Survey of Family Law Cases 2004-2013

2008 Family Law Survey

MAINTENANCE

In In re the Marriage of Swing and Stuva, 194 P.3d 498 (Colo. App. 2008), Wife appeals from orders reducing her maintenance award after her former Husband changed jobs in anticipation of his **imminent retirement**. When the parties divorced in 2005, Husband was a long-haul truck driver ordered to pay $242 per week in maintenance to Wife. In 2006, when he was 64 years old, Husband took a new job as a local truck driver at a lower wage. Based upon this, the magistrate reduced Husband's maintenance obligation.

Pursuant to C.R.S §14-10-122(1)(a), maintenance may be modified "only upon a showing of changed circumstances so substantial and continuing as to make the terms [of the decree] unconscionable." (The word unconscionable has since been replaced with "unfair.") The court must look to the interests of both parties when determining if the existing maintenance order has become unfair. Section §14-10-122(1)(a), C.R.S. does not preclude an obligor from making an employment decision that serves the obligor's own interests, nor does the statute prevent maintenance modification solely because the obligor's decision reduces the ability to pay maintenance. In this case, the court made detailed findings as to the financial circumstances of both parties, that wife was incapable of meeting her needs without maintenance, that the previous maintenance award would be unfair as it would consume 43.7% of Husband's new income. Since Wife's original maintenance award was 24.2% of Husband's prior income, the court reduced maintenance to 24.2% of Husband's new income.

A trial court may consider whether a spouse paying maintenance is voluntarily underemployed when it determines whether there has been a substantial and continuing circumstance that would support a modification of maintenance. But there is no Colorado case or statute defining voluntary underemployment for maintenance purposes, nor is there a case which considers whether a job change in connection with retirement may qualify as voluntary underemployment.

Based upon a review of cases from other states, the court held that "a Colorado court may consider an obligor spouse's reduced income as a result of early retirement, and that if the court finds (1) the obligor's decision was made in good faith, meaning not primarily motivated by a desire to decrease or eliminate maintenance, and (2) the decision was objectively reasonable based on factors such as the obligor's age, the obligor's health, and the practice of the industry in which the obligor was employed, the court should not find the obligor to be voluntarily underemployed." Id. at 501.

However, the court specifically withheld determining whether a more limited inquiry should apply when job changes occur before sixty-five years old, which was precisely the fact pattern of this case.