

## The ties that keep binding...Sharing of post-separation income

At what point after separation do former spouses truly have economic independence from one another? Child support obligations tie parents together until the children become independent adults. That may be a lengthy period of time after separation but it is a defined period. For spousal support obligations there may be no clear end date to the obligation. Unless former spouses have agreed to release each other from future claims or have agreed to a fixed term limit for support, the obligation can continue indefinitely. That leaves open the possibility of ongoing legal expense and uncertainty. Spousal support may be adjusted to reflect changes in the former spouses' lives such as retirement, job loss, remarriage or ill health. There is a lack of clarity in how and when spousal support should be adjusted in the years after the initial settlement. One of the most contentious questions is whether a support payor is required to share increases in income which occur after the separation.

Spousal support is justified in one of three ways: (i) the couple agreed to spousal support, perhaps by a marriage contract; (ii) one of the spouses was disadvantaged economically by the relationship and has a right to compensation; or (iii) one of the spouses is in need. The amount of spousal support should reflect the couple's lifestyle during their relationship and is directly related to the payor spouse's income at the time of the separation. What if a support payor's income increases substantially in the years after separation? Does the support recipient have a right to come back and ask for more? The answer is not at all clear. Courts have not dealt consistently with these cases. The uncertainty in this area promotes conflict and litigation.

The argument in favour of allowing a support recipient to share in the payor's good fortune post – separation is that in some respect that success relates to the other spouse's contribution during the marriage. That may be because the payor spouse acquired professional qualifications, started a business, or started to climb the corporate ladder during the marriage which led to financial success later. On the other hand, post-separation success may be largely attributable to the hard work and creativity of the payor spouse. Others, such as a new spouse, adult child or business partner may have contributed to the post-separation success. The idea that spouses acquire a property interest in each other's careers has long since been rejected by Ontario courts, yet sharing post separation income increases looks a lot like sharing ownership of a career.

Courts are more likely to order a payor spouse to share increased income if it is earned in the same business in which the spouse worked during the relationship. Also, an increase in income close in time to the separation is more likely to be shared than when the increase comes many years later. Some courts require very specific contributions to the ultimate benefit, such as paying for a spouse's professional education. Other courts have accepted typical domestic services such as caring for children or the household as being sufficient to entitle a spouse to increased post-separation income.

The uncertainty as to whether or not post-separation increases in income will have to be shared with a former spouse can generate conflict and litigation. This possibility is yet another good reason why it is advantageous to negotiate a lump sum payment of spousal support with a release or, at least, a time limit on support payments to mitigate this risk.