

## VI. RESISTING JUDICIAL INTERVENTION AND THE LAW OF RELIANCE IN FAMILY LAW AGREEMENTS [§2.24]

### A. THE FAMILY LAW AGREEMENT AS A BAR TO FURTHER LEGAL PROCEEDINGS [§2.25]

Family law agreements are often made after lengthy disputes, and one of their purposes is to remove the need for litigation. Consequently, agreements often mention that legal proceedings were commenced, or that disputes are being settled by the agreement. Clauses are drafted to prevent future litigation (see, for example, the recitals on “Final Agreement” and “Reliance on Agreement: Possibility of Judicial Intervention” in chapter 6 and the clause on “Legal Proceedings: Agreement Is a Defence” in chapter 17).

If one spouse applies to court to vary the support obligation in an agreement, the other spouse who wants to resist the variation will usually rely on the agreement. It has been held, however, that a spouse who is in breach of the agreement may not rely on it for the purpose of resisting variation (*Thomas v. Thomas*, 1986 CanLII 1357 (BC SC) at para. 25; *McVeetors v. McVeetors*, 1985 CanLII 2168 (ON CA), leave to appeal refused (1985), 43 R.F.L. (2d) xxxiv (S.C.C.)).

### B. RELIANCE [§2.26]

A series of common law and equitable restitutionary principles recognizes the rights, or protects the interests, of a person who has relied in good faith (usually because the other party has in some way invited reliance) on an unenforceable promise. These legal doctrines include waiver, change of position, acquiescence, inexcusable delay, representation by silence, and estoppel.

For example, a supported spouse who does not act diligently may not be able to complain about, or collect, arrears of spousal support (*Logan v. Williams* (1989), 41 B.C.L.R. (2d) 34 (C.A.); *Daniels v. Lakes*, 1987 CanLII 2401 (BC CA)). Similarly, where a supported spouse agrees to take reduced support, the supported spouse can give notice to restore the support to its former levels, but would be estopped from claiming the arrears (*Boekhoff v. Boekhoff*, 2016 BCCA 33; see the discussion of this case at “Releases and Support” in this chapter).

Generally, one spouse’s reliance on another’s unenforceable promise has no legal consequence. For example, an agreement waiving child

support will not be enforced merely because one spouse relied on it. Similarly, the principle of reliance has not helped spouses who wish to enforce an unfair pre nuptial agreement. The reliance doctrines will not assist in the enforcement of unfair agreements. Quite the contrary, they are used to prevent one person from taking unfair advantage of the other.

### **C. GOOD FAITH [§2.27]**

In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada changed the law of contractual interpretation in a fundamental way by recognizing that good faith, as well as a duty of honest performance, is an organizing principle in all contract law. It remains to be seen how far-reaching this development will prove to be in general, and in the context of family law agreements.

These principles were applied by the court in *Wiebe v. Treissman*, 2017 BCSC 1523. The parties' agreement (made in January 2016) provided that the husband was not required to pay lump sum support of \$700,000 to the former spouse until a butterfly transaction had been completed, but the butterfly transaction was delayed for various reasons and still not completed by the time of the application to court (in August 2017). There was evidence that the husband viewed the delay in payment as putting pressure on the wife to settle various outstanding issues. The court, relying on *Bhasin*, ordered the immediate payment of the lump sum support.

## **VII. LEGISLATIVE DISCRETION TO INTERVENE IN FAMILY LAW AGREEMENTS [§2.28]**

### **A. THE COURT'S JURISDICTION TO INTERVENE IN FAMILY LAW AGREEMENTS [§2.29]**

No agreement will oust the court's jurisdiction to order child support. If an application is made to court for spousal support, the agreement is only a factor, although an important factor, considered in determining a fair level of support. On a spousal support application, the court will look to the whole of the agreement. A generous division of property may, for example, counterbalance support set at a miserly level. If an application is made to court for child support, the court will consider the Federal Child Support Guidelines. For more information about variation of spousal and child support provisions, see chapter 9 (Child