

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

	)	<i>B. L. Bernhard</i>
	)	<i>on his own behalf</i>
<i>MYRNA ANN ANDERSON</i>	)	<i>(in person)</i>
)	
<i>(Petitioner) Respondent</i>	)	<i>R. A. Horton</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	<i>(via videoconference)</i>
)	
<i>BARRY LEROY BERNHARD</i>	)	<i>Appeal heard and</i>
	)	<i>Decision pronounced:</i>
<i>(Respondent) Appellant</i>	)	<i>June 19, 2020</i>
)	
	)	<i>Written reasons:</i>
	)	<i>July 3, 2020</i>

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

On appeal from 2018 MBQB 100

PFUETZNER JA (for the Court):

[1] The respondent appealed an order dismissing his motion to vary a consent variation order made in 2010 (the variation order) that varied a consent final order made in 2009 (the final order). At the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[2] The parties separated in 1998 after more than 30 years of marriage,

during which the petitioner was out of the work force for many years in order to raise their two children.

[3] The final order provided for payment by the respondent to the petitioner of an equalization payment and monthly spousal support that had a compensatory component, amongst other things. The respondent did not pay the equalization payment, as required under the final order, so the parties re-negotiated and the terms of their agreement were incorporated into the variation order. The equalization payment was reduced and the spousal support payments were increased. As found by the judge (at para 25): “The Variation Order converted the . . . equalization payment to a schedule of spousal support payments.”

[4] In 2016, the respondent moved to vary the variation order based on a material change in his circumstances—in particular, that his health had declined, impacting his ability to work which resulted in decreased income from his management consulting business. He sought to reduce the monthly spousal support payments significantly below the level set out in the final order, reduce the life insurance coverage, suspend enforcement and delete the significant arrears that had accumulated.

[5] The judge dismissed the motion, finding that the respondent did not meet the onus to establish a material change in circumstances. A material change is one that, if known at the time of the order, would have resulted in different terms (see *Willick v Willick*, [1994] 3 SCR 670; and *LMP v LS*, 2011 SCC 64 at paras 30-32).

[6] As for the respondent’s health concerns, the judge found that “[t]he respondent was aware of his chronic health conditions at the time [of the

variation order], and knew he was going to age” (at para 65).

[7] In connection with his income, the judge found that “[t]he respondent’s income subsequent to 2010 has increased. His income in 2015 was higher than it was in 2008, 2009 or 2010” (at para 68).

[8] An appellate court should not overturn a decision regarding spousal support unless the reasons disclose an error in principle or a significant misapprehension of the evidence, or unless the award is clearly wrong (see *Hickey v Hickey*, [1999] 2 SCR 518 at para 11).

[9] We are not convinced that the judge erred in principle or misapprehended the evidence in a material way. The record supported her findings. Nor are we persuaded that the decision is clearly wrong.

[10] Accordingly, the appeal was dismissed with costs of \$3,000, plus reasonable disbursements, awarded in favour of the petitioner. The funds currently held in trust by counsel for the petitioner as security for costs are to be applied towards the cost order.

“Pfuetzner JA”

“Beard JA”

“Mainella JA”