Spousal Maintenance Obligations Upon Retirement

By James J. Vedder | 612-877-5294 | Jim.Vedder@lawmoss.com

Jim Vedder is a shareholder who practices exclusively in the area of family law. Jim assists clients in a variety of matters including antenuptial/prenuptial and postnuptial agreements, valuation of businesses, complex litigation and settlement of marital and non-marital assets, complex non-marital tracing, custody settlement and litigation, and settlement negotiations, as well as appeals.

Visit: **LawMoss.com/James-J-Vedder**
Call: **612.877.5294**
Email: **Jim.Vedder@lawmoss.com**

The question of when a spousal maintenance payor may retire and modify or terminate his or her maintenance obligation has been arising more frequently as many of the baby boomers enter into retirement. The natural questions that arise are:

- At what age will a Minnesota court find that a spousal maintenance payor's retirement is in good faith and not to avoid a spousal maintenance obligation?
- Even if the court does find that the retirement is appropriate, will it terminate or reduce the maintenance obligation?
- What factors does the court consider when determining a retired spousal maintenance payor's ability to pay maintenance after retirement?

The answers to the above will depend in large part on the specific facts of each case given the nature of family law and the significant discretion that is afforded to family court judicial officers. However, there have been a number of cases that have addressed these issues and provide some valuable guidance.

First, there is no bright line rule regarding the age when a spousal maintenance payor may retire and end or reduce his or her obligation. The closer the spousal maintenance payor gets to the traditional retirement age of 65 or 66, the more likely the court is to determine that the retirement is in good faith and not to avoid paying spousal maintenance. However, this is not to say that an individual younger than age 65 cannot retire and have his or her maintenance obligation reduced or terminated. In such cases, the court is to consider the payor's intentions with respect to retirement at the time of the original divorce decree, the job market in the area where the payor is employed, the payor's health, the payor's financial circumstances (e.g., retirement/investment accounts), and other subjective factors the payor offers regarding early retirement. When considering retirement, the obligor should consult with his or her attorney regarding the above factors to determine whether they support a modification or termination.

Second, once a spousal maintenance payor retires, there often will be certain pools of income that the court will review to determine whether the payor can continue to pay spousal maintenance. A spousal maintenance payor has no obligation to pay spousal maintenance from marital assets that were awarded to the payor as part of a divorce. Those assets were divided at the time of the initial divorce and cannot be divided a second time through spousal maintenance. Even so, any income earned on the payor's share of marital assets will be used to determine the payor's continued ability to pay spousal maintenance.

A more difficult question is what to do with assets that the payor has acquired since the divorce. Certainly, it would seem unfair that a spousal maintenance recipient could get a second bite of the apple and receive assets that the payor has obtained since the divorce. However, Minnesota courts are allowed to consider assets that have been acquired by the payor after the divorce in terms of assessing his or her ability to continue to pay spousal maintenance. There is some question about whether the court ought to be able to do this, and it does not appear that the issue is as well defined as some may think, particularly when it comes to defined contribution plans, such as 401k plans. The court can consider the income earned on a payor's post-divorce assets when assessing a payor's ability to continue paying spousal maintenance.

The question also rises about whether the court can use an obligor's premarital assets to determine an obligor's ability to continue to pay maintenance. It would appear that, if the premarital assets were awarded as an asset in the divorce proceeding, then the court cannot do so, but some of the decisions on such cases are a bit confused in this regard.

There has been discussion that a party should, at the very least, receive a "return of" his or her marital assets, as opposed to a "return on" those assets. Simply put, the payor should receive the assets that he or she was awarded in the divorce, but the investment return received on those assets would be available to determine the payor's ability to continue paying spousal maintenance.

Third, a payor will often want to know when a permanent maintenance obligation will end. There is no set end date for a permanent obligation, and, therefore, it will depend on the parties' respective financial circumstances at the time the payor seeks a reduction or termination of the maintenance. One thing the court may consider is whether the recipient of the maintenance has been a "prudent investor" with his or her assets. Certainly, it would not be fair if the spousal maintenance payor prudently invested his or her assets only to have to continue to pay spousal maintenance to a former spouse because he or she did not sufficiently invest his or her share of assets awarded at the time of the divorce. Again, this seems like a second bite of the apple when determining the division of assets.

The law on maintenance reductions and terminations as a result of retirement will very likely be a heavily litigated issue over the next several years as more and more of the baby boomer generation retire. The law on this issue should become much more settled as Minnesota courts consider a variety of fact patterns when addressing these types of issues. In the meantime, it is strongly encouraged that spousal maintenance payors who are considering retiring consult with an experienced family law attorney so they can begin to plan for the future.