

ANALYSIS OF GREENBERG v. GREENBERG

68 Mass.App.Ct.344,

Decided on February 28, 2007

On February 28, 2007 the Appeals Court decided a critically important modification case, entitled Greenberg v. Greenberg . In Greenberg, the court clearly articulated that retirement of the payor spouse does not mean that alimony must be reduced or terminated unless it is embedded in a substantial and material change of financial circumstances. Retirement neither triggers an automatic termination nor an automatic reduction of the obligation to pay support - like the death of either party or remarriage of the recipient spouse.

The retiring spouse must demonstrate that his (or her) circumstances have changed substantially and materially since the last modification or divorce judgment; loss of earned income alone does not necessarily mean that the burden is met. In fact, there is no presumption that arises in favor of reduction due to retirement. It is merely one of the circumstances – which may, or may not, be a substantial and material change. If the payor’s financial circumstances (assets, retirement income, unearned income, social security income) are sufficient to meet the alimony order without affecting his standard of living, then no decrease in alimony is warranted.

The instant appeal was brought by Suzanne Greenberg and arose from the second modification judgment obtained by Dr. Frederic H. Greenberg, which was based on his soon to occur retirement from his medical practice. The couple had been married for twenty-four years and had three children before they divorced in December, 1994. In

1999, Dr. Frederic H. Greenberg and Suzanne Greenberg had reached an agreement, which was entered as a modification judgment, which reduced Dr. Frederic H. Greenberg's original alimony obligation.

In the instant case, the trial judge concluded that a reduction of Dr. Frederic's alimony obligation was warranted even though Dr. Frederic H. Greenberg "had failed to 'demonstrate a material change of circumstances sufficient to justify a full termination of alimony' but that his retirement from full-time employment 'does constitute a material change in circumstances sufficient to allow a reduction of his obligation.'" The trial judge's findings appear to have accepted all the doctor's alleged reductions in income as presented on his financial statement, without imputing any ability of the doctor to tap his investment or retirement income although finding that he did have the ability to do so. The trial judge further found that Suzanne was now employed, her costs and expenses had been reduced since the emancipation of the children and that she could access her retirement in the future.

The Appeals Court determined that the trial judge's conclusions were erroneous because the law demands that the petitioner demonstrate a material change of circumstances since the entry of the earlier judgment (the divorce judgment). The necessary findings of fact, which must form the basis of a successful modification are set forth clearly and in detail in Greenberg. They are as follows:

1. Findings with respect to the financial circumstances of the payor ex-spouse. These findings must include the value of the payor's assets and the actual or potential income to be derived from all assets. The payor's ability to meet his alimony obligation is measured by the

income generated from retirement assets (whether or not the payor elects to draw upon), investment assets, which may or may not be currently utilized to support the payor. A secondary finding that needs to be made is that continued payment of alimony does not adversely affect the payor's standard of living.

2. Findings with respect to the financial circumstances of the recipient ex-spouse. These findings must include that the recipient ex-spouses' current expenses are not inconsistent with the standard of living the parties enjoyed during the marriage. That standard includes the real estate, capital assets, and pensions allocated to each party after the divorce. There must be a finding that the recipient is able to meet all of her current needs (as defined by the marital standard of living) without depleting assets allocated to her as part of the divorce judgment or reducing her standard of living. That income will be available to the recipient ex-spouse at some point in the future from her retirement accounts is not a permissible basis upon which to make a present modification.

The findings listed in Paragraph 2 above are only necessary to reach if the payor ex-spouse demonstrates a substantial and material change in circumstances, such that cause financial inability to meet the current alimony obligation. If he succeeds in so demonstrating, then the recipient ex-spouse must establish her need for support to maintain the station that the parties enjoyed during the marriage.

On April 10, 2007, The New York Times had a special section labeled “Retirement”. In the leading article, authored by Claudia H. Deutsch, entitled “Training To be Old”, a statistic was repeated: “Women can expect to live 13 years longer than their mother or their maternal grandmother, and men can expect 11 more years than their father or paternal grandfather.”

Not only is retirement not an automatic relief from the obligation of support, but the obligation can be expected to endure for far longer than previously anticipated! A vice president of a research group focusing on aging is quoted by Deutsch as saying, “We are getting to the point where people’s retirement life stage may be longer than their work life stage.” This possible outcome is yet more startling given that many people have chosen to work into their 70’s after Congress struck down mandatory retirement in 1986. Of course, there are those employers who downsized and thereby eliminated many workers jobs.

The lessons to be learned from Greenberg v. Greenberg case are several:

1. A Complaint for Modification filed because the payor ex-spouse has (or intends to) retire and seeks reduction or elimination of his support obligation is not a sufficient reason in and of itself to modify the alimony obligation.
2. The retiring petitioner must prove a substantial and material change in his circumstances regardless of his actual or intended retirement.
3. All potential and actual sources of income of the petitioner will be considered in the Court’s analysis. Retirement and investment accounts, for instance, will be examined to determine what they might generate – regardless of whether or not

the party seeking reduction in alimony is currently receiving the income stream or has elected to defer its receipt.

4. Evaluation of the appropriateness of filing or defending against a modification complaint should include an analysis of all actual and potential income sources, including all investment assets, retirement accounts (regardless of whether or not the payor is actually drawing down these funds), social security income, royalty income, estate income and the like.

5. In preparing for the taking of a deposition and at trial, counsel should make sure to elicit sufficient facts to make all the mandatory findings enumerated in Greenberg.

6. In negotiating separation agreements, do not agree that retirement of an ex-spouse is an automatic reason to reduce or terminate alimony. For the same reasons, consider any agreement to reduce or eliminate alimony based on obtaining a fixed age suspect.