THE EFFECT OF RETIREMENT ON SUPPORT OBLIGATIONS

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I. Early Retirement

When a person retires before mandatory retirement age, such a decision is a voluntary act decreasing income, authorizing the court to impute income. Mann v. Mann, 725 So. 2d 989 (Ala. Civ. App. 1998) (husband resigned from job with annual salary of $123,000 to be with paramour); Dunn v. Dunn, 952 P.2d 268 (Alaska 1998) (where husband retired in his 50s claiming shoulder pain but was building houses, income would be imputed); In re Marriage of Stephenson, 46 Cal. Rtpr. 2d 8, 39 Cal. App. 4th 71 (1995) (court can impute to earlier levels where parent retires early); Pimm v. Pimm, 601 So. 2d 534 (Fla. 1992); Ward v. Ward, 502 So. 2d 477 (Fla.Dist. Ct. App. 1987); In re Marriage of Lang, 668 N.E.2d 285 (Ind. Ct. App. 1996); Ellis v. Ellis, 262 N.W.2d 265 (Iowa 1978); Bushnell v. Bushnell, 527 So. 2d 15 (La. Ct. App. 1988); Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998); Stubblebine v. Stubblebine, 22 Va. App. 703, 473 S.E.2d 72 (1996); Ryan v. Kramer, 21 Va. App. 217, 463 S.E.2d 328 (1995). Some courts have held that where a person retires before mandatory retirement age for health reasons, the decision to retire is involuntary. In re Marriage of Cooper, 524 N.W.2d 204 (Iowa Ct. App. 1994) (husband's chronic fatigue syndrome and consequent loss of income warranted change in support); Roach v. Roach, 61 Ohio App. 3d 315, 572 N.E.2d 772 (1989) (retirement at age 59, motivated in part by medical problems, was not voluntary and thus income would

not be imputed); Cox v. Cox, 877 P.2d 1262 (Utah Ct. App. 1994) (husband's disability and age made his retirement non-voluntary). See also Yourman v. Yourman, 216 A.D.2d 308, 627 N.Y.S.2d 746 (1995) (contention that disabling knee problems forced husband to abandon career as carpenter and handyman was not supported by record). The decision to retire for health reasons, however, is more properly categorized as a voluntary act undertaken for good faith reasons.

A number of recent cases have considered the question of whether acceptance of a buy-out plan, whereby the employer encourages the employee to resign on more favorable terms than he would otherwise receive if he had stayed in the job, constitutes a "voluntary retirement." Most of these cases have held that this type of retirement is not voluntary; the courts reason that the employee would have been fired anyway, and acceptance of the buy-out plan constitutes a rational employment decision. Jamison v. Jamison, 845 S.W.2d 133 (Mo. Ct. App. 1993); Ms. B v. Mr. K, 158 Misc. 2d 817, 601 N.Y.S.2d 980 (Fam. Ct. 1993); In re Marriage of Case, 19 Kan. App. 2d 883, 879 P.2d 632 (1994). See also Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (where position eliminated and husband took lower paying position with same employer rather than look for higher paying job, income would not be imputed); Kaplan v. Kaplan, 21 Va. App. 542, 466 S.E.2d 111 (1996) (where employer went bankrupt and husband renegotiated salary rather than be fired, such action was rational employment decision). But see McKeown v. Woessner, 249 A.D.2d 396, 671 N.Y.S.2d

134 (1998) (retirement because of attractive bonus incentive was voluntary act). As with the other retirement cases, these cases are better viewed as a voluntary act undertaken for a good faith reason.

A few decisions also have considered the specific situation of a parent retiring to pursue the religious or contemplative life. Generally, the court will impute income in such a situation. E.g., Hutto v. Kneip, 627 So. 2d 802 (La. Ct. App. 1993); Bassette v. Bartolucci, 38 Mass. App. Ct. 732, 652 N.E.2d 623 (1995); Dunn v. Dunn, 105 Mich. App. 793, 307 N.W.2d 424 (1981); McKeever v. McKeever, 36 Or. App. 19 (1978); Hunt v. Hunt, 162 Vt. 423, 648 A.2d 843 (1994). But see In re Marriage of Meegan, 11 Cal. App. 4th 156, 13 Cal. Rptr. 2d 799 (1992). Retiring at normal retirement age, however, generally does not result in imputation income. In re Marriage of Malloy, 2001 WL 804114 (Iowa Ct. App. July 18, 2001); Price v. Price, 614 A.2d 1386 (Pa. Super. 1992); Hoffman v. Hoffman, 762 A.2d 766 (Pa. Super. 2000); Bogan v. Bogan, 28 Fam. L. Rep. (BNA) 1028 (Tenn. Ct. App. Nov. 8, 2001).

Many times, an obligor spouse will take early retirement due to medical reasons. Where an obligor justifiably relies on medical reasons for retirement, income will generally not be imputed. For example, Curtis v. Curtis, 442 N.W.2d 173 (Minn. Ct. App. 1989), the obligor quit his job, claiming his doctor had advised him to take early retirement. The evidence showed, however, that the doctor had merely stated that the obligor's allergies were aggravated by his working conditions. The doctor had not stated that retirement was necessary. The court

