

Spousal Support in the Golden Years?

Spousal support law seems to change with each generation. The last major transformation occurred in the early 1990s when the courts changed the approach from treating spousal support obligations as transitional and usually for a limited number of years to imposing long term indefinite obligations, at least for those coming out of marriages of lengthy duration. That first wave of indefinite support orders and agreements were applied to the baby boomers who, at the time, were in middle age. Spouses who separated after a twenty year marriage in what may have been their peak earning years were 40 something in the early 1990s. Those former spouses are now 60 something and facing retirement. If the spousal support has remained in place, perhaps with a cost of living increase, the payments may seem an insurmountable burden to the payor spouse in retirement. On the other hand, the receiving spouse may still have a real need for the support if there has not been a successful reintegration into the work force.

All spousal support orders or agreements can be adjusted if circumstances change. The *Divorce Act* permits applications to change support and most separation agreements include a mechanism to adjust the support. A troublesome issue may be the trigger for a change. Under the *Divorce Act* a support order can be changed if there is a material (or significant) change that was not foreseeable or foreseen when the initial order was made. Of course, eventual retirement, not to mention decline and death are as universally foreseeable as taxes for all of us. That reality means that to restrict support adjustments to changes that are utterly unforeseen or unforeseeable is a very high threshold. Because of that, many court orders and separation agreements now provide that support can be changed even if the material change was foreseeable. There are still many orders and agreements out there without such special provision and in those cases it may be challenging for a payor spouse to have his or her support payments reduced or terminated because of retirement.

Whatever the legal standard may be, however, there is a practical problem to a support recipient trying to enforce a spousal support order against a payor who no longer has adequate means to pay. This is a real concern for a recipient spouse who has not managed to find another source of income. After all, you can't get blood from a stone. Spousal support is an important and necessary means to share the financial impact of separation or one spouse bearing an unfair share of the financial burden from child care or the allocation of household responsibilities during a marriage. Yet spousal support cannot be treated as akin to a defined benefit pension plan for the recipient. Spousal support is too fraught with risk of the payor's financial limitations, not to mention potential ill health.

Indefinite spousal support awards are not forever. For those who have such awards, it is well worth reviewing them in advance of retirement and as part of sensible retirement planning. A renegotiation and, potentially, a court action may be necessary to sort out how much needs to be paid and for how long. For separated boomers that is likely the only option left. For Generation X and younger separating spouses it makes sense to plan for these issues when the initial settlement or order is reached. That means taking into account eventual retirement or ill health, considering a long but fixed time limit to age 65 or a review at 65. It also means that spousal support recipients should focus on doing whatever they

can to move towards financial independence if at all possible so that they are not so vulnerable in their old age.