

# To Retire, or Not to Retire: That Is the Question

by Lawrence D. Diehl



## Mr. Jones shows up for a consultation and the following discussion occurs:

Mr. Jones: I am paying spousal support. I'm 62 years old and plan to retire at age 65. Can I retire, and will the support I am paying stop?

Mr. Diehl: I don't know.

Mr. Jones: What? I thought you were the man and could help me on this. Why don't you know?

Mr. Diehl: I know enough to know that I don't know.

If the above sounds like the famous "who's on first" Abbott and Costello routine, that's because there is no definitive answer to these questions under Virginia law. Factors such as the length of the marriage, assets, amount of support, health of the parties, agreements made during the marriage, and the judge all make the issue unpredictable. This article will summarize Virginia's law on the issue — a summary that might help in litigating the issue — and where the issue might be headed legislatively.

### Imputing New Income

In the lodestar case of *Stubblebine v. Stubblebine*,<sup>1</sup> in a 5–4 *en banc* decision, the Virginia Court of Appeals held that the trial court did not err in imputing \$40,000 of in-

come to a 65-year-old twice-retired four-star general who had recently earned additional income from a one-year contract in Desert Storm. I handled the appeal of this case and argued that at age 65, and after thirty years of military service and eight years of private employment, thus two retirements, there should be a presumption of the ability to retire without having income imputed. The argument was that based on historical case law which had indicated that attempted retirements at ages in the 40s through 54 were too early, and thus a spouse still had an obligation to earn income for support purposes. I argued that this was a case with the "appropriate age" for retirement, so in essence the court should do what prior case law implied: let one retire with impunity unless there was some hardship standard that was met. The majority opinion rejected the blanket presumption approach that was suggested, and held that each case must be viewed on its own merits and there was no error in considering the recent earnings of the general in deciding that spousal support should be paid over and above the former wife's share of two other retirements.

Does *Stubblebine* say that you can't retire at an appropriate age? Many practitioners say yes, but that is not accurate. It never held or said that; it merely rejected a blanket

presumption on the issue. It was technically an abuse-of-discretion case on the facts of that case only as to imputing income based on evidence of recent earnings. It was more accurately an imputation of income case and it leaves the issue of when one can retire to case-by-case analysis. And that is the problem, because it leaves the issue open in Virginia.

### Mixed Results

I predicted that there would be harsh results from the *Stubblebine* ruling, and I was right. In *Geddis v. Geddis*,<sup>2</sup> shortly after the *Stubblebine* decision, the Court of Appeals affirmed the imputation of income of \$13 an hour to a 70-year-old former wife who had not worked for over thirty years, had high blood pressure, and who was performing pro bono bookkeeping services for her friend at a marina. This was based on the income of another paid marina bookkeeper, not a vocational expert. Was that fair? Read the case.

However, in *Edick v. Edick*,<sup>3</sup> a circuit court refused to follow *Stubblebine* in a short 6½ year marriage where the husband had a support obligation to a former spouse preventing him from paying an award at retirement age.

Since *Stubblebine*, the anecdotal feedback I have received from discussion with family law practitioners is that there are mixed results when an action for modification of spousal support is filed upon one's retirement. I have had moderate success in arguing for either a termination or reduction of support at the age of retirement. But there is really no reasonable prediction of the outcome given the status of Virginia law. I suggest that if you are representing a soon-to-be retired spouse and the issue of spousal support comes up, the best advice you can give is to be honest and realistic.

An attorney advising a client on the issues should review all of the required statutory factors<sup>4</sup> applicable to the particular case. The length of the marriage — the longer the marriage, the more likely a court is going to order continued support; the careful analysis of the current income and expenses of the parties as anyone would do in preparing for a support hearing; the health of the parties — are there special medical needs of a spouse that require continued support; the agreement of the parties during the marriage — did they plan and discuss and agree to retirement and what were the specific understandings upon which their marital partnership relied;

what are their assets and the implications of *Driscoll v. Hunter*,<sup>5</sup> which basically says a court can consider the assets of the payor spouse in fashioning a support award, even liquidating real estate, but not the assets of the payee spouse; and critically, the length of time before the retirement will occur — was the act of the retirement considered by the parties in a Property Settlement Agreement or by the court in fashioning the award. Finally, counsel should review in detail the voluminous number of appellate cases that are fact specific in either imputing or not imputing income generally to the facts in existence in a specific case at the time of retirement.<sup>6</sup> Providing the court with a case that is close on its facts can often be persuasive.

### Expectations Are Critical

That inquiry regarding the expectation of retirement at the time of the award is critical since there may be no basis for a modification of spousal support if the trial court or the parties' agreement already considered the financial results of a retirement. In other words, the act of retiring may not be a material change if it was within the contemplation of the court or the parties at the time a property settlement agreement is prepared. See, for example, the ruling in *Nunez v. Nunez*<sup>7</sup> where the trial court did not err in refusing to reduce the wife's spousal support even though she was now receiving part of the husband's pension where her receipt of this was anticipated and foreseeable. The recent trend of cases in Virginia on this issue should be carefully reviewed to assess this issue.

In other states, courts have generally not found that retirement was a foreseeable event where it was not specifically stated in the order.<sup>8</sup> As a practice hint, if retirement income has the potential of impacting a future spousal support modification proceeding, counsel should provide, either in a Property Settlement Agreement or in the order of the court, a specific recitation that the retirement income has or has not been contemplated by the parties in calculating the current amount of support. That would moot any uncertainty on the issue for future modification proceedings that evolving case law has addressed.

