

Fourth Annual Bread and Butter Issues in Family Law

Friday, September 27, 2013

Understanding the Effect of Retirement on Support Obligations

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No Easy Way Out – Early Retirement and Its Effect on Spousal Support Obligations

By Robert M.G. Shawyer and Andrew Sudano

The Ontario Superior Court of Justice in *Hesketh v. Brooker*, 2013 CarswellOnt 1866 recently confirmed that there are no applicable general principles when considering a motion to vary spousal support triggered by a payor's early retirement and that each case is fact driven. Nonetheless, the jurisprudence on this topic reveals some clues as to what facts savvy counsel should look for when advising clients about motions to vary spousal support:

1. When determining whether a material change in circumstances has taken place, keep in mind that the court is free to make reasonable inferences and to judge the credibility of the parties' positions. See *Hesketh v. Brooker*, *supra* and *Gajdzik v. Gajdzik*, 50 R.F.L. (6th) 390.
2. Always keep in mind that a party must bring a motion to vary spousal support in good faith and on appropriate grounds with supporting evidence. For instance, the payor in *Hesketh* advanced no medical evidence supporting a material change in circumstances despite claiming that his medical issues necessitated his early retirement. Accordingly, the court in *Hesketh* held that a motion devoid of medical evidence, documents from the individuals' employer and evidence as to whether the payor could have been accommodated with less stressful work would not allow the payor to sidestep his support obligation. Further, Joyce J. in *Butler v. Butler*, 2013 CarswellBC 502 provides a helpful summary of the case law surrounding voluntary retirement to determine whether the payor's early retirement was an attempt to subvert his child support obligation. See also *Gajdzik*, *supra*, *Vennels v. Vennels*, 45 R.F.L. (3d) 165 and *Gowan v. Gowan*, (2000), 11 R.F.L., (5th) 101 (Ont S.C.J.) for further reference.
3. Examine the circumstances of how to the underlying spousal support order was resolved. For instance, inquire as to whether there was any evidence that early retirement was previously contemplated by the parties. See *Caverhill v. Caverhill*, 2013 CarswellNB 57.

4. Ensure that you review all Financial Statements carefully and analytically. As the court is free to make reasonable inferences based on the evidence, an inaccurate Financial Statement can sabotage a motion to vary from the outset, particularly if the support payor is claiming financial hardship while contributing significant amounts of money to frivolous expenses. See *Hesketh, supra*.
5. Determine the financial situation of both parties. For instance, the New Brunswick Court of Queen's Bench in *Caverhill, supra* reviewed the parties' financial statements and determined that they had comparable assets and were in a relatively equal financial position. As a result, the Court in *Caverhill* determined that the support recipient no longer had a compensatory claim for support as the payee was no longer economically disadvantaged. As a result, it is crucial to assess as to whether the support recipient is still economically disadvantaged as a result of the breakdown of the marriage. Further, the financial situation of the support recipient and their steps to become economically independent, including current employment and income, may be relevant. Conversely, the age of the support payor at the time of retirement and their ability to pay support are key factors as well. See also *Cramer v. Cramer, 6 R.F.L. (5th) 107 (B.C.C.A.), Butler, supra, Gajdzik, supra* and *Hesketh, supra*.
6. The circumstances surrounding an increase in the support payor's income following the finalization of the underlying support order will be relevant when determining the proper amount of support and any concerns with respect to double dipping, if a pension is involved. *Hesketh, supra*.
7. Depending on who you represent, you may want to ensure that any consent order relating to spousal support be reviewable and/or triggered by an event, (such as the sale of a business, or a payor's age. See *Caverhill, supra* and *Hesketh, supra*.