



Retroactive Spousal Support By Scott Abel

One question that is often asked by spouses who are separating is whether or not they have to pay spousal support if there is no court order in place.

While there is no requirement to pay spousal support before there is a court order, the obligation to pay support may exist as far back as the date of separation, regardless of whether a court case has been started.

One of the purposes of starting a court proceeding is to give notice to the other person as to what you want, including whether you want spousal support. There can be no doubt that as of the date of filing the court documents a claim for spousal support is at issue.

The more difficult question to determine is whether spousal support ought to be paid prior to the commencement of any court proceedings, starting at the date of separation.

Our Court of Appeal has recently confirmed that it is possible to make an order of spousal support retroactive to the date of separation,

regardless of when the court proceedings were commenced.

The Court said that the ability to make a spousal support order retroactive to the date of separation exists because of the similar jurisdiction it has to make such an order for child support. That is, if there is an obligation to pay child support retroactive to the date of separation for child support, a similar right should exist for spousal support.

What is still unknown is in what circumstances ought the court exercise its jurisdiction to order retroactive spousal support. Simply because the court has the ability to do so does not mean it should do so.

Obviously, each particular case will be decided on its own set of facts. At some point, guidelines will be established as to when it is appropriate to order spousal support back to the date of separation.

What does this practically mean for spouses who are separating, and the issue of spousal support?

For a potential payor spouse, he or she can no longer sit back and believe that because a court application has not been made, that there is no exposure for spousal support.

For a potential recipient spouse, he or she no longer needs to rush to court right away in order to preserve their right for spousal support. However, that spouse cannot sit idly by and do nothing as well.

One of the factors regarding retroactive child support is to look at when was effective notice of the claim made. That is, if a parent is going to seek child support for a period prior to the court proceedings, was there some notice given to the other parent regarding that request before court documents were filed.

Similarly, one would think that if a spouse is going to make a claim for retroactive spousal support, prior to the commencement of court proceedings, that there will have to be some indication of the claim for support. Whether the courts will follow through

on that principle is still to be determined.

Ultimately, this is a new area of law that the courts are going to have to address. With time, specific guidelines and factors will be set out to determine when a claim for spousal support retroactive to the date of separation will be appropriate.