim for maintenance for herself is dismissed.” With

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<sup>19</sup> *Miglin*, *supra* at 299-303.

<sup>20</sup> McLeod, “Annotation,” *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255.

<sup>21</sup> (2003), 2003 CarswellBC 1192 (B.C. C.A.).

the termination of the payments, the wife brought an application to vary the original order. The husband defended by asserting *res judicata*.

Smith J.A. disposed of the case by finding that the wife had every right pursuant to s. 17 to seek a variation of the support terms. The order “dismissing” her claim could not remove the court’s statutory jurisdiction to vary operative support terms. Smith J.A. need not have commented further, but chose to do so. Smith J.A. stated *in obiter* that following the Supreme Court of Canada’s decision in *Miglin*: “any agreement purporting to deal in a final way with spousal maintenance is open to subsequent review by the courts.” In concurring reasons also approved by Smith J.A., Lambert J.A. affirmed:

. . . it is my understanding that a court order dismissing a support claim, even if it is not supported by a prior agreement of the parties, or does not incorporate a prior agreement of the parties, cannot be said to be final having regard to the decision in *Miglin, supra*. The jurisdiction of the courts always remains open if the circumstances are appropriate, to consider the matter again.

Particularly poignant, at least to a practitioner, is Smith J.A.’s brusque disposition of what he described as counsel’s eloquent and forceful argument that “the parties ought to be allowed to agree to a dismissal of the action to achieve finality without the requirement to submit themselves to further court proceedings, perhaps many years hence, with their attendant expense and anxiety.” There, neatly stated, is the argument for finality which in today’s jurisprudence appears to find few supporters, at least in the judiciary.

McLeod prepared a full annotation of *D.(B.G.) v. D. (R.W.)*.<sup>22</sup> Here, his views on support dismissals are quite different from those he expressed in his *McCowan* annotation. McLeod accepted the result in *McCowan* but crafted a much more persuasive technical argument than the one propounded in *Cotter*. McLeod maintained that *Miglin* has not elided the distinction between agreements and court orders. He acknowledged that an agreement that provides no support but only a release does not bind a court from granting spousal support on a s. 15.2 application under the 1985 *Divorce Act*. He argued that if the parties consent to an order dismissing spousal support that the issue should be *res judicata*. McLeod noted that if the doctrine did not apply to orders under s. 15.2 there would be no need for s. 17 to have been included in the *Divorce Act*. Barring *res judicata*, any spouse could reapply for a new order at any time. Parliament enacted s. 17 to provide a means for spouses to

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<sup>22</sup>McLeod, “Annotation” *RFL*.

seek to amend spousal support orders in the event of a change of circumstances. McLeod accepted the proposition that a dismissal of spousal support is not a spousal support order. As such, neither spouse may access s. 17 to vary the dismissal. As McLeod succinctly put it, that leaves three options: (1) After a dismissal, the issue of the spouse's entitlement is *res judicata*; (2) after a dismissal, the spouse can relitigate his or her claim pursuant to s. 15.2, thereby having an advantage over a spouse who successfully obtained support at the first instance and must apply to vary under the more restrictive terms of a s. 17 application; or (3) after a dismissal a spouse may re-litigate the issue only if there is a change of circumstances. That last option would put those whose claims have been granted and dismissed on a level playing field but McLeod saw no statutory support for the proposition.

McLeod concluded by observing that the issue could only be resolved by the Supreme Court of Canada. Until then, McLeod observed that counsel "can do little more than explain the uncertainty to their clients and hope for the best." That comment captures McLeod's ability to understand the jurisprudence and its practical implications. For all the attraction of dispensing finely attuned justice to individual litigants, on a broader scale the impact of undermining finality is to create legal uncertainty. Following closely on the heels of legal uncertainty are inevitably further court proceedings, expense and anxiety. If both spousal support agreements and court orders are equally open to review by the courts, then there is no means left under the *Divorce Act* for parties to resolve spousal support claims. Any solution is contingent.

