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Effect of Retirement on Spousal Support Obligations

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Spousal support payors and recipients are increasingly looking to the court for determination of issues around support obligations after, or in anticipation of, retirement. Some clarification has emerged from recent decisions from the Superior Court, Divisional Court and one decision from the Court of Appeal.

Forseeability

For some time there was confusion created by the issue of foreseeability of retirement on a motion to change (vary) spousal support. The argument was: if it is foreseeable that almost everyone will retire at some point, and retirement is not specifically addressed in the original order or agreement, how can it be used as a ground for variation, since, per the principles of *Miglin v. Miglin* (2003), 66 OR (3d) 736; 224 DLR (4th) 193; 34 RFL (5th) 255; 302 NR 201; [2003] CarswellOnt 1374, it was "foreseeable" at the time of the order or agreement that retirement would happen at some point. There now appears to be consensus, after *Droit de Famille 091889,* [2009] CarswellQue; 2009 QCCS 3389, that, with an open ended spousal support provision, actual retirement may be considered by courts to be a material change in circumstances, and thus there is jurisdiction to consider variation, even when retirement was not addressed in the original order or agreement. The need to address foreseeability only arises if the original order or agreement included termination previsions which are later challenged.

Voluntary Early Retirement and Contractual Eligibility for Retirement

Early retirement, at the choice of the payor, was the issue in *Hickey v. Princ,* 2015 ONSC 5596 (Divisional Court). The motion judge allowed a reduction and eventual termination of spousal support when the payor spouse retired on full pension at age fifty-one. The Divisional Court found the trial judge erred, and that the payor's "means," post retirement, included notional income the payor could earn from other employment available to him after retirement. The recipient spouse was unemployed and dependent on spousal support. The appellate order, which reinstated the payor's obligation to continue spousal support payments, was indefinite, leaving open the question of how long such notional income should be attributed to the payor. Sixty-five has been the standard retirement age, but many people, including judges, work well past age sixty-five. In this case the court left open this issue. While this decision

has been questioned for various reasons, the principle that early, voluntary retirement at the first contractually available date will not be automatic justification for a reduction in spousal support appears reasonable.

Cossette v. Cossette, 2015 ONSC 2678 (Divisional Court) provides guidance from the Divisional Court as to the evidence necessary to establish reasonable grounds for retirement, and thus seek a reduction or termination of spousal support. The Appellant husband paid spousal support after a twenty-two year marriage and moved to terminate when he retired voluntarily, due to claimed ill health. The motion judge found a lack of evidence of the husband's claimed depression as justifying retirement, and that his financial disclosure was not accurate and complete. There was therefore no finding of material change and thus no reduction in spousal support. The Divisional Court agreed. It also found that the husband's position that the wife should begin to draw from her retirement pension entitlement at age 55, to replace spousal support, was unreasonable. The Appellant husband also argued that contractual entitlement to retire should be considered an automatic change in circumstances. The Divisional Court found that contractual entitlement to retire is not, automatically, a material change.

Important comments are found at para 14,

> *"This is not to say that voluntary retirement can never constitute a material change in circumstances. Every case must be determined on its own facts, with consideration of all relevant factors, including the language of settlement documents. In this case, the minutes of settlement were silent on the issue of retirement. It would be beneficial for parties to turn their minds to this eventuality when crafting terms of resolution. We adopt the comments in Bullock v. Bullock 2004 16949 ON SC at para 1:*
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> > *Does withdrawal from the workforce at age 62 qualify as a "material change of circumstances" justifying variation of spousal support? While every case must be looked at on the basis of the unique circumstances of the parties, as a general proposition, a payor of spousal support should make his or her retirement plans on the basis that support will continue until aggregate retirement savings can be expected to keep both former spouses at reasonable standards of living. Otherwise, our regime of spousal support will tend to leave payee spouses in positions of financial need, often dire need, at a time in their lives when they cannot take meaningful steps to ameliorate their own condition."*

