

Survey of Family Law Cases 2004-2013

2008 Family Law Survey

SEPARATION AGREEMENTS AND OTHER MARITAL AGREEMENTS

In *In re the Marriage of Thornhill*, No. 05DR1025, 2008 WL 3877223 (Colo. App. 2008), Wife appeals, arguing that the parties' separation agreement was unconscionable, that the court erred when it applied a marketability discount to the valuation of Husband's closely-held business; while Husband cross-appeals, contending the court erred when it ordered temporary maintenance for Wife.

Parties to a marriage may enter into **separation agreements**, and the provisions of separation agreements are binding upon the court unless they are found to be unconscionable. C.R.S. §14-10-112(1) & (2). When reviewing for conscionability, the court must first "review the provisions for fraud, overreaching, concealment of assets, or sharp dealing not consistent with obligations of marital partners to deal fairly with each other." *Id.* at *1. Regardless of this finding, the court must then review the economic circumstances of the parties under to the agreement to determine whether it is "fair, just and reasonable."

In this case, the Court found that the agreement was unconscionable because Wife was not represented when the agreement was negotiated and signed; Wife's father, who aided in the negotiation of the agreement, was also the Chief Financial Officer of Husband's business, thus he was conflicted between assisting Wife and attempting to preserve the business assets; and Wife testified to a lack of mathematical ability, reliance upon her father's advice, and a lack of understanding of the value of the marital assets. Moreover, the intent of the agreement was to divide the marital assets equally, yet Wife was to receive her half of the assets over a period of ten years, without interest, therefore the present value of Wife's interest was considerably less than one-half of the marital assets. Though the court did not find fraud, overreaching or sharp dealing, the court held that the property distribution was not "fair, just and reasonable," and must be vacated.

Maintenance during a divorce in Denver

With regard to **temporary maintenance**, magistrate's awards of temporary maintenance are appealable under C.R.M. 7(a). The threshold determination whether maintenance is applicable is that the spouse seeking maintenance must (1) lack sufficient property, including marital property, to provide for his/her own needs; and (2) be unable to support himself/herself through appropriate employment. C.R.S. §14-10-114(3). If the spouse meets this test, then the spouse is entitled to maintenance, and maintenance of the parties' lifestyle becomes relevant.

With regard to Husband's majority shareholder interest in a **closely-held business**, the court appropriately applied a marketability discount to the value of Husband's interest. Marketability discounts are applied in valuing closely held businesses in dissolution of marriage cases because such stock is less marketable than publicly traded stock, and courts in dissolution cases act as courts of equity, thus they should have discretion to apply a discount.

Since the property division was vacated, and property division, maintenance and attorney fees are inextricably intertwined, the court must reconsider all three of these issues upon remand.