**(a) Finality Ends: *Tierney-Hynes***

The evolution of McLeod's views on spousal support dismissals in the years following *McCowan* was counter-cyclical to those of the Ontario Court of Appeal. In *Tierney-Hynes v. Hynes*<sup>23</sup> the Court of Appeal heard a factually compelling application by a former spouse for support. The parties lived together and were married over a period of twelve years. At the time of their separation they had three small children. The wife financed the husband's training as a family physician. She cared for the home and the children, including one child with special needs. In the initial adjudication Ms. Tierney-Hynes received spousal support

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<sup>23</sup> (2005), 2005 CarswellOnt 2632 (Ont. C.A.), leave to appeal refused (2005), 2005 CarswellOnt 7437 (S.C.C.).

of \$300/month and child support of \$500/month. Mr. Hynes' income declined post-separation. To remedy the situation he obtained a residency in psychiatry and qualified as a specialist. While he pursued his advanced qualifications as a psychiatrist his income dropped. He applied for an order to terminate spousal support and reduce child support. At the hearing, Ms. Tierney-Hynes chose not to defend against the spousal support termination and her spousal support claim was dismissed. She did not appeal that dismissal. The proceeding that ultimately came before the Ontario Court of Appeal was round three for this family. By the time of Ms. Tierney-Hynes' renewed application she was in her mid-50s, in poor health and unable to support herself. Mr. Hynes had established his practice as a psychiatrist and was earning \$250,000/year. The lack of parity in the outcomes of this couple after twelve years together and approximately fifteen years of separation must create tremendous sympathy for the applicant wife.

No doubt with an eye to the apparently binding decision of the Court of Appeal in *McCowan*, Ms. Tierney-Hynes advanced her case on the basis that she believed the first variation application to have disposed of her spousal support claim on a temporary basis. That makes sense, as the reason for ending the spousal support payments in the variation was Mr. Hynes' temporary reduction in income. The case was heard as an appeal of a summary judgment dismissing Ms. Tierney-Hynes' claim on the basis of *Cotter* and *McCowan*. Madam Justice Lang, writing for the Court of Appeal, took the opportunity to revisit the issue and find a new interpretation of the application of the *Divorce Act*.

Lang J.A. approached the question as one of statutory interpretation. She noted with approval the view of both the majority in *Cotter* and in *Gill-Sanger* that the question did not invoke the doctrine of *res judicata* but rather the proper application of the statute. As a consequence, she did not entertain any discussion of the principles of *res judicata* or issue estoppel.

Lang J.A.'s analysis of the problem has two aspects. As with all these appellate decisions, Lang J.A. reviews the new support language of the 1985 *Divorce Act* with regard to the changes from the 1970 *Divorce Act*. She presents her interpretation as a careful textual analysis of the statute. In the 1985 legislation, a spousal support order is defined as an order "made under s. 15(2) of the Act." The variation power under the 1970 *Divorce Act* granted a court jurisdiction to vary an order made "pursuant to" s. 11(1). Lang J.A. finds great significance in the replacement of "pursuant to" with "made under" the legislation. On a conceptual

level, Lang J.A. cites the philosophical change marked by the arrival of compensatory support analysis in *Moge*. In *Moge*, the Supreme Court of Canada first interpreted the 1985 *Divorce Act* and emphasized the relegation of self-sufficiency in the statute to only one objective for support. This change guides Lang J.A.'s review of the problem of spousal support dismissal orders.

In her overview of the jurisprudence, Lang J.A. grants a prominent place to McLeod's critique of *McCowan* and of *Irvine*.<sup>24</sup> She quotes McLeod's opinion that after the introduction of the 1985 *Divorce Act*, the award of nominal support orders became infrequent because courts accepted that a spouse might bring an application for corollary relief under s. 15 of the *Divorce Act* despite a dismissal where there had been a change of circumstances. As McLeod himself pointed out, however, in his annotation on *Gill-Sanger*, there is no statutory basis for a change of circumstances threshold if, in fact, a spouse may reapply under s. 15 for a spousal support determination. The only basis for imposing such a threshold would be if the reapplication is understood as an application under s. 17 to vary the dismissal of spousal support. Whether that is possible lies at the heart of the statutory interpretation propounded by Morden J.A. in *Cotter* and Lang J.A. in *Tierney-Hynes*.

The 1997 amendments, which were an integral part of the legislation before the Court in *Tierney-Hynes*, include subtle changes in language. Lang J.A. finds two to be significant: the addition of s. 15.3 and the amendment to s. 17(7). These new provisions, which are currently in force, are:

- 15.3(1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.
- (2) Where as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.
- (3) Where as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change in circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

<sup>24</sup>*Tierney-Hynes*, *supra* at 13, referring to McLeod, "Annotation" *Irvine v. Irvine* (1996), 25 R.F.L. (4th) 401 (Man. Q.B.).

