Survey of Family Law Cases 2004-2013

2011 Family Law Survey

CHILD SUPPORT DETERMINATION MODIFICATION LAW

In re the Marriage of Davis, 252 P.3d 530 (Colo. App. 2011), the Court of Appeals addressed **retroactive application of C.R.S. §14-10-115(6)(b)(I)**, the questions of whether 401(k) contributions, stock options, employer contributions to insurance plans, and employee's stipends constitute income for purposes of the child support guidelines, how the child's income is factored into child support, and attorney's fees.

Wife contended that the trial court erred when modifying child support by applying the January 2008 revisions to section 14-10-115(6)(b)(I) retroactively to her 2006 motion to modify child support. "A statute is applied prospectively if it operates on transactions that occur after its effective date; it is applied retroactively if it operates on transactions that have already occurred or on rights and obligations that existed before its effective date." See Specialty Rests. Corp. v. Nelson, 231 P.3d 393, 399 (Colo. 2010). A statute is presumed to operate prospectively and may be interpreted to operate retroactively only if the legislature clearly indicates that intent. Id.

During the pendency of this case, which began in December 2007 and concluded in February 2009, C.R.S. §14-10-115(6)(b)(I) was amended to allow for a deduction when calculating child support for all children not of the parties' marriage, including children born after the children of the marriage, who were not included under the previous version of the statute. The new version of the statute "shall take effect January 1, 2008."

THE REVISED RULING ON CHILD SUPPORT

The Court held that providing an effective date is not sufficient alone to indicate an intent to apply a statute retroactively. Yet here, there is no indication in the legislative history to overcome the presumption of prospective application of the statute. Thus, the Court held that the trial court erred by applying the new provisions of the statute to the parties' child support obligations that accrued *before* the January 1, 2008 effective date of the amended statute. Yet, because child support is a continuing obligation that is always modifiable under the provisions of section C.R.S. §14-10-122(1)(a), the court did not err in applying the revised statute to the parties' child support obligations that accrued *after* the effective date of the statute.

The Court further stated that §14-10-115(6)(b)(I) applies to all after-born children belonging to a party; the statute does not only apply to the children belonging to the parent moving to modify child support.

Next, the Court addressed **401(k) contributions** as they relate to child support calculations. Prior to actual distribution, employer contributions to a spouse's retirement account or pension plan do not constitute gross income for child support purposes. In re Marriage of Mugge, 66 P.3d 207, 211 (Colo. App. 2003). Yet pension and retirement benefits, which are expressly included as income in C.R.S. §14-10-115(5)(a)(I)(H), include only such benefits that have actually been paid out and not those that are undistributed at the time of the hearing. Here, husband's employer made contributions to his 401(k) account, but he could not receive those funds prior to retirement without paying a penalty. Such unrealized employer contributions are not income for child support purposes.

The Court also addressed **stock options** in calculating child support. A spouse's stock options from an employer are included in gross income for child support purposes only to the extent that the options have been exercised at the time child support is determined. *See* In re Marriage of Campbell, 905 P.2d 19, 20-21 (Colo. App. 1995). Therefore, employer contributions to a stock option plan are not income for child support purposes.

Next, the Court held that **employer contributions to insurance plans** on an employee's behalf are not income for child support purposes. When a party does not have the option to take these contributions as wages and use them for general living expenses, they shall be excluded as income for child support purposes.

The Court also addressed an **employee's stipend** in calculating child support. Pursuant to section C.R.S. §14-10-115(5)(a)(I)(X), expense reimbursements received by a parent in the course of employment are included in gross income for child support purposes if such payments are significant and reduce personal living expenses. *See* In re Marriage of Long, 921 P.2d 67, 69 (Colo. App. 1996). Here Husband received $51.34 in his bi-monthly paycheck as a stipend that was applied directly to defray part of his monthly health insurance expense. The Court held that the trial court did not abuse its discretion in deciding not to include the small stipend in husband's income for child support purposes.

Finally, the Court addressed the **child's income** in calculating child support. The financial resources of the child are a factor that a trial court must consider when determining child support pursuant to C.R.S. § 14-10- 115(2)(b)(I). If the court finds that a child's income diminishes the child's basic needs, the court may reduce the basic child support obligation by an amount representing the reduction in need. In re Marriage of Anthony-Guillar, 207 P.3d 934, 943 (Colo. App. 2009). The extent to which a child's income is used to defray the basic support obligation depends upon the totality of circumstances in a particular case and is within the trial court's discretion. Id. Here the trial court included the child's employment income in the child support calculation because the child had a long-term work history and his income was used for his living expenses. The parties testified that the child, who was eighteen and attending college, had worked part time at the same job for the last two years earning $400 a month, which he used for discretionary expenses and college savings. Thus, the trial court did not err when it included the child's income in the support calculation.

Husband argued that the trial court erred by calculating child support separately for each of the parties' two children and by ordering him to pay extraordinary expenses relating to the parties' teenaged son's car in In re the Marriage of Wells, 252 P.3d 1212 (Colo. App. 2011).

C.R.S. §14-10-115(8)(b) provides that in the case of shared parenting time, the basic child support obligation is apportioned according to the parents' number of overnights. The statute does not explicitly address a parenting time arrangement that involves different overnight visits for different children in the same family. In that situation, child support should be calculated according to the formula set forth in In re Marriage of Quam, 813 P.2d 833, 835 (Colo. App. 1991) which held that when calculating child support, the father's overnights should be apportioned so that father is not credited with a full overnight when he does not have all three children overnight. Instead, he should be credited for one-third of an overnight each time he has one of the children.

Child support, as calculated pursuant to the guidelines establishes a rebuttable presumption of the amount owed. A court may deviate from the guidelines if application would be inequitable, unjust, or inappropriate. A deviation must be accompanied by findings specifying the reasons for deviation. Here, the trial court ordered that, "given the different circumstances of the children," the court would deviate from the guidelines by using a multiple worksheet method to calculate support. The court then added the

amounts from the two worksheets together and deviated again downward from that amount. The court made no findings, however, as to the reason for the downward deviation.

By beginning the calculation using two worksheets, the court inappropriately treated the children as if each was an only child. That approach is contrary to the guidelines. In a situation as here where Wife has primary care of both children but only one child has overnight parenting time with Husband, child support should be calculated according to the formula set forth in Quam unless sufficient findings are made to justify any deviation.

Next, the Court addressed extraordinary expenses as they relate to child support. The addition of extraordinary expenses to a parent's basic child support obligation must be supported by the court's findings and evidence in the record. In re Marriage of West, 94 P.3d 1248, 1252 (Colo. App. 2004).

Here, the child was expelled from his regular high school. Wife argued that child needed a car to get to and from his new school because the district did not provide bus transportation, public transit was unavailable, and Wife was unable to transport him. The child's driver's license was also suspended because of a DUI conviction. Husband argued that child should not have a car because he was involved in a drive-by shooting with a car husband had provided for him earlier, resulting in the impoundment of that car. The trial court found that because the child was attending a school where no transportation was available, it was appropriate to allocate to husband a proportionate share of the costs that wife sought relating to the child's car.

Husband did not argue that the expense was unreasonable because the child was unable to legally drive. Instead, he argued that husband should not be required to provide another car in light of the child's criminal conduct that led to the previous impoundment.

Simply that the child had earlier engaged in criminal conduct with a car is not sufficient to undermine the trial court's finding that the child needed a car for transportation to school. Because husband did not argue that the child's inability to legally drive should be a basis for rejecting the educational expense as unreasonable, the Court of Appeals declined to address the argument on appeal.