Survey of Family Law Cases 2004-2013

2010 Family Law Survey

CHILD SUPPORT DETERMINATION/ MODIFICATION

Mother appeals the court's order denying her motion to modify child support in In re the Parental Responsibilities of M.G.C.-G., Cabello and Gomez, 228 P.3d 271 (Colo. App. 2010). In 2003, Mother filed a motion to relocate with the child. Father objected. Prior to a hearing on this matter, the parties agreed that Father would withdraw his objection and allow Mother to move, and that Mother would accept child support of $500 per month from Father. This agreement became an order of the court. Four years after the relocation, Mother filed a **motion to modify child support**. Father objected, stating that the 2003 agreement was entered in exchange for mother's relocation and therefore modification should not be permitted. The trial court calculated and held that child support would have been between $625-$640 in 2003, had the parties not reached their own agreement. Pursuant to Mother's current motion to modify child support, child support would have been $650. Therefore, the trial court denied the motion to modify as there was no evidence of a ten percent change in child support from "what [child support] would have been on October 29th, 2003 to today."

Pursuant to C.R.S. §14-10-122(1)(a), modification of an existing child support order may occur only upon a showing of changed circumstances that are substantial and continuing. A change is not substantial if it results in "less than a ten percent change in the amount of [child] support due per month." C.R.S. §14-10-122(1)(b). Both of these provisions apply to orders "currently in effect." At the time the motion to modify child support was considered, the only order currently in effect required Father to pay $500 in child support. As such, the trial court's denial of Mother's motion to modify is reversed and remanded. Upon remand, the court of appeals reminded the trial court that it may consider the terms of the 2003 agreement between the parties in determining whether any deviation from the guidelines is warranted, even though there is a rebuttable presumption that a modification of child support must be granted when there is more than a ten percent change in the amount due.

In the post-decree case of In re the Marriage of White and Martin, 240 P.3d 534 (Colo. App. 2010), Father appeals an order modifying child support. At dissolution, the child resided primarily with Mother and Father paid child support. Then in June 2007, the parties agreed that the child would reside primarily with Father, and that neither parent would pay child support, so long as Mother continued to have overnight parenting time. However, in August 2008, Father filed a **motion to modify child support**, asking that Mother pay child support, retroactive back to the date the child began residing with him in accordance with C.R.S. §14-10-122(5), and In re the Marriage of Emerson, 77 P.3d 923 (Colo. App. 2003). The trial court ordered Mother to pay child support, retroactive back to the date of filing the motion (August 2008), not the date the child began residing with Father (July 2007).

C.R.S. §14-10-122(1)(a), (1)(c), and (1)(d) each refer to the general rule, that child support may be modified only as to installments accruing after the filing of a motion for modification. C.R.S. §14-10-122(5) provides that "when a mutually agreed upon change of physical care occurs, "the provisions of child support of the obligor under the existing child support order…will be modified as of the date when physical care was changed." The Court of Appeals noted that the statute specifically limited retroactive modification to child support payable by the obligor, and that the statute is plain, clear and not ambiguous.

When C.R.S. §14-10-122(5) was first added in 1991, it provided that "[w]hen a voluntary change of physical custody occurs, the provisions for support…will be modified as of the date when physical custody was changed. Within months of In re the Marriage of Pickering, 967 P.2d 164 (Colo. App. 1997), the legislature added, "the provisions of child support of the obligor under the existing child support order" to C.R.S. §14-10-122(5). Additionally, references of the newly amended C.R.S. §14-10-122(5) were added to C.R.S. §14-10-122(1)(a), (1)(c) and (1)(d), thus further establishing C.R.S. §14-10-122(5) as the exception. Then, five years later, the Court of Appeals held that "the burden of support, along with the identity of the obligor, 'shifted' when the children changed residences," thus child support could be modified with regard to the parent who was not the obligor under the existing order as of the date the physical care changed. Emerson, 77 P.3d at 926.

The Court of Appeals agreed with Father's argument that when the parties mutually agreed to change physical care, Father was the obligor under the existing child support order. Therefore the court could properly modify his child support obligation retroactive back to the date of the change of physical care under the exception of C.R.S. §14-10-122(5). Thus Mother does not receive a windfall of child support when she no longer had physical care. However, since Mother was not an obligor under that child support order, the general rule under C.R.S. §14-10-122(1) applied, and her child support obligation was modified back to the date of filing the motion. The Court held that Father has the right and choice to file or postpone the filing of his motion to modify child support. The Court of Appeals declined to apply Emerson because it did not find the language of the statute to be ambiguous or unclear.

In his concurrence, Judge Loeb stated that it was a "fair reading" of the record that the trial court concluded that mother became the obligor when the physical care changed. But he also stated that it was within the discretion of the trial court to find that mother's child support obligation would be zero from the date of change of physical care to the date Father filed his motion. Judge Loeb provided that since the two divisions had conflicting conclusions regarding the interpretation of C.R.S. §14-10-122(5), it would be appropriate for the General Assembly or the Supreme Court to resolve the conflict.

In another post-decree case, Mother appeals the trial court's order modifying child support and **imputing income** to her based upon a finding that she was **voluntarily unemployed** in In re the Marriage of Connerton and Nevin, 2010 WL 3584282 (Colo. App. Sept. 16, 2010). Mother sought to modify the current child support, based upon her receipt of maintenance ending. Father argued that Mother was a licensed real estate agent and emergency medical technician (EMT) who was voluntarily unemployed. The trial court held that Mother had substantial job skills and imputed income to Mother, based upon full time employment as an EMT, held that her educational goal of becoming a nurse did not meet the standards of reasonableness because the program would take 4 ½ years and she did not pursue her degree while receiving maintenance.