17(7) A variation order varying a spousal support order should. . . [this section lists then lists the objectives.]

Before the 1997 amendments, s. 17(7) had read “A variation order varying a support order *that provides for the support of a former spouse* should. . .”

Lang J.A. attributes great significance to these amendments. She holds that the introduction of s. 15.3, a completely new provision, “clearly evidences Parliament’s intention to allow a variation of an earlier dismissal of spousal support.”<sup>25</sup> Lang J.A. finds no principled reason to deny a spouse the ability to have spousal support revisited when that spouse has been denied support on an initial application by reason of inability to pay or the absence of need while permitting a spouse denied because of the priority of child support to renew the spousal support claim. Assuming legislative consistency, Lang J.A. extrapolates that Parliament must have intended to grant to courts the power to revisit spousal support orders without restriction.<sup>26</sup>

The amendment to s. 17(7) is more subtle, replacing reference to the power to vary an order that “provides for the support of a former spouse” with “varying a spousal support order.” “Spousal support order” is of course a defined term in the *Divorce Act*, but as Lang J.A. has already observed, it constitutes an order made *under* the *Divorce Act*, as opposed to *pursuant to* the *Divorce Act*. Lang J.A. accepts that the authority to make an order *pursuant to* an act is necessarily limited to positive orders and cannot include dismissals.<sup>27</sup> She finds that the change in the new legislation to permit variation of an order *under* the *Act* broadens the court’s authority to vary both positive orders and dismissals.

Lang J.A. also relies on the language of s. 17(1)(a) of the *Divorce Act* that was not affected by the 1997 amendments. This section provides a court with the power to vary either a child or spousal support order without differentiating between the two. Lang J.A. comments, without any supporting references, that courts have always had the authority to vary a dismissal of child support, relying on *parens patriae* jurisdiction. Lang J.A. attaches significance to the failure of the legislature to separate the authority to vary child and spousal support orders into separate provisions of the *Act*, coupled with the failure of the legislature to

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<sup>25</sup> *Tierney-Hynes, supra* at 17.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Tierney-Hynes, supra* at 19.

expressly provide for differential treatment. From this she draws the conclusion that Parliament intended to grant to spousal support applicants the same right that child support applicants have to renew a claim after an initial dismissal.

Lang J.A. comments on the flexible options available for a court making a support award under the 1985 *Divorce Act*. She observes that courts may adjourn spousal support claims *sine die*, require support to resume on a particular event or time, require subsequent reviews and structure orders to meet the particular needs of the parties.<sup>28</sup> It is possible to quibble with Lang J.A.'s sweeping statement of the options listed. She cites no specific precedent for courts adjourning spousal support claims *sine die*, which does not appear to be a viable option to a judge asked to rule on a s. 15.2 claim at the end of a trial. Perhaps Southin J.A.'s suggestion in *Gill-Sanger* of an order dismissing a spousal support claim with liberty to apply falls into that category.<sup>29</sup> The Supreme Court of Canada has expressly frowned on excessive reliance on review orders in *Leskun v. Leskun*,<sup>30</sup> a decision subsequent to that of the Ontario Court of Appeal in *Tierney-Hynes*. However, the general tenor of Lang J.A.'s remarks are accurate, as courts have considerable room to make creative spousal support orders that suit the parties, without resorting to nominal orders. All this developed in the shadow of *McCowan* which for a decade lower courts in Ontario and other provinces treated as at least persuasive authority on the technical question of reopening dismissal orders.

Overlying this textual analysis of the 1997 amendments, Lang J.A. avers to spousal support jurisprudence with specific reference to *Bracklow v. Bracklow*<sup>31</sup> and *Miglin*. Lang J.A. cites both decisions as “evidence of a jurisprudential shift away from a prioritization of the goals of finality, certainty and self-sufficiency in determining spousal support. Instead, the courts have moved towards a more contextual analysis of the particular circumstances of each case in light of all the factors and objectives prescribed by Parliament in the 1985 Act and in the current Act.”<sup>32</sup>

In *Tierney-Hynes*, the Ontario Court of Appeal unequivocally finds jurisdiction under the *Divorce Act* for a court to vary a spousal support dismissal. Mr. Hynes sought leave to appeal the decision to the Supreme

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<sup>28</sup> *Tierney-Hynes*, *supra* at 19.

<sup>29</sup> *Gill-Sanger*, *supra*.

<sup>30</sup> 2006 SCC 25 (S.C.C.) at 12-13.

