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Pensions and Retirement in Family Law: August 13, 2015

Retirement is an important issue that is too often overlooked in Family Law disputes. There are different vehicles a spouse may use to save for retirement such as personal savings, Registered Retirement Savings Plans (RRSP's), Tax Free Savings Accounts (TSFA's) and pension plans through employment. The above methods of saving are all viewed as assets for the purposes of determining a party's net family property and eventually equalization under the *Family Law Act*.

A spouse's pension is a unique piece of property within the context of family law as it is both a potential source of income for the purposes of support as well as a piece of property. For the most part, pension issues are reserved for spouses who are legally married and for whom property equalization is at issue and as such that is where we will focus this review.

The Ontario *Family Law Act* incorporates Section 67.2 of the *Ontario Pension Benefits Act* which sets out that for family law purposes, the valuation of a pension is to be determined by the pension plan administrator. The administrator will determine an imputed value of the pension for family law purposes which takes into account the value of the pension on the date of marriage (if it was in existence) subtracted from the value of the pension on the date of separation in order to determine what the actual value is for the purposes of equalization under Section 5 of the *Family Law Act*. This imputed amount also does not take into account the tax considerations of the pension on the relevant dates so a tax calculation will have to be done. In some cases it is necessary to retain the services of an actuary to value a pension; however, this will vary depending on the pension plan.

It is good practice to request the pension valuation early on in the process to not delay the ability to determine the party's net family property.

The issue of spousal support is also important when dealing with the issue of retirement. Spousal support clauses should take into consideration that a payor's income will likely decrease upon retirement. Spouses receiving spousal support should be preparing for this eventuality and planning accordingly as they will have a hard time convincing a court that their former spouse should not be allowed to retire, provided that their age and other factors warrant the retirement. When possible, agreements reached dealing with spousal support that do not have an end date should set out specifics with regard to material changes in circumstances such as retirement and what happens to ongoing support when a change occurs.

A pension that has been included for the purposes of equalization can still be used as a source of income for the purpose of support. Although technically double dipping, a court can find that the payee still has a need and can look at the pension income for support purposes. On the other hand, Courts have also found that spouses who received equalization payments and do not save or invest the funds for the future may not be able to receive support based on the payor's pension income.

The moral of the story is that retirement issues should be taken into consideration when support is for an indefinite duration and a pension is involved.

(The information provided above is general, not legal advice, as circumstances vary from case to case. As well, generally speaking, the above information relates to Ontario law. Thus, if you wish legal advice that you can rely upon for your specific case, or if you are making inquiries where Ontario law may not apply, please contact Andrew Kania at: (905) 451-3222 for a free consultation).