

Survey of Family Law Cases 2004-2013

2010 Family Law Survey

DEFINING PROPERTY

Presenting an issue of first impression in Colorado, In re the Marriage of Cardona and Castro, 2010 WL 5013737 (Colo. App. Dec. 9, 2010) assessed whether Husband's **accrued leave time** is a marital asset that is divisible upon dissolution. The court analogized this issue to stock options and interests in irrevocable trusts. In Colorado, only enforceable contractual rights constitute property; interests that are merely speculative are mere expectancies and not property. The court found that the "value of the unused leave time," which is calculated based on Husband's salary, and "the very existence of the time," are both indeterminate and speculative. If Husband would become sick, or use vacation days as he testified he would do to exercise parenting time after Mother relocated with the child, he would never collect payment for those days. Other states have found that a spouse may never collect payment for this leave, and that accrued leave time is only an alternative form of wages. Therefore, the court of appeals found that Husband's right to be paid the accrued time is not vested. The court rejected a delayed distribution of the leave time as well, and did not treat the leave time as marital property due to the uncertainty of the benefit. The court noted that this issue is suitable for legislative action.

Additionally, Husband argued that the court abused its discretion by reimbursing Wife's contribution of separate property toward the purchase of the marital house. Premarital property that is placed in joint tenancy during the marriage reflects a gift to the marriage, and the property is presumed to be marital, absent clear and convincing evidence to the contrary. During the marriage, Wife owned a condo. The condo was sold; proceeds were placed in a joint account, and subsequently used to purchase the marital home. The trial court failed to make findings as to why Wife's funds remained separate property. The court of appeals remanded this issue, reiterating that the trial court may not set aside Wife's separate property contribution without further findings as to why Wife did not intend to make a gift of the condo proceeds to the marriage.

Husband also contends that the court abused its discretion in valuing his separate property. The court found that when a spouse uses marital income, rental income in this case, to pay down debt on separate property, the court must consider both the increase in value on the separate property during the marriage, and the amount of equity increased based upon use of marital funds to pay down separate debt. This issue was remanded. Reconsideration of an asset on remand requires the trial court to reexamine the entire property division, and reconsider the property division based upon the parties' economic circumstances at the time of remand. The maintenance must be reconsidered too, as it is inextricably interwoven with property division.

Husband also argued that the trial court erred in valuing his income for child support purposes, by using husband's actual gross income rather than reducing it by the amount he pays into his employer's cafeteria plan for the children's daycare and health insurance. While the court found that Husband may elect to set aside this income, the child support guidelines do not deduct these amounts as "preexisting child support obligations and ... alimony or maintenance actually paid by a parent." C.R.S. 14-10-115(3)(a).

The trial court did not err by not awarding Husband his own travel expenses because the statute only provides that the cost of transporting a child, or a child and a parent if the child is under 12 years old, shall be divided in proportion to income. C.R.S. 14-10-115(11)(a)(II).

With regard to the dependency tax exemptions for the children, C.R.S. 14-10-115(12) divides the exemptions in proportion to the contributions to the costs of raising children, thus according to the percentage of income attributed to each parent for child support purposes. Prior to the hearing, the trial court entered an order dividing the exemptions such that Husband had the majority of exemptions. After the permanent orders hearing, the court reallocated the exemptions so that each parent could claim one child each year, despite Husband's 65% share of income, and Wife's 35% share of income. This issue is remanded, as the court made no findings for revising its earlier order, and the order did not comport with the statute.

Finally, Husband argued that the trial court abused its discretion when it issued sanctions in the form of attorney fees for Husband's "substantial lack of disclosure throughout this case." The trial court's record showed that Wife filed only one motion to compel, which was granted, and fees awarded at that time, and Wife did not request additional fees or sanctions in her TMC. Since the record did not support the sanctions, they were reversed.

In re the Marriage of Anderson, 2010 WL 5248920 (Colo. App. Dec. 23, 2010) reviewed another issue of first impression in Colorado, whether spouses may contract between themselves as part of the property division to require payment of one spouse's **future Social Security benefits** to the other. The parties' separation agreement provided, at two parts, that "as a provision of the property settlement and not as spousal support...(1) [husband] shall pay to [wife] a monthly sum...from his Social Security benefits. In the future, this amount will be increased or decreased by an amount equal to fifty percent (50%) of any increase or decrease in [husband's] Social Security benefits;" and (2) husband shall pay a sum "to provide for [wife's] own health insurance and/or health care." Fourteen years after the dissolution, Husband moved to set these provisions aside pursuant to C.R.C.P. 60(b), or in the alternative, to modify these provisions pursuant to C.R.S. 14-10-122. The magistrate denied his motion.

The anti-assignment clause of the Social Security Act provides that "the right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process..." 42 U.S.C. §407(a). This act is strictly interpreted to prohibit voluntary and involuntary transfers or assignments. Thus a state court in a dissolution proceeding cannot distribute or divide a spouse's future Social Security benefits as marital property.

The doctrine of equitable estoppel cannot be applied to bar a party from challenging a judgment voided by the Supremacy Clause.

Applying the Supremacy Clause, the court of appeals held that the provision of the separation agreement treating future Social Security benefits as property is void because it violates the anti-assignment clause of the Social Security Act. The entire property division is remanded and the court must look at the parties' economic circumstances at the time of the remand hearing. The trial court may distribute the property unequally based upon the fact that one party is likely to enjoy a secure retirement through Social Security. The payments for health insurance were explicitly defined as in the nature of property division, not maintenance, therefore these payments for health insurance are only modifiable if the court finds that conditions exist to reopen the judgment.