<sup>31</sup> [1999] 1 S.C.R. 420 (S.C.C.).

<sup>32</sup> *Tierney-Hynes*, *supra* at 13.

Court of Canada. That Court dismissed his leave application with costs.<sup>33</sup> McLeod did not have the opportunity to prepare a full annotation of *Tierney-Hynes*. He did make a few pithy comments in his weekly newsletter shortly after the Court of Appeal decision was rendered. His thumbnail sketch of the case:

The upside is that the controversy between the OCA [Ontario Court of Appeal] and BCCA [British Columbia Court of Appeal] on the point is over. The BCCA was correct. The downside is that agreements have more effect than court orders. Yet one more way to try for finality shut down.<sup>34</sup>

Interestingly, despite the concerted effort of both the British Columbia Court of Appeal and the Ontario Court of Appeal to distinguish the issue of judicial authority to re-open dismissals from the doctrine of *res judicata*, McLeod continued to refer to the problem in the context of that doctrine.

Many commentators were surprised by the decision of the Supreme Court of Canada to refuse to hear Mr. Hynes' appeal. McLeod may have captured the rationale for that. With the decision in *Tierney-Hynes*, the apparent conflict between provincial Courts of Appeal was resolved, reason perhaps for the Supreme Court of Canada not to see any need to hear the case. McLeod's reaction to the decision was a common one amongst the bar. If *Miglin* provides at least some stringency to the enforcement of spousal support releases, then the unfettered authority to vary a dismissal of support found in *Tierney-Hynes* makes a dismissal of spousal support more easily circumvented than a private contractual release. Lang J.A. did not ascribe to this view and expressly states that her decision is in line with that of the Supreme Court of Canada in *Miglin* which she saw as reflecting a "shift away" from finality and certainty. Whether there is even a conflict between *Miglin* and *Tierney-Hynes* is a matter of some debate.<sup>35</sup>

Before moving to the debate about how *Miglin* and *Tierney-Hynes* interact, the first question must be whether Lang J.A.'s statutory analysis is convincing. Her Honour neutralized Osborne J.A.'s statutory interpretation in *McCowan* by finding that it was in *obiter* and also by relying on the subsequent statutory changes embodied in the 1997 amendments.

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<sup>33</sup> *Tierney-Hynes v. Hynes* (2005), 2005 CarswellOnt 7437 (S.C.C.).

<sup>34</sup> McLeod "Jay McLeod's This Week in Family Law" FAMLNWS 2005-27, July 12, 2005.

<sup>35</sup> See Patrick D. Schmidt and George Karahotzitis, "Miglin v. Tierney-Hynes Conflict or Consistency?", Family Law from Beginning to End, the 2006 CBA-O Institute.

Whether or not the comments were in *obiter*, on the central point of drawing a distinction between an order made *pursuant to* an act and an order made *under* an act, Osborne J.A. saw no significance to that difference. I tend to agree, but by the same token it is not at all clear that Morden J.A.'s initial restrictive interpretation of the language of the 1970 *Divorce Act* in *Cotter* makes sense. An order to dismiss a spousal support claim is still an order made pursuant to the statute in all but the most constipated use of the language. None of this would matter if there were not a power to vary. Absent the power to vary a support order, the dismissal would necessarily be final as the applicant would have no other status to apply for relief. Once legislation provides for orders to be reconsidered in certain circumstances it seems artificial to draw a hard line between an order that grants relief and one that denies it. Lang J.A.'s holding that the authority to vary an order under the 1985 *Divorce Act* must include the power to vary a dismissal accords with a plain reading of the statute.

Lang J.A. also appears to be on firm ground in finding significance in the amendment to the variation provisions of the *Divorce Act* to permit variation of a "spousal support order" in place of the authority to vary an "order that provides for spousal support". The latter clearly excluded orders dismissing spousal support while the current language does not.

The suggestion that the introduction of s. 15.3 reflects Parliament's intent to expand the authority of the courts to vary spousal support dismissals is more problematic. Section 15.3 must have a purpose. If courts had the authority to vary spousal support dismissals in any event there would be no need to include a specific term to protect this right in situations in which the priority of child support has precluded a spousal support order at first instance. The ultimate cessation of child support which, unlike spousal support, always comes to an end at some date is a foreseeable or foreseen event. With the limited exception of a severely disabled child who never reaches independence, all children cease to be children of the marriage eligible for support at some point. Spousal support is a much more open-ended proposition. Arguably s. 15.3 protects a spouse from being precluded from bringing a claim at a later date for a variation of spousal support on this basis. This interpretation of s. 15.3 may, however, accord too much foresight to the legislative drafters.