### What Next?

So where should Virginia go from here in assisting clients, family law practitioners, and courts in addressing the impact of retirement

on spousal support? In the 2017 session of the General Assembly, HB 859 was introduced. This bill would have amended §20-107.1 (C) by providing that for initial support proceedings or modification proceedings, periodic payments of support “shall” terminate no later than upon the payor attaining full retirement age (defined as normal age for full retirement benefits under social security law), although for good cause shown the termination could be extended. The statute did not define “good cause shown” and therefore was vague and gave the courts no guidance. It further provided that a payor’s ability to work beyond the full retirement date would not be grounds to extend the termination date. Thus, a payor with significant income who is still working at full retirement age would have the support terminated without any regard to the health, assets, age, or other circumstances of the recipient spouse. You reach that age — that’s it, end of story.

This bill was opposed by the Virginia Bar Family Law Coalition since it was oppressive, could result in hardship in many cases, and was bad policy to have legislation that would effectively terminate support without consideration of the many other factors that any case would normally consider. Those factors have been summarized previously in this article. The bill was defeated but the coalition agreed to study the issue of retirement for potential legislation that might assist the courts in having factors and guidance more directly related to retirement issues.

### States Struggle

Have other states addressed the issue of retirement as it affects spousal support? It appears that most states still struggle with the issue, just like Virginia. The issue is one of the facts as applied to the statutory factors.<sup>9</sup> Retirement may justify a modification, but each case is based on the decision of a trier of fact and subject to reversal only upon an abuse of discretion. However, recently a few states have either attempted to introduce legislation, or have enacted legislation, which addresses the impact of retirement on an award or modification of support.<sup>10</sup>

Colorado has enacted legislation allowing a rebuttable presumption that retirement was made in good faith when the obligor reaches the age of retirement. The presumption may be rebutted by an agreement or statement in a

final decree. Massachusetts states that alimony automatically terminates when the obligor reaches the full age of retirement. Similar to HB 859, the court may set a different termination date for good cause. Further, if the divorce occurs within ten years of the retirement date and the marriage is over twenty years, then that would also constitute good cause to rebut the presumption. New Jersey also has enacted a rebuttable presumption that retirement at the appropriate age would terminate support. However, the presumption may be overcome for good cause shown based on specific factors relevant to retirement issues.<sup>11</sup> South Carolina states that retirement may be a change of circumstance factor — no presumption — based on set factors in the statute.<sup>12</sup>

### Certainty Needed

Based on the statutory approaches set forth above, it is my opinion that there should be some certainty to a payor that retirement at a full or appropriate retirement age should be a modification factor. But to permit that sole act of retirement to result in the full termination of support as proposed by SB 859 is too harsh. This could result in economic hardships in cases to the payee spouse, and such a consequence ignores the many other factors that other states have incorporated in their retirement statutes.

No statute is going to solve all issues and give us a nice and neat answer for every case. By their very nature, retirement issues and results are going to be fact-specific. But Virginia can improve the guidance we give to courts and provide some hope to retirees on the issue. As a policy matter, we have to protect the needs of recipient spouses. But we also need to accept a potential retirement in good faith as part of life experiences and in most cases the expectation of any marital partnership.

It is therefore my opinion that a legislative enactment in Virginia similar to the approaches of New Jersey and South Carolina should be considered. Retirement should not be presumed to be an act that totally terminates support in and of itself. But a good faith retirement could be a circumstance that is presumed to be a material change in circumstance and constitute a presumption for modification or reduction of support as was actually argued for in *Stubblebine*. However,

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the enactment of any statute on the issue should include very specific factors related to retirement issues to provide courts with those factors that could rebut the presumption. This would give court's guidance and limit the guesswork on the issue. Such an approach would greatly reduce the uncertainty that exists in Virginia on the issue. Hopefully the result of the Virginia Bar Family Law Coalition's study on the issue will result in a positive legislative approach to the issue.

Endnotes:

1. 22 Va. App. 703, 473 S.E.2d 72 (1996).
2. 1997 WL 583570 (Va. Ct. App. 1997).
3. 2000 WL 1210836 (Va. Cir. Ct. 2000).
4. See Va. Code Ann. §20-107.1 (E).
5. 59 Va. App. 22, 716 S.E.2d 477 (2011).
6. See Swisher, Diehl & Cottrell, *Virginia Family Law: Theory and Practice*, Chapter 9:5, fns. 27 & 28, Chapter 9:16 fns. 26 & 35 (Thomson Reuter 2016).
7. 2009 WL 1850968 (Va. Ct. App 2009). But see *McNamee v. McNamee*, 2011 WL 291438 (Va. Ct. App. 2011) where the trial court erred in finding that certain events were contemplated at the time of the execution of their property settlement agreement.
8. See, eg. *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 of spousal support).
9. The author would like to acknowledge and extend thanks to Amy J. Amundsen, Esquire, of Memphis, Tennessee, a fellow in the AAML and International Academy of Matrimonial Lawyers for background research and information supplied to the Coalition.
10. See, eg., S.C. Code Ann §20-3-170 (B); Mass. Gen. Laws ch. 208, §49 (f); Colo. Rev. Stat. 14-10-122 (s) (a) (IV)
11. N.J.S. 2A:34-23. These include such factors as the ages of the parties, ages at the time of marriage, degree of economic dependency by the payee on the payor, duration of alimony already paid, health, assets, full retirement age, sources of income and the ability of the recipient to have adequately saved for retirement. Any finding of overcoming the presumption by the court must be in writing and upon said finding support can continue for an amount and term as set by the court.
12. S.C. Code Ann §20-3-170 (B). These factors include whether the retirement was contemplated when alimony was awarded, age, health, whether the retirement is mandatory or voluntary, whether the retirement would result in a decrease of support and other factors.



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