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## The Latest Baby Boomer Dilemma: Spousal Support Obligation and Early Retirement

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Family law lawyers are increasingly encountering issues arising on the breakdown of a marriage where the parties previously agreed that one spouse could take an early retirement, or a spouse unilaterally chooses to take early retirement, prior to or shortly after a separation.

The problem generally arises where one spouse has worked throughout the entire marriage, and by virtue of that hard work, prudent investing and maintenance of a comfortable but modest lifestyle, the family has accumulated wealth and other valuable assets in anticipation of and as a sound financial foundation for early retirement.

Generally speaking, the division of the parties' assets can be easily accomplished pursuant to section 5 of the Family Law Act. When the matter of spousal support arises, however, that may very well have an impact on those plans for early retirement, regardless of any agreement previously reached between the parties.

Once the claimant for spousal support has met the "entitlement" threshold and has proven that he/she is deserving of spousal support, the quantum and duration are determined based upon the individual facts of the case with reference to factors including the financial means of the payor and the financial need of the recipient, among others. The current case law should give rise to caution when considering early retirement if one currently has, or will have, a support obligation to one's former spouse. Early voluntary retirement involves the "choice" of the payor to retire and is typically accepted as reasonable by the Court if the payor had major health issues and/or worked in a non-sedentary field. Additionally, the Court will consider the age at which the payor retired, with those choosing early retirement closer to age 65 being seen as retiring at a more "reasonable" age. If the voluntary

early retirement of the payor spouse will severely prejudice the recipient spouse, the court may "assign," "impute" or "attribute" an income as though the payor had not retired, at what it considers to be a more realistic income despite retirement resulting in an actual lesser income.

In *Teeple v. Teeple*, [1999] O.J. No. 3565 (C.A.), the judge found that the payor husband had deliberately taken early retirement just two weeks before trial to decrease his income for the purpose of decreasing or eliminating his spousal support obligation. The Court ordered continued monthly support to the wife despite the payor's attempt to discontinue support. Thus, as seen in *Teeple*, if the Court finds that the payor intentionally retired early to frustrate his/her spousal support obligation, this action can be viewed by the Court as lacking in good faith and the court will impute income and order continued support.

In the recent case of *Hickey v. Princ*, (2015) ONSC 5596, the payor spouse retired at age 51 and attempted to reduce and ultimately discontinue paying spousal support to his former wife. The payor husband was successful at the Ontario Superior Court level; however, success was short-lived for the payor as the decision was set aside on appeal, and ongoing support was reinstated. The Court in that case held that the payor's pension income alone was not the only source from which to determine the payor's ability to pay support and stated: "[m]eans, therefore, includes both actual income as well as income-earning capacity." The payor was ordered to resume payment of spousal support to the wife in the same amount as was being paid before his retirement, even though he was only receiving his pension at that time.

While the Court acknowledges that individuals are free to retire whenever they choose, it is clear that one cannot voluntarily choose to be unemployed or underemployed and thereby avoid or frustrate a spousal support obligation. Whether a person is



“underemployed” is determined based upon the specific facts of a case. As stated in *Cossette v. Cossette*, [2015] O.J. No. 2073 (Div. Ct.), “Parties cannot sidestep support obligations by unilaterally deciding to leave the workforce.”

Accordingly, exercise caution when considering early or voluntary retirement, if a spousal support obligation exists, or may exist thereafter.

### **About the Author** **Brian McCann**

Brian McCann is a partner at SorbaraLaw, whose practice includes all aspects of family law. Brian was recently selected by his peers for inclusion in The Best Lawyers in Canada® 2015 for Family Law.