Despite the great attention courts have directed to the statutory interpretation problems presented by the *Divorce Act*, and there are many, the consciously stated motivating factor in each of the decisions is that of spousal support jurisprudence. Spousal support jurisprudence

is a complex and sophisticated structure that has an alarming tendency to shift dramatically. The courts at each change in direction have taken care to ground decisions in the then current legislation and there is no doubt but that the legislation has changed significantly at least once, with the introduction of the 1985 *Divorce Act*. The statutory changes on which successive courts have supported jurisprudential shifts do not seem significant enough on their own, however, to justify the radical new directions taken. Although the 1997 amendments were significant for child support it is difficult to interpret them such as to find any striking impact on concepts of spousal support, certainly not to the extent claimed by courts called upon to apply them. The jurisprudential shift from *Cotter* to *McCowan* to *Tierney-Hynes* must logically derive much more from the changing view courts have of the spousal support obligation than from the relatively minor legislative amendments that have occurred.

McLeod among others championed the propriety of courts changing their minds in the direction of family law jurisprudence to reflect changing mores. In the context of the *Miglin* decision which finally put to rest the Trilogy of *Caron*, *Richardson and Pelech*, McLeod observed that: “. . .the court changed its collective mind. . .If family law is to remain an effective instrument of social regulation, it must change to reflect changes in society.”<sup>36</sup> The same collective change of mind seems as good an explanation as any of the result in *Tierney-Hynes*, evidently with the support of the Supreme Court of Canada. It leaves unresolved the knotty problem of how courts are expected to identify the changes society needs or wants and whether the jurisprudential transformations that have occurred in family law actually reflect a broad social consensus.

### **(b) The Interaction of *Miglin* and *Tierney-Hynes***

Like the appellate courts, McLeod’s views evolved on the question of finality in the years between *McCowan* and *Tierney-Hynes*. That evolution was likely pushed by the debate over those same years on the question of what degree of discretion, if any, courts should have to interfere in privately negotiated separation agreements. The issues are clearly intertwined as both sides to the debate draw on *Miglin* in the context of exploring the appropriateness of courts revisiting cases in which spousal support has been dismissed. Lambert J.A. of the British

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<sup>36</sup> McLeod, “Annotation” *Miglin* at 265.

Columbia Court of Appeal cites *Miglin* as support for the proposition that courts should be able to reopen a spousal support dismissal. Similarly, Lang J.A. refers to *Miglin* as authority for the statement that the jurisprudence favours judicial resolutions tailored to fairly allocate spousal support obligations to individual parties over rigidly pursuing an ideal of consistency or predictability in support awards. That was not McLeod's view of *Miglin*, as discussed above. Nor does it fairly represent the emphasis that the majority in *Miglin* clearly placed on principles of certainty, autonomy, and finality. Canadian courts have consistently maintained an overarching right to set aside separation agreements in appropriate circumstances. Nothing short of an express statutory revocation of that authority will cause them to abandon that role. Yet, the reasons in *Miglin* do place significant limitations on that authority to intervene and counsel courts to do so with restraint. The policy rationale for that finding, which the majority opinion in *Miglin* supported by somewhat tenuous statutory interpretation, is the social benefit of private settlements of matrimonial disputes.

The Supreme Court of Canada's decision to deny the leave application in *Tierney-Hynes* indicates an approval of the result in that case, if not the reasons provided by the Court of Appeal. So where does that leave us? Once spousal support has been adjudicated, the result, whether it be a positive order or a dismissal, is subject to variation under the strictures of s. 17. That is not a free for all, as the applicant must meet the threshold of a material change in circumstances not foreseeable at the date of the initial determination.<sup>37</sup> An unsuccessful applicant at first instance need not seek a nominal order to preserve that right, presuming that applicant can rely on some stability in the future jurisprudence.<sup>38</sup> An applicant may seek a variation on any ground but those most likely to find success will be applications based on a change in ability to pay or need. If a court finds that a spouse had no entitlement at first instance, a variation application is unlikely to find success.

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<sup>37</sup> *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.) and *B. (G.) c. G. (L.)* (1995), 15 R.F.L. (4th) 201 (S.C.C.).