Both parents have an obligation to support their children. A court may calculate child support based upon a parties potential income, if that parent is voluntarily unemployed or underemployed. C.R.S. §14-10-115(5)(b)(I). A court may not deem a parent voluntarily unemployed or underemployed if (1) the parent is "enrolled in an educational program that is reasonably intended to result in a degree…within a reasonable period of time and that will result in a higher income," (2) the "educational program is a good faith career choice that is not intended to deprive the child of support," and (3) the "parent's pursuit of the career does not unreasonably reduce the support available to the child." C.R.S. §14-10-115(5)(b)(III)(C). The trial court must make all of these findings.

In this case, the trial court did not find that Mother's plan was not reasonably intended to result in a degree, was not a good faith career choice, or that the plan was intended to deprive the child of support or

unreasonably reduce the support available to the child. The Court of Appeals remanded the case, as the trial court did not make findings as to all parts of the statute.

Since remand may raise other issues, the Court of Appeals reiterated that the trial court may impute income at the annual income that parent previously earned. While the court may consider whether employment is available, there is no burden to prove a particular job exists. The court may consider only childcare expenses that are actually incurred, as it would be "patently unfair" to include childcare expenses in the child support calculation that were speculative.

Finally, Mother argued that the court erred in denying her request for attorney fees pursuant to C.R.S. §14-10-119. When seeking fees under C.R.S. §14-10-119, a party must present evidence of the reasonableness of the fees at the time of the hearing on fees, including facts such as the billing rate, the number of hours billed, and the reasonableness and necessity of the hours billed. Since this evidence was not presented, the trial court properly denied Mother's request for fees.

El Paso County Child Support Enforcement (CSE) appeals an order modifying child support, alleging that the trial court abused its discretion for **deviating from the child support guidelines** in the post decree modification case of In re the Marriage of Hein and Farrer, No. 09CA2290 (Colo. App. Sept. 30, 2010). In the dissolution, Mother was ordered to pay child support of $173 per month. A year later, paternal grandparents intervened and sought parental responsibilities of the children. The children began living with the paternal grandparents, who received public assistance benefits to pay for a portion of the children's daycare. CSE filed to modify child support. At the hearing, the trial court found that Mother's presumptive child support was $399 per month. But, because an order of child support exceeding $245 per month would cause grandparents to lose their public assistance benefits, the court deviated from the guidelines and modified the child support to $240 per month.

The court may deviate from the child support guidelines if the presumptive amount of child support would be inequitable, unjust or inappropriate. C.R.S. §14-10-115(8)(e). The party seeking deviation has the burden to show the deviation is both reasonable and necessary. The court must make findings specifying both the presumptive amount of child support and the reasons for the deviation. C.R.S. §14-10-115(8)(e).

A court does not abuse its discretion by refusing to deviate, even if the presumptive amount would end eligibility for public assistance. Other states have held that child support orders should not be structured to ensure recipients remain eligible for public assistance. Child support is income to the child; therefore any public assistance eligibility must be determined after child support income is set.

The Court of Appeals held that the trial court abused its discretion by deviating from the guidelines solely to protect grandparents' eligibility for public assistance benefits, and remanded the case.

In the dissolution of marriage case In re the Marriage of Roos-Ooley and Ooley, 2010 WL 4492448 (Colo. App. Nov. 10, 2010), Wife appeals the trial court's order entered after remand of her first appeal. Wife contends that the trial court erred in determining her **income for child support purposes** when it included actual part-time wages and **Social Security survivor benefits** she receives on her son's behalf, as a result of his father's death. On remand from the first appeal, the trial court declined to hold a hearing but issued an order finding that income was not imputed to Wife, rather Wife's monthly income was her reported part-time wages and the Social Security benefits she receives on behalf of the son she had with her deceased first husband. Wife filed a motion to reconsider, which the court denied as to her income, and affirmed as to other issues including a denial of maintenance and attorney fees.

C.R.S. 14-10-115(5)(a)(I)(P) provides that a parent's gross income includes "Social Security benefits, including benefits actually received by a parent as a result of the disability of that parent, or as a result of the death of a minor child's stepparent." (emphasis added). C.R.S. 14-10-115(5)(a)(II)(D) provides that "Social Security benefits received by the minor children or on behalf of the minor children as a result of the death or disability of a stepparent are not to be included as income for the minor children for the determination of child support." C.R.S. 14-10-115(11)(c) provides that where a custodial parent received periodic disability benefits on behalf of children "due to the disability of the noncustodial parent…the noncustodial parent's share of the total child support obligation …shall be reduced in an amount equal to the amount of the benefits."

The court of appeals treated this case similarly to In re the Marriage of Anthony-Guillar, 207 P.3d 934 (Colo. App. 2009), holding that a child's Social Security survivor benefits should not be included in a parent's gross income, even if the benefits are paid to the parent because the child is a minor. These benefits are the child's financial resource. The court of appeals found no reason to distinguish between survivor benefits and disability benefits. Since the court remanded to determine Wife's income, the trial court should also consider if Wife is underemployed, the denial of maintenance and attorney fees, and allocation of various costs.