

## Survey of Family Law Cases 2004-2013

### 2007 Family Law Survey

# SEPARATION AGREEMENTS AND OTHER MARITAL AGREEMENTS

The Supreme Court reversed the Court of Appeals and held that under the Colorado Marital Agreement Act (CMAA), C.R.S. §14-2-301 to –310, a court may review a waiver of attorney fees within a valid marital agreement for unconscionability at the time of enforcement in In re the Marriage of Ikeler, 161 P.3d 663 (Colo. 2007).

The parties' marital agreement provided that each party would pay their own attorney fees during a dissolution of marriage. Wife argues the court can review the waiver of attorney fees for unconscionability at the time of dissolution. Husband argues that the plain language of C.R.S. §14-2-307(2) does not include attorney fees, but rather states that an enforceable marital agreement "is nevertheless unenforceable insofar, but only insofar, as the provisions of such agreement...relate to the determination, modification, or elimination of spousal maintenance and such provisions are unconscionable at the time of enforcement."

When reviewing the plain language of the CMAA, the Court found that C.R.S. §14-2-307(2), which purports to limit conscionability review to spousal maintenance, conflicts with C.R.S. §14-2-304(1)(i), the catchall provision that permits parties to contract about any matter not in violation of public policy. The Court's reasoning is that unconscionable contracts are unconscionable precisely because they violate public policy. Though the legislature did not discuss attorney fees in the CMAA, the Court concludes that the General Assembly did not wish to preclude courts from reviewing waivers of attorney fees in marital agreements for unconscionability. Case law shows that awards of maintenance and attorney fees are based upon the same public policy concerns. In sum, a maintenance provision that is unconscionable violates public policy, thus is not a valid contract term under C.R.S. §14-2-304(1)(i), thus is unenforceable, just as a waiver of attorney fees that becomes unconscionable because it violates public policy, thus is not a valid contract term and is unenforceable.

The Court's holding is specific to a waiver of attorney fees within marital agreements. Provisions regarding property division are not subject to a review for conscionability. Despite the Court's limited holding, the concurrence suggests that the majority's rationale behind enforcement of C.R.S. §14-2-304(1)(i)'s catchall provision may apply equally to all subjects included within a marital agreement, thus invalidating the limitations to spousal maintenance found in C.R.S. §14-2-307(2).