<sup>38</sup> Interestingly, Philip Epstein and Lene Madsen advise counsel that it is prudent to obtain just such a nominal order to make clear to the parties, counsel and a subsequent reviewing court that the applicant's claims were intended to be preserved. This is in a case comment prepared after *Tierney-Hynes* and reflects the now understandably cautious attitude of the bar which has seen so many reversals in this jurisprudence. Epstein and Madsen, "Epstein and Madsen's This Week in Family Law" FAMLNWS 2006-05, February 7, 2006.

If a spouse has entered into full and comprehensive spousal support releases in a separation agreement, that spouse may ask a court to set aside that separation agreement. To do so, the applicant must satisfy the two stage *Miglin* test. Does that set a higher standard than the material change of circumstances threshold under s. 17 of the *Divorce Act*? At the threshold stage of the determination *Miglin* would seem to place a higher standard for judicial intervention because of the express deference to the parties' "subjective sense of equitable sharing" in a negotiated settlement.<sup>39</sup> The majority opinion in *Miglin* considered the question of whether an agreement incorporated into an order, and hence variable under s. 17 of the act would provide a court with a wider scope to set a new support order than if the issue came before the court as an application under s. 15.2. The majority concluded that there should be no such inconsistency of result. Even under a s. 17 application, a court should consider "the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage."<sup>40</sup> This comment seems to apply only to cases in which an agreement has been incorporated into a court order. That would encompass the typical settlement arrangement in which parties both enter into a separation agreement with full spousal support releases and obtain a final order dismissing the applicant's support claim. In that situation, a court asked to vary the final order must determine the issue consistently with the *Miglin* standard. An unanswered question is whether the mere fact that the parties' agreement was incorporated into a consent order at first instance, and thereby had the imprimatur of the court, should be relevant or perhaps determinative of whether the decision passes stage one of the *Miglin* test.

What of the situation in which a final order dismissed spousal support at first instance but the parties never entered into spousal support releases? In that case the *Miglin* principle of respect for and encouragement of private settlement of matrimonial disputes does not come into play. A court has free rein to make an appropriate order for support as long as the applicant satisfies the threshold test of a material change of circumstances. A spouse who truly wishes to minimize his or her risk of the other spouse returning for round two, or three or four as the case may be, is well-advised to obtain full and complete spousal support releases. At least, that is, until the next jurisprudential shift.

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<sup>39</sup> *Miglin, supra* at 298.

<sup>40</sup> *Miglin, supra* at 303.

In *Leskun v. Leskun*, Mr. Justice Binnie writing for the Court chose to comment on the use of reviews in spousal support determinations. Binnie J. described such orders as having a “very limited role.”<sup>41</sup> While acknowledging their usefulness in cases in which courts face genuine and material uncertainty at the time of trial, Binnie J. cautioned that as far as possible courts should decide the issues at trial and make final orders subject only to variations in the event of a change in circumstances under s. 17 of the *Divorce Act*. He observed that failure to strictly limit the support issue will simply encourage re-argument of the dispute.<sup>42</sup> Directing courts to limit the use of reviews, thereby constraining subsequent applications into the restrictions of s. 17 is consistent with the comments of the majority in *Miglin*. It is also consistent with the result in *Tierney-Hynes* which confines renewed applications after a spousal support dismissal to variation applications. Yet it is clearly inconsistent with Lang J.A.’s commentary in *Tierney-Hynes* at least to the extent that it was based on a purported reduced concern for the values of certainty and finality in *Miglin*.

For family law practitioners and their clients the evolution of the jurisprudence that has brought us to the current position has in its very changeability frustrated principles of consistency and predictability. Before 1985, a party wishing to resolve a support claim on a final basis with his or her spouse could comfortably do so by obtaining a dismissal of that order. If an applicant spouse had a claim doomed to failure at first instance, he or she could obtain a nominal order permitting the claim to be re-opened at a later date when circumstances changed. With the introduction of the 1985 *Divorce Act* courts largely, although not evenly, stopped making nominal orders on the assumption that they were unnecessary. A spouse wishing to avoid a renewed application in the future by the same token was well-advised to enter into a spousal support release and to make no provision for support or dismissal of support in the divorce judgment. The decision in *McCowan* turned the wheel once more. Now the prudent course of action for an applicant spouse was to obtain a nominal support order and for a potential payor spouse who had a spousal support release in his or her pocket the prudent course of action was to obtain a dismissal.

