

Survey of Family Law Cases 2004-2013

2009 Family Law Survey

Defining Property

The husband appealed from permanent orders related to property division, including stock options and an IRA, maintenance, and attorney fees, in *In re the Marriage of Powell*, 220 P.3d 952 (Colo. App. 2009), cert. denied (2009). The parties married on September 23, 2000. The wife was granted stock options on February 27, 2001, for the previous calendar year (February 1 through January 31). The wife's 2001 options allowed her to purchase 11,494 shares, with a certain number of shares vesting each February for the four subsequent years.

First, the court had to determine whether the 2001 options, prorated from the start of the fiscal year (Feb. 2000) to the day before the marriage (Sept. 22, 2000), and granted to the wife on February 27, 2001, were marital or separate property. The wife testified that these options were earned prior to the marriage, and thus were separate property; the husband testified that the 2001 options were granted for future services, and thus were marital property. An "employee stock option is a contractual right to purchase stock during a specified period at a predetermined price." *In re the Marriage of Miller*, 915 P.2d 1314 (Colo. 1996). But an "employee stock option constitutes property for purposes of dissolution proceedings only when the employee has an enforceable right to the options." *In re the Marriage of Balanson*, 25 P.3d 28 (Colo. 2001). The trial court found that most of the 2001 options were awarded for work prior to the marriage and thus were the wife's separate property. But the court of appeals found that the wife had only a mere expectancy in the 2001 options, not an enforceable property right, until February 27, 2001. Thus, the stock options were marital property in their entirety. Since the stock options all had vested and expired, the trial court's property division had to be vacated and remanded.

With regard to the valuation of the wife's IRA, the husband argued that the court should have determined the marital portion based upon increased values of individual securities within the IRA, instead of a change in the entire gross value of the IRA. According to *In re the Marriage of Burford*, 950 P.2d 682, 685 (Colo. App. 1997), the amount of increase in each asset should be added together, while any asset that decreases in value should be disregarded. Although the husband and wife each valued the marital portion of the wife's IRA as the total value of the IRA at the end of the marriage less the total value at the beginning of the marriage, the wife also called an expert who valued each investment within the IRA. The wife's expert's interpretation would have resulted in an increase in marital property to the husband, but the court did not consider it an abuse of discretion not to accept this position.

With regard to the remaining property issues, the court found that while a trial court must consider all relevant factors, pursuant to C.R.S. 14-10-113(1), to achieve an equitable property distribution, the court does not have to make specific findings as to each factor, so long as the findings are supported by competent evidence. The fact that the wife received 60 percent of the marital home, which belonged solely to the husband prior to his causing title to be placed in both spouses' names, was still an equitable distribution of property. The court did remand the property distribution regarding two vehicles purchased by the husband, as well as several World Savings accounts to review all expenditures and accounts and to treat them all consistently.

Since the property division was vacated, the court must reconsider maintenance and attorney fees upon remand.

In *In re the Marriage of Obremski and Williamson*, 205 P.3d 538 (Colo. App. 2009), the wife appealed from an order denying her request to divide the husband's Temporary Disability Retired List (TDRL) military benefits under a provision of the permanent orders. Pursuant to the permanent orders in 2001, the husband's "pension/retirement benefits" were to be divided evenly. In March 2007, when the husband had 16 years of military service, he was put on the TDRL with a 30 percent disability. The husband's active duty pay of \$5,400 per month was replaced with \$1,629 per month in TDRL benefits. The husband sought to modify child support, while the wife sought to divide the husband's TDRL benefits pursuant to permanent orders, as she contended that they were retirement benefits.

Military retirement benefits are generally distributable as marital property under the Uniformed Services Former Spouses' Protection Act (USFSPA). But retirement benefits exclude disability pay. To be placed on TDRL, a military member has a disability rating of at least 30 percent, and it is determined that the disability may be permanent. A member may remain on TDRL for up to five years, at which point the member must (1) return to active duty, (2) permanently retire for longevity (20 years of service, not including time on TDRL), or (3) permanently retire for disability.

Though there is no Colorado law directly on point, the court looked to *In re the Marriage of Franz*, 831 P.2d 917 (Colo. App. 1992), which found that all of a military member's pay that is "based and computed on" the member's disability is excluded from division as marital property. In this case, the husband did not have 20 years of service with the military. As such, he was ineligible for any military retirement benefits apart from his disability. Therefore, the court found that all of the husband's TDRL benefits were based on his disability and not divisible as marital property.

The husband's request for attorney fees under C.A.R. 38(d) were denied because the wife's appeal was not frivolous, but the court remanded the request for fees under C.R.S. § 14-10-119, as the trial court would be better equipped to evaluate current financial resources of the parties.