thus found husband's retirement was in bad faith. See also In re Marriage of Ebert, 81 Ill. App. 3d 44, 400 N.E.2d 995 (1980) (civil service commission certification of disability is insufficient evidence of need to take early retirement; medical evidence that medical condition prevents work is necessary); In re Marriage of Lyons, 155 Ill. App. 3d 300, 508 N.E.2d 458 (1987) (although father claimed he was forced to quit his job earning $40,000 per year, there was insufficient medical evidence to establish injury that father claimed); Scott v. Scott, 668 N.E.2d 691 (Ind. Ct. App. 1996) (finding by Social Security Administration that man is unable to work due to disability does not preclude imputation of income; S.S.A. finding of inability to engage in "any substantial gainful activity" is not same as calculation of gross income); King v. King, 615 N.E.2d 109 (Ind. Ct. App. 1993) (evidence insufficient to sustain medical claim for early retirement); Aaker v. Aaker, 447 N.W.2d 607 (Minn. Ct. App. 1989) (although father claimed he was unable to work, testimony of psychologists established husband's inability to work was temporary and would improve after divorce; income could therefore be imputed based on earning capacity level); Fox v. Fox, 942 P.2d 1084 (Wash. 1997) (although 66- ear-old surgeon claimed he was retiring because of his advanced age, the court found bad faith in that he sold his practice to a company for which his new wife was the registered agent. After the sale she was hired as office manager and the surgeon in fact continued to work at a reduced salary while the couple's combined income after sale was higher than husband's had been before sale).

In New Jersey, a court may find that the early retirement was undertaken in good faith and for good reasons and may still impute income if the disadvantage to the obligee outweighs the advantage to the obligor. Deegan v. Deegan, 254 N.J. Super. 350, 603 A.2d 542 (App. Div. 1992). 315 In the case of Dilger v. Dilger, 242 N.J. Super. 380, 576 A.2d 951 (App. Div. 1990), the court laid out the various factors to consider in determining whether the advantage of retirement to the obligor outweighs the disadvantage to the obligee. These factors include: age and health of the retiring party, health of other party, motive in retiring, timing of retirement, ability to pay maintenance after retirement, ability of obligee to provide for herself or himself, the expectations of the parties at the time of the agreement, whether the retiring spouse was planning retirement at a particular age, and the opportunity given to the obligee to prepare to live on reduced support.

Early retirement for reasons other than health is generally not favored. For example, in Hughes v. Hughes, 761 S.W.2d 274 (Mo. Ct. App. 1988), the father took the company's offer of voluntary early retirement out of fear that if he did not take the offer, he would be laid off. The court found that this reason was not sufficient, and that in any event, the father was bound to find another job if he was able. See also Cefola v. Cefola, 165 Misc. 2d 570, 629 N.Y.S.2d 631 (Sup. Ct. 1995) (where husband opted to retire from IBM in anticipation of downsizing, court would impute income to husband where evidence showed he could earn additional income as a private consultant in his field of expertise). Contra Santy v. Santy, 207 A.D.2d 535,

616 N.Y.S.2d 92 (1994) (court would modify support obligation based on father's early retirement where such retirement was based on father's employer's severe financial problems).

II. Normal Retirement at Retirement Age

Support obligations are generally modifiable upon a showing of a "substantial change in circumstances." A commonly litigated question is therefore whether normal retirement at retirement age constitutes such a change in circumstances since retirement is generally contemplated. Cf. In re Blomquist, 126 Or. App. 319, 868 P.2d 1356, 1357 (1994) (where parties' agreement spoke of husband's retirement at age 65 or earlier, husband's early retirement was not an unforeseen change of circumstances).

When the retirement is voluntary but occurs at normal retirement age, courts are generally willing to reduce or terminate the support obligation. See In re Waldschmidt, 241 Ill. App. 3d 7, 608 N.E.2d 1299 (1993) (where husband retired in good faith at normal retirement age, and incomes of the parties would be roughly equal when wife retired, error not to terminate support). Courts facing this situation have not insisted upon proof of a parallel drop in earning capacity, apparently reasoning that retirement at normal retirement age is sufficient proof of a genuine drop in earning capacity.

Where there is evidence that the court considered retirement in making its

initial alimony award, retirement may not be a sufficiently unforeseeable changed circumstance to justify modification. See In re Blomquist, 126 Or. App. 319, 868 P.2d 1356, 1357 (1994) (where order and agreement contained provisions for husband's retirement at age 65 or earlier, husband's early retirement was not a changed circumstance). The courts have been reluctant, however, to find that retirement was foreseeable where it was not specifically contemplated in the original order. See Pimm v. Pimm, 601 So. 2d 534 (Fla. 1992) (error to hold that voluntary retirement cannot as a matter of law constitute changed circumstances); McFadden v. McFadden, 386 Pa. Super. 506, 563 A.2d 180 (1989) (error to hold that retirement is a foreseeable change which is not sufficient as a matter of law to justify modification); Silvan v. Silvan, 267 N.J. Super. 578, 632 A.2d 528, 530 (App. Div. 1993); In re Waller, 253 Ill. App. 3d 360, 625 N.E.2d 363 (1993) (whether retirement constitutes a change in circumstances depends upon all of the facts). The reason for this reluctance is essentially practical: retirement is always foreseeable in a general sense, yet few orders contain specific retirement-related provisions. This failure is understandable, for it is essentially impossible to predict at divorce the circumstances of the parties upon retirement. The best policy is therefore to treat the entire subject of retirement as one among many factors which can be considered in a motion to modify. This procedure may be technically inconsistent with the foreseeability requirement, but it yields a highly desirable policy result.

All types of retirement, of course, are only one among many changed

circumstances which the court can consider. Where other circumstances point toward a continuing need for support, the court always has discretion to deny a reduction. See, e.g., Burris v. Burris, 258 Mont. 265, 852 P.2d 616 (1993) (husband's income had dropped upon retirement, but wife's financial condition was even worse; proper to deny reduction).