In practice, courts continued to devise alternative orders leaving room for later adjustments as circumstances changed, the development

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<sup>41</sup> *Leskun*, *supra* at 12.

<sup>42</sup> *Leskun*, *supra* at 13.

of review orders being a significant example. The movement to set aside spousal support releases in the late 1990s fostered the interest of potential payors in obtaining a support dismissal. With a dismissal in hand, parties and counsel had reason to believe their situation was more secure than a mere spousal support release capable of being set aside by a court. The Supreme Court of Canada's decision in *Miglin* restored some faith in the enforceability of spousal support releases but still left open a window of judicial discretion. All of this evolved at a time in which the popularity of review orders in place of time limited spousal support has underscored the potentially indefinite — if not endless — nature of matrimonial litigation. The intense reaction to the Ontario Court of Appeal's decision in *Tierney-Hynes* "finality shutdown", as McLeod put it, owes as much to the anxiety of counsel attempting to advise clients and resolve disputes in a jurisprudence characterized by radical uncertainty as anything else. Hence the calls for real finality in litigation. Does the *res judicata* doctrine have something to offer family lawyers despite the reluctance of the courts to consider its principles in the context of spousal support dismissals?

**(c) *Res Judicata* – How Final is it Anyway?**

The interaction of *Miglin* and *Tierney-Hynes* means that an order dismissing a spousal support claim has marginally less impact than a contractual release. That does seem to violate common law principles of *res judicata*. Throughout the family law jurisprudence, courts have on the whole very carefully restricted their analysis of the issue to the question of statutory interpretation under the *Divorce Act*. McLeod just as consistently in his commentary set these decisions in the context of the doctrine of *res judicata*. Does that distinction matter? In its essence, the doctrine of *res judicata* precludes the relitigation of disputes. The doctrine bars a party from launching a claim not only on a matter that a court decided upon, but on any issue which should or could have formed part of the lawsuit and which a reasonably diligent party could have put forward.<sup>43</sup> This formulation weighs the benefit of compelling an ending to a dispute against the harm of a court erring in its final determination, perhaps as a result of a party's failure to vigorously or competently advance her cause. Re-opening settled matters without restriction would

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<sup>43</sup>*Henderson v. Henderson* (1843), 3 Hare 100, [1843-60] All E.R. Rep. 378 (Eng. V.C.) at 115.

create the obvious harm of fostering litigious claimants' abuse of the court process at great waste and expense to the courts and to individual defendants. Yet, a firm application of the doctrine of *res judicata* may result in particular injustices in no small part because judgments are not all equal. Some are the result of a comprehensive hearing in which all possible claims were considered with care, some are the result of a less perfect process because of the failings of litigation resources or simply the human inadequacy of barristers, witnesses and judges. Some final judgments represent no more than a rubber stamping of a private settlement. In each of these cases does the goal of finality continue to justify the individual injustices in the cases that were perhaps wrongly decided in the first place?

It is not only in family law jurisprudence that this tension between the general injustice of indeterminate adjudication and the specific injustice of inadequate adjudication in a particular case arises. Nor is the natural judicial instinct to remedy an apparent unfairness in treatment of particular individuals in his or her courtroom reserved only for our family law courts. Led by the House of Lords, Canadian courts have accepted that the doctrine of *res judicata* may not bind a later court if there has been a subsequent change in circumstances. The change in circumstances may be a change in the law.<sup>44</sup> Commenting on the related doctrine of issue estoppel, Mr. Justice Laskin held that "if the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings."<sup>45</sup>

Another chink in the defence of *res judicata* has developed in cases in which the initial judgment was on consent. While a clear line of cases suggest that a consent judgment is of the same value as a judgment following adjudication, other courts distinguish between a consent order that simply incorporates a private settlement without any judicial oversight. Mr. Justice Nordheimer concluded in *Lawyers' Professional Indemnity Co. v. Geto Investments*:

Where the consent order has an adjudicative aspect to it, as it did in *Maiocco* and in *Staff Builders*, then the principle of *res judicata* may apply. But where, as here, the order does nothing more than dismiss the action pursuant to a

<sup>44</sup>*Arnold v. National Westminster Bank plc*, [1991] 2 A.C. 93 (U.K. H.L.) at 110.

