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Pounding the Pavement

Divorce may force you out into the workforce or into a classroom
Have you thought about a plan?

BY KATHLEEN HOGAN

THE END OF A MARRIAGE OFTEN MARKS A TIME WHEN A HOME-MAKER MAY NEED TO CONSIDER ACQUIRING JOB SKILLS AND/OR RETURNING TO THE WORKFORCE. Similarly, a spouse who has been employed part-time or only on an intermittent basis may be asked to become more self-supporting. A dissolution proceeding is also a time when one spouse or the other may threaten to quit a job or return to school, to minimize funds available for alimony and/or child support. While both parties have choices to make regarding their future education and employment, both should give serious consideration to the potential consequences of those choices.

● Employment changes that reduce income

A party's threat to manipulate or reduce income so as to minimize financial obligations in the divorce is a common one. However, it is not commonly successful, and the consequences are frequently not what the party making the threat intended. Each state's child-support guidelines allow

the court to consider a party's "earning capacity" if he or she is, in the view of the court, voluntarily unemployed or underemployed. The concept of underemployment applies if an individual has intentionally pursued employment that pays significantly less than prior positions or than positions for which the individual is qualified. For example, an executive who leaves a high-paying position to work at a fast-food restaurant would be voluntarily underemployed. Similarly, an individual who had the necessary licenses and credentials to work as a health-care provider would be underemployed if she was applying only for lower paying clerical positions.

It is important to distinguish between an individual who intentionally leaves paid employment and one who is fired or laid off. The person who has voluntarily left a paying position should expect that the court may base its financial orders on the prior earnings level. The result is less clear-cut if the job loss was the result of company-wide layoffs, a business closing, or other consequences of an economic downturn. In those instances, a court may be less quick to base its orders on a prior level of earnings, at least in the absence of evidence that substitute employment is available.

A third category relates to job losses or income reductions that are the result of some “fault” on the part of the employee. This category includes demotions for poor performance or job losses for things like alcohol or drug use, theft, or the like. Many courts treat a job loss for cause as an instance of voluntary unemployment, justifying the court’s basing of financial orders on imputed income, rather than actual income. However, in some states, courts have viewed such a job loss as involuntary (notwithstanding that the employee arguably committed voluntarily the act that led to the discharge). If that analysis is employed, the court may look to whether the party has pursued diligent efforts to find replacement employment.

● Educational choices

The situation is somewhat different when the question is whether a primary breadwinner may end or reduce employment to go back to school. The analysis will depend largely on the reasonableness of the education program and its projected impact on future earning capacity. For example, if the return to school is not for the purpose of minimizing income available for support and the educational program will result, within a reasonable time, in higher earning and, thus, additional income for support, such a choice may not result in adverse consequences. However, a careful analysis of the cost, duration, and projected future earnings from the educational program is necessary.

For example, if an individual has been passed over for promotions due to his or her lack of a professional degree and the educational program is designed to attain that degree, the court will likely view such a choice as reasonable. By contrast, if a party proposes a seven to ten-year educational program in an entirely new field that, although emotionally satisfying, is typically low paying or offers little potential for paid employment, such a choice is likely to be viewed as unreasonable because it would reduce the current income available for support without providing the prospect of higher income in the future.

● The stay-at-home parent returns to work

In the absence of illness, physical disability, or old age, even a party who has been out of the workforce during the marriage should be exploring his or her employment and/or educational options to enter the workforce. It is not a given that every homemaker reentering the workforce will be entitled to some preliminary period of education and training. Rather, much like the discussion above, educational choices will be judged on whether they are necessary and reasonable to prepare the individual to enter the workforce or reasonably to enhance the individual’s employability and future earning capacity.

For example, a spouse who has been out of the workforce for only a short time or who has significant advanced education and training should not reasonably expect that a pro-

posal for further education would be viewed favorably. By contrast, a homemaker, whose prior education or job experience would relegate her to minimum-wage positions at best, should be examining the cost and duration of educational options that could lead to higher potential earnings and reasonable job opportunities.

In looking at educational options, practicality, enhanced job prospects, and earning capacity should be the focus. For example, with these goals in mind, it would be impractical for a homemaker in her fifties to consider pursuing a ten-year educational program designed to lead to a Ph.D. However, an 18-month course to provide updated computer and office skills might be entirely reasonable. Similarly, pursuing education in a subject area that is personally interesting is not likely to be viewed as a reasonable choice if the field offers no discernable job opportunities in the area. For example, while art history or French literature might be interesting, persuading a judge that such a degree would enhance one’s earning capacity, in the absence of evidence of available positions, could be quite difficult.

Where a parent has been the full-time caretaker for a minor child or children, that obligation can affect the parent’s options with respect to employment or education. However, courts are typically not sympathetic to a claim that a parent should remain out of the workforce when all the children have reached school age. In addition, in many states a court will treat a stay-at-home parent as voluntarily unemployed well before the youngest child reaches school age. Although the exact age differs from state to state, courts commonly expect that a parent will return to the workforce once the youngest child is between two and three years old.

