



PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex:

A client came to me for help. She believes her ex-husband will be filing a motion to modify his alimony obligation to her. Their Judgment of Divorce provides for modifiable alimony. My client was told that her former husband is going to base his claim on his recent retirement and resulting loss of wages. However, after the parties' divorce, my client believes that her ex-husband accumulated substantial assets that may produce income or have the potential to generate income to him. It doesn't seem fair that her ex-husband can retire with substantial assets and income, and get off the hook from his alimony obligation based upon his retirement. Do you have any suggestions?

Practitioner

Dear Practitioner:

"The modification of an award of spousal support must be based on new facts or changed circumstances arising after the judgment of divorce." *Gates v Gates*, 256 Mich App 420, 434 (2003) (internal citations omitted); MCL 552.28. "The party moving for modification has the burden of showing such new facts or changed circumstances." *Id* (Citing *Ackerman v Ackerman*, 197 Mich App 300, 302 (1992)).

In the alimony modification context, a party's "retirement constitutes changed circumstances." *McCallister v McCallister*, 205 Mich App 84, 86 (1994). However, "even where a party demonstrates that retirement is a change in circumstances, the party must also show that the resources available for living expenses have also changed." *Miller v Miller*, 2003 WL 21362997, at *3 (Mich App)(citing *Stoltman v Stoltman*, 170 Mich App 653, 659 (1988)).

For instance, in *Stoltman, supra*, the Court of Appeals found no error with the trial court's decision to deny a party's motion to modify their alimony obligation where:

plaintiff has proven his retirement but has failed to show a change in the resources available to him for living expenses. Upon his retirement, plaintiff began receiving net regular monthly payments of \$2,503.02, or \$577.62 per week. Although it is unclear whether plaintiff's pension benefits will become subject to income tax, the Friend of the Court referee estimated that, even allowing for tax deductions, plaintiff's weekly checks will net him \$430.21. At the time of the divorce, plaintiff's net income was \$474.20 per week. Accordingly, we affirm the trial court's order denying plaintiff's motion for modification. [*Stoltman* at 659]

When you receive service of a motion to decrease the spousal support award, you should immediately commence discovery to determine the payor's post-retirement economic status in light of the above cited cases.

You should also be aware that factors, other than the payor's income, may be relevant to your case. Such factors could include his age at the time of his retirement. You are cautioned to learn all of the facts related to his retirement.

Answer respectfully submitted
by Harvey I. Hauer, Hauer & Snover.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

Please send questions for Professor Lex to Hhauer@hauersnover.com.