<sup>45</sup>*Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.) at 340 and see *Robb Estate v. St. Joseph's Health Care Centre* (2001), [2001] O.J. No. 606, 2001 CarswellOnt 481 (Ont. C.A.).

settlement and therefore clearly does not purport to have made any adjudication of the action on the merits, then I do not see how the doctrine of *res judicata* can flow from it.<sup>46</sup>

With this approach, the value to a defendant of obtaining a consent judgment dismissing a claim withers, as he or she may at a later stage face a renewed lawsuit on the same issues. In a commercial or other non-family matter, the litigants at least have the option of obtaining comprehensive and enforceable releases which form the real defence to endlessly fighting the same battle. This is unlike spousal support law in which, even following *Miglin*, the possibility of a subsequent adjudicator setting aside a release remains ever present at a much lower threshold than the available doctrines for setting aside a commercial contract, such as unconscionability, fraud or duress.

The rationale for treating a consent judgment with less respect than an adjudicated judgment in civil matters is clearly expressed in the jurisprudence. With the latter, a subsequent court knows that there has been a judge's consideration of the legal and factual issues. A consent represents nothing more than the agreement of the parties to resolve their dispute. Making it easier for a party to re-litigate a dispute settled by a private resolution reflects a preference for public dispute resolution and scrutiny. This preference for court adjudication coupled with the ability to reopen disputes which were "wrongly" decided as evidenced by a subsequent change in circumstances or law, tips the balance away from the general principle of encouraging settlement and the final resolution of disputes to a fine-tuning of dispute resolution for each particular litigant.

The developments in *res judicata* jurisprudence have real resonance for family law practitioners who have participated in the parallel debate, mostly in the context of spousal support. Perhaps family law is not such a special case after all. There is an irony in the fact that as the jurisprudence stands currently in *Miglin* and *Tierney-Hynes*, arguably consent orders and private agreements in the family law context receive more, not less consideration, than a court order.

#### **(d) How Much Finality Can Family Law Bear?**

The evolution of McLeod's views over a decade and a half of fastmoving jurisprudence is indicative of the problem. There is likely not a

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<sup>46</sup>(2001), 54 O.R. (3d) 795 (Ont. S.C.J.).

right answer to the jurisprudential problem of how far courts should move along the spectrum in either the direction of certainty or precisely calibrated justice. Spousal support applications under the *Divorce Act* pose a special set of problems as they involve a relationship which may have developed between two individuals over a number of years and which may continue long after the separation, quite unwillingly on the part of one or the other as the case may be. The *Divorce Act* contains within it variation provisions and an open-ended right to apply for spousal support after a divorce, which make untenable any finality to court orders. The debate evident in the jurisprudence between Osborne J.A. and Lang J.A. as to how the 1985 *Divorce Act* should be read is not easily resolved but the latter's view expressed in *Tierney-Hynes* seems a more reasonable reading of the statute. If Parliament wishes to impose finality, clear legislative language to direct that result would be needed.

### 3. CONCLUSION

The doctrine of *res judicata* may not apply to the narrow question of whether spousal support dismissals are capable of being varied or reviewed under (or is that pursuant to?), the current *Divorce Act*. However, the doctrine addresses the same principles which should apply. At what point does individualistic justice actually foster the greater public harm of encouraging litigation? At what point does the expediency of preventing relitigation of disputes unfairly prejudice an individual to the extent that it undermines the legitimacy of the judicial process? Keeping these principles in mind helps ground the debate about how far it is appropriate for the law to move towards individualized and contingent justice and away from finality.

A better balance might be achieved if courts retained the authority to intervene in particular cases where there have been changes in circumstances within the s. 17 framework, but were willing to grant effective autonomy to parties to contract out of the courts' supervision. In light of *Miglin*, the only means to further restrict the intrusion of the courts into parties' private ordering would be by legislation. Maintaining the stringent requirements of the *Miglin* test by respecting the restraining language of the majority opinion, rather than seeing the decision as a license to intervene in private arrangements, is at least a first step.

The evolution of McLeod's views on the question of finality reflects his experience as both an academic and a practitioner. As the former, he contributed to the technical debate about the proper interpretation of the

*Divorce Act* through its various formulations. Also, in his academic role he recognized the inevitability of courts adjusting jurisprudential analysis to comply with their changing views of marriage. As a practitioner, his discomfort with the “end of finality” grew in response to a decade of turmoil in the treatment of dismissals of support as well as intervention in spousal support agreements. Parties and counsel will arrange their affairs to their best advantage around any set of “finality” principles. The key is to maintain a firm set of such principles. It is the very instability of these principles over the last two decades that has pushed family law too far toward indeterminacy.