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— Epstein's This Week in Family Law

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Early Retirement and Variation of Spousal Support

Kehler v. Kehler, 2017 CarswellMan 157 (Man. Q.B.) - Doyle J. Cases of early retirement are a difficult issue for the courts and the parties. These cases raise the difficult question of when the support payor should be relieved of a spousal support obligation in the face of an agreement or a court order in a long-term marriage.

In this case, the parties were married for 24 years and had two children.

When the parties separated they were both 45 years old. The husband retired from Safeway as a store manager shortly before his 61st birthday after working with the company for 42 years.

At the time of the support order, the husband was earning about $98,000. He was eligible to retire and receive an unreduced pension as of 2015 even though his normal retirement date would have been August 2019. The husband noted that out of 190 Safeway stores in Canada only eight managers were 60 years of age or older. While the husband alleged he had some health problems, he did not provide a medical report and there was no evidence that anyone medically trained recommended to the husband that he retire. In his last full year of employment he earned $140,000.

The husband now has a pension of $32,000 per year and has obtained new employment to supplement his pension income. The husband also rents out some property he and his new wife own and he now has a total income of about $81,000 per year.

The first wife has very little income other than the support and has some health issues.

The order for support contemplated the husband paying spousal support on an income of $79,900. Taking a close look at the husband's situation, the significant years of his employment, and considering the husband's motivation for retirement, Justice Doyle decides that the voluntary retirement of the husband was reasonable but also took into account his obligation to pay ongoing spousal support to the wife. That is, the decision was reasonable when one took into account "the husband's age, years of employment, his entitlement to an unreduced pension, his obtaining supplemental employment income, and his receipt of rental income".

However, the husband's voluntary retirement did not relieve him of the support obligation. Given that the original support order was based upon an income of $79,000 and given the fact that the husband's income now is $2,000 higher, the husband's retirement is not, in and of itself, a material change which requires a variation of the final order. That is, voluntary retirement of a payor spouse before the age of 65 may not be a material change. Clearly the onus is on the parties seeking a variation to establish such a change. See *Droit de la famille - 091889*, 2011 CarswellQue 13699 (S.C.C.) [*L.M.P. v. L.S.*].

This case also considers the double-dip issue raised in *Boston v. Boston*, 17 R.F.L. (5th) 4 (S.C.C.). The wife's support order was both compensatory and needs based. As Justice Doyle notes: "While there is an issue of double-dipping here the husband did not present any evidence to identify the portion of his monthly pension that was derived from the equalized portion of his Safeway pension." Clearly if one is going to argue double-dip, you need the actuarial calculations in order to be able to demonstrate to the judge what part of the pension has already been equalized.

There are cases where retirement will result in a material change of circumstances, but in light of *L.M.P. v. L.S.*, one has to compare the income of the payor with the income that was used to establish the original support order. If there is no difference in income, there is no material change.

Arbitration - Refusal of Adjournment Leads to Award Being Set Aside

Lockman v. Rancourt, 2017 CarswellOnt 5118 (Ont. S.C.J.) - Tracy Engelking J. The parties signed an arbitration agreement submitting their dispute to an experienced arbitrator. The parties agreed to an arbitration date and less than a month later the father sought an adjournment on the basis that he was going to be out of the country and might be retaining an expert.

The arbitration was adjourned by the arbitrator peremptorily to the father and that date came and went. The arbitrator again adjourned the matter and again made it peremptory to the father.

Eight days before the arbitration was scheduled to begin, on what I note was the third date, the father dismissed his lawyer on the basis that he had lost confidence in his lawyer and needed a new one. He wrote an email to the arbitrator telling her that he intended to retain a new lawyer but was out of the country again and would do so on his return. He asked that the arbitration be cancelled. The mother, quite understandably, wished to proceed on the peremptory date and warned the father that she would proceed on an uncontested basis if he did not appear. Faced with the competing claims, the arbitrator ruled that the father had ample notice of the dates of the hearing and he dismissed his lawyer at a very late date and noted "in the absence of a satisfactory explanation from Mr. Rancourt, the Arbitration hearing will proceed on the scheduled date."

The parties attended on the hearing and in response to the arbitrator's question as to whether the parties were ready to proceed today, the father responded: "I'm ready, yes, as much as I can, yes". The mother said she was prepared to proceed and the matter proceeded.

The father now argues that he was not treated fairly and equally pursuant to section 19 of the *Arbitration Act* which constitutes a breach of natural justice. Justice Engelking of the Ontario Superior Court of Justice finds that the father was not treated fairly and equally by the arbitrator and not given an opportunity to present his case or respond to the mother's case. I note that it is the duty of the decision maker to exercise judicial discretion in order to grant or refuse an adjournment by weighing many relevant factors. See for example *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CarswellOnt 2371 (Ont. S.C.J.), *Igbinosun v. Law Society of Upper Canada*, 2009 CarswellOnt 3420 (Ont. C.A.).

Justice Engelking notes that the arbitrator's reasons reveal not much consideration on the father's request for an adjournment. That may be because the father, when asked if he was ready to proceed on the date scheduled, said that he was.

There is no discussion in the arbitrator's reasons that would indicate that the mother would have been prejudiced by the granting of an adjournment and Justice Engelking finds fault with the arbitrator for not considering the potential prejudice to the father of not granting the adjournment versus the potential prejudice to the mother of granting the adjournment.

Justice Engelking recognizes that deference must be given to the discretionary decision of the arbitrator to grant or refuse an adjournment, but notes the dissenting decision in *Khimji v. Dhanani*, 2004 CarswellOnt 525 (Ont. C.A.) by Laskin J.A. which was adopted by Doherty J.A. for the majority:

> A trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. The decision is discretionary and the scope for appellate intervention is correspondingly limited. In exercising this discretion, however, the trial judge should balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. In any particular case several considerations may bear on these interests. A trial judge who fails to take account of relevant considerations may

> exercise his or her discretion unreasonably and if, as a result, the decisions contrary to the interests of justice, an appellate court is justified in intervening.

Thus, the Court finds that the father was not treated equally and fairly and that justice was not done. The award is set aside and the arbitrator is replaced. This seems to me to be a much closer call than the judgment reveals. The father had been granted two previous adjournments two of which were supposed to be peremptory. He fired his lawyer eight days before the hearing which would lead most arbitrators to believe that he might well not have been acting in good faith and sought to simply delay the hearing. I am not sure a judge would have granted the father an adjournment in these circumstances. It may well be that if there was any mistake here at all by the arbitrator, and I have some doubts that there was, it may have been in failing to compare the issue of prejudice to both parties by granting or refusing the adjournment. Nevertheless this case is an object lesson to arbitrators when faced with a request for an adjournment.

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