● Voluntary unemployment

In any instance in which a parent may be viewed as voluntarily unemployed or underemployed, it is important to keep in mind what a court can or cannot do. A court has no power to directly force any party to get a job or take a better job or work more hours. However, the court does have the power to fashion its financial orders based on the assumption that the unemployed or underemployed party has the capacity to earn more income than he or she presently is generating. The net result is likely to be a very real gap between the individual’s monthly expenses and the income available to pay those expenses.

● Overtime or second jobs

In some instances, individuals can choose to work overtime or hold a second job. Understandably, the decision to work overtime or take a second job might be appealing to an individual who sees that extra effort as a way to recover from the economic effects of the divorce. However, that extra effort might be less attractive if the result is to increase the financial payments owed to the other party as child or spousal support.

Approaches differ from one state to another as to whether or under what circumstances the party exerting the extra effort can count on retaining all the benefits of the overtime or additional job. Typically, if the overtime is not genuinely voluntary, but is required as a condition of employment, the financial orders of the court will be based on the individual's actual earnings, including the pay from mandatory overtime. In some states, that approach also would be followed if the family had typically relied on both regular pay and overtime earnings for support during the marriage.

By contrast, in other states as a matter of public policy, courts will not enter financial orders that effectively require or assume that an individual will be employed more than forty hours per week. In those jurisdictions, a person who elects to work overtime will retain the benefits of that extra employment.

A similar approach is common with respect to second jobs. In some states, where an individual has a history of continued income from a second job, that income may be considered in fashioning the financial orders. In other states, income from a second job is not included.

● Early retirement

For many workers who have diligently saved for retirement, early retirement may have been a long-standing goal. However, even for workers whose retirement funds have not been depleted due to market swings, the divorce process may affect that goal in at least two respects. First, the division of assets may include retirement funds and, second, spousal and/or child support obligations can put an end to early retirement plans.

The court may view early retirement, if it is entirely voluntary, in the same fashion as voluntary unemployment or underemployment. As a result, the retiree may need to be prepared for financial orders based on his or her prior level of income, rather than orders based on retirement income only. By contrast, if the early retirement is a result of verifiable health problems, a court may be more likely to base its determinations on retirement income, rather than the former level of earnings.

A more difficult situation exists when early retirement is offered in place of a layoff or termination, such as sometimes happens when an employer downsizes. If the employee is young enough and healthy enough to remain in the workforce, this situation is likely to be treated in the same fashion as any other involuntary job loss. One should be prepared to seek substitute employment. **FA**

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Books & More

A Bibliography

Heroic Parenting

For parents:

★ *ADR Options: A Client Handbook (Family Advocate).*

The American Way of Divorce: Prescription for Change by Sheila Kessler, Ph.D. (1975) (check your public library).

★ *Coparenting After Divorce: A Client Handbook (Family Advocate).*

Creative Divorce by Mel Krantzler (2002) \$14.95.

★ *Divorce Forms: A Handbook for Clients (Family Advocate).*

★ *FAQs: Answers to 200+ Frequently Asked Questions About Divorce (Family Advocate).*

Moving Forward After Divorce by David & Lisa Frisbie (2006) \$10.99.

101 Ways to Be a Long-Distance Super-Dad... or Mom by George Newman (2001) \$9.95.

★ *Surviving Your Divorce and Beyond: A Client Manual (Family Advocate).*

Talking to Your Children About Separation and Divorce by Risa Gordon (1999) \$13.90.

★ *What Your Children Need Now: A Divorcing Parent's Handbook (Family Advocate).*

For children:

The Boys and Girls Book About Divorce by Richard A. Gardner, M.D. (1985) \$7.50.

Dear Dad: A Letter of Love to a Divorced Parent by Lee Shapiro, J.D (1981) \$29.95.

Dinosaurs Divorce by Marc Brown & Laurie Krasny Brown, \$7.99.

Helping Your Kids Cope with Divorce the Sandcastles Way by M. Gary Neuman (1999) \$12.95.

Mama and Daddy Bear Divorce by Cornelia Maude Spelman & Kathy Parkinson (2001) \$6.95.

The Most Important Thing by Rhonda Roth & Shari Grajczyk (2006) \$16.95.

★ *My Parents Are Getting Divorced: A Handbook for Kids (Family Advocate).*

What Happened to My Family? by Tracy Nahachewsky (2005) \$17.95.

Two Homes by Claire Masurel & Kady MacDonald Denton (2003) \$6.99.

Where Am I Sleeping Tonight? A Story of Divorce by Carol Ekster & Sue Rama (2008).

Tax Issues

Divorced or Separated Individuals, U.S. Dept. of Treasury, I.R.S. (Pub. 504) available at www.irs.gov.

Health Insurance

www.statehealthfacts.org

Health-insurance resources with links to other useful sites.

★ *Published by the ABA.*

For price and ordering information go to www.abanet.org/family/advocate/client.html