Focus FAMILY LAW

Retiring boomers revisiting separation agreements

Joanne Stewart

On separation, most couples want to be done with the situation and get on with their lives. Domestic and financial decisions have been made in regard to any children. Property and spousal support have been accounted for and for the "couple," it feels like a deal done forever.

Maybe, but maybe not. What happens if there is a change in circumstances over time? For example, what if a former spouse wants to retire, or retire early, and stop paying support?

These are important questions for the law and for society as a whole given the longevity of the Canadian boomer generation. As a group, they worry about having enough money set aside to live a comfortable retirement, or at worst, outliving their retirement funds. As well, while we hope this longevity is accompanied by good physical and financial health, in their golden years a significant percentage of boomers will experience at least some portion of ill health and require substantial funds for short or long-term care.

As former spouses look to their lawyers to secure additional financial assistance from former spouses or for assistance in getting out of support obligations to former spouses, there are typically two approaches: a review or a variation.

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What complicates the process is that in revisiting existing orders or agreements, lawyers and the courts often use the words "review" and "variation" interchangeably. But a "review" is a particular test, completely different from variation.

A review order or agreement is not routinely made. The review process is the first-instance process, a hearing de novo, a fresh look at that snapshot in time. There is no onus to demonstrate changed circumstances.

In *Gray v. Gray* [2014] O.J. No. 4519, the Court of Appeal for Ontario recently dealt with a variation and said "support ought to be indefinite, until a review occurs as a result of a material change in circumstances." The court speaks to variation, not review, and the use of "review" needs to be read with care.

In contrast, an order or agreement allowing for variation is routinely made. The variation process is a comparative process. The focus is on the prior order or agreement and the circumstances in which it was made, compared to the circumstances present when the variation request is heard. The correctness of the prior order or agreement ought not be considered or departed from lightly. When the prior order or agreement was made, what did each spouse earn? What was each spouse's net worth? How was each spouse's health? Does the prior order or agreement give any guidance as to what the circumstances were at the time it was made, or does the prior order or agreement give guidance as to what future circumstances may, or will, give a party the chance to request a variation in the future?

The variation process typically seeks to determine whether there has been a "material change" in circumstances. For example, retirement of the payor is typically a condition defined as a material change. If the payor retires, does a variation in support obligations (to the payor a reduction) necessarily result?

To be material, the change must be one that, had it been known, a different order or agreement would have resulted. It generally must be continuing, not temporary (*Allaire v. Lavergne* [2014] O.J. No. 3603), and in existence when the new decision is to be made, not based on a future event that may or may not happen.

For example, if the payor earned $70,000 and had a net worth of $600,000 when the prior order or agreement was made, then retires with an income of $65,000 and a net worth of $1 million, although his retirement is defined to be a material change, it likely will not result in a reduction because retirement does not result in a "material" negative financial consequence to him. Retirement in and of itself is not necessarily a material change that will result in reduced spousal support obligations.

As boomer former spouses retire, what will happen to support obligations between them? Who will pay? Will the burden shift from between former spouses to adult children of dependent parents (which the *Family Law Act* allows) or to society as a whole? Given the way case law is evolving, it seems former spouses frequently stay hooked, but given the cohort of boomers, only time will tell.

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Aboriginal: Justice Edward went against decades of precedent

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test is far from objective and the value judgments of the social workers and lawyers assigned to the case by the CAS and the presiding judge are relied upon. Regarding Makayla, section 37(2)(e) of the *Child and Family Service Act* was involved, which states that a child is in need of the protection of the state where: "The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment."

The issue was recently considered by Justice Gethin Edward in *Hamilton Health Sciences Corp. v. D.H.* [2014] O.J. No. 5419. The judge had to decide whether to grant the hospital's application for an order protecting 11-year-old J.J., another aboriginal child diagnosed with leukemia, by imposing chemotherapy against her parents' known wishes.

The judge sided with the parents and dismissed the hospital's application, relying on the family's aboriginal status by stating the following:

"It is this court's conclusion, therefore, that D.H.'s decision to pursue traditional medicine for her daughter J.J. is her aboriginal right. Further, such a right cannot be qualified as a right only if it is proven to work by employing the western medical paradigm. To do so would be to leave open the opportunity to perpetually erode aboriginal rights."

This judge decided that J.J. did not need the protection of the state because her parents were making a responsible (albeit debatable) decision in her best interest. He grounded his decision in the fact that aboriginals are given special treatment and that western medicine has no guarantees.

But what about the many other cases where judges intervene and override the parents' wishes? Think about the cases of Jehovah's Witness children ordered to receive blood transfusions, or divorcing Orthodox Jewish parents who do not agree on whether kosher foods may be consumed by their child, or parents who do not agree on a treatment plan for their obese child.

In the past, the courts have declared that a parent who refuses western medical treatment must lose custodial power. In the cases of Jehovah's Witnesses, judges have for years transferred the right to choose the form of medical care from parents to the CAS.

Courts throughout Canada refer to the decision of Chief Justice Charles Lamer in the case of *R.B. v. Children's Aid Society of Metropolitan Toronto* [1995] S.C.J. No. 24:

- A parent's freedom to choose medical treatment for his or her child is not an all-encompassing liberty, and freedom of religion is not an absolute freedom.
- Those freedoms can and must be restricted when they are demonstrably against their child's best interests.
- Parents may not refuse medical treatment found to be necessary and for which there is no reasonable alternative.
- It is the state, through the province's child protection authorities, that is given authority to intervene when it considers it necessary to safeguard a child's autonomy or health.

Following Chief Justice Lamer, in *A.C. v. Manitoba (Director of Child and Family Services)* [2009] S.C.J. No. 30, Chief Justice Beverley McLachlin stated: "...it is the province's child protection statute that provides a complete statutory scheme to govern medical decisions for children deemed to be in need of state protection."

Surprisingly, Justice Edward went against decades of precedent and opened a new door to aboriginal parents, for now, and perhaps one day for all Canadian parents seeking to exercise their parental authority over life and death medical decisions for terminally ill children — without state intervention.

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