Reassessment of Spouses' Financial Positions after Retirement

In *Nye v. Nye*, 2016 ONSC 3905, the Court considered a second motion to change brought by the payor husband. The parties separated in 1993 after a twenty-five year cohabitation. The payor husband moved to terminate spousal support, after about ten years of payments. He was unsuccessful. The support payment was increased based on his increased income. In 2014, the husband moved to terminate support due to his retirement at age 66. The Respondent wife was seventy-two. The husband had a lengthy list of serious medical issues, well documented with reports from his health care providers. The Court found his decision to retire at that time was a reasonable one. However, spousal support was not terminated, but reduced after consideration of the actual post retirement incomes of each of the parties.

In *Moul v. Moul*, 2016 ONSC 4758, both parties, after a twenty-four year relationship, suffered from post-traumatic stress disorder after living in Rawanda during turbulent times. The payor husband moved to terminate spousal support after retiring at age fifty-four, with medical advice supporting the need for his retirement from his consulting company. He was re-partnered and spending time at his partner's winery, which he described as a hobby, without substantial income. The Court found his decision to stop working at his consulting company was reasonable, but that full retirement was not justified in his circumstances. The Court imputed an income to the payor of one half of his previous income from his consulting work. Spousal support continued, based on the reduced imputed income, on an indefinite basis.

In *Walts v. Walts*, 2016 ONSC 4777 a decision from McKinnon, J., an experienced and respected family law judge, the Court found that the payor husband's second attempt at termination of spousal support again failed. He had first unsuccessfully attempted, a few years before, to have support terminate based on his voluntary retirement. The second attempt was based on the recipient wife having reached age fifty-five, when she could access her Locked in Retirement Account. The Court found this was not reasonable, as the recipient's health issues could require her to need those funds, as increased with anticipated investment income, in future years. The Court commented, at para 20, "In this context *Bullock* v. Bullock is authority for the proposition that the court should consider the payor's choice of retirement date in relation to what is reasonable for both payor and recipient having regard to their aggregate retirement resources and the ability of these resources to provide reasonable standards of living for both parties."

Motion to Change Support in Anticipation of Retirement

Schulstad v. Schulstad, 2017 ONCA 95, a recent decision from the Ontario Court of Appeal, concerned a twenty-four year relationship that ended in 1990. The payor, a physician, had paid support since the separation. He brought the matter before the court in 2014, two years in advance of his plan to retire, at the age of seventy, in 2016. The application judge approved the payor's decision to bring the matter to court well in advance of the retirement date, and found that the parties would be in similar financial positions after the payor's retirement and therefore ordered the termination of support on the date of retirement. The Ontario Court of Appeal concurred with the application judge that the application was not premature, being brought, with thoughtful foresight, well in advance of retirement, because of the specific facts in the case. The Court cautioned, however, that, in most cases, the material change, such as retirement, must have occurred before the court has jurisdiction to hear a variation proceeding. The Court found the application judge erred in his finding there was adequate evidence that the parties would be in similar financial positions after the payor's retirement. The matter was sent back to another Superior Court judge for determination, with a modest temporary support payment to be made pending that decision.

There is currently no clear guidance as to when a recipient should be obligated to access his or her retirement savings when the former spouse chooses to continue working at age sixty-five, or seventy, or seventy-five. If there are, or should be, means for the recipient spouse to reasonably fund retirement from his or her own resources, after years of spousal support, should the payor, who chooses to work, rather than pursue pursuits of leisure at a certain age, be obligated to keep paying support? What if he or she retires, and then returns to work or finds a new form of work? There are many support payors who would like clear guidance in regard to these issues in order to plan their lives.

What is clear is that retirement, alone, does not end a spousal support obligation.

Case law will eventually provide guidelines for support payors and recipients in regard to reasonable plans for retirement, including the appropriate age to stop working and the timing and rate of draw down by both spouses from capital resources. In the interim, counsel can only attempt to address these issues through carefully worded clauses regarding triggers for variation or termination, when drafting Separation Agreements or Court Orders.