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Voluntary Early Retirement as a Factor in Modifying Maintenance
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A headline in the *New York Daily Law Journal* reads, "Retiree Told To Pay Alimony Or Get A Job."(fn1) A like, but very different, headline appeared in the *Los Angeles Daily Journal*, "Man Ends Spousal Support By Entering Monastery."(fn2) In both cases, maintenance obligors had sought to modify or terminate their maintenance obligations by reason of their voluntary early retirement, with markedly different results.

On June 2, 1996, twenty-five years will have elapsed since the Uniform Dissolution of Marriage Act ("UDMA")(fn3) first became law in Colorado. Despite this passage of time, family law practitioners in Colorado face uncertainty on the result that will follow when a court addresses the issue of whether voluntary early retirement constitutes a substantial change of circumstance warranting a modification or termination of a spouse's maintenance obligation. This article attempts to explain the source of the uncertainty, why it continues to exist and how this issue may be resolved.

Two Illustrative Approaches

Illustrative of the approaches at least two other jurisdictions have taken when confronted with the voluntary early retirement issue are the cases behind the above headlines.

In the New York case, the judge framed the issue in terms of a legal duty analysis:

Can a former husband voluntarily retire at age 57 resulting in a substantial reduction in his income, marry a woman who does not work and has no income, voluntarily move to a county which he describes as having the highest unemployment rate in New York State, refuse to seek any type of employment and as a result of his actions, obtain a downward modification or elimination of his support obligations to his former wife . . .?(fn4)

Applying New York law, the court held:

[T]he supporting spouse has an affirmative duty to avoid a loss of income and failing such duty the loss of income cannot serve as a basis for downward modification. . . . The fact that a husband does not work does not mean he cannot work. The measure of ability to support is not based upon what an irresponsible husband designs to earn, but his potential ability to earn in light of his past experience.(fn5)

California, a state of sunshine and retirees, focused instead on the obligor's motive. In the California case, the trial court found that the monastic husband had not quit his job to

avoid spousal support payments and that the husband's voluntary vows of poverty were sincere and in good faith. This finding of good faith was made despite unrebutted evidence at permanent orders that the husband had threatened to quit his job unless his wife agreed to forego spousal support.(fn6)

While the foregoing New York and California cases are illustrative, they are not necessarily instructive as to the modification approach likely to be followed in Colorado courts when considering an early retirement case.(fn7) At present, due to the absence of definitive case law and statutory guidance, a Colorado family law practitioner will be hard pressed to answer a client's inquiry: "At what age can I retire or substantially reduce my working hours and have a reasonable certainty that a court will modify or terminate my maintenance obligation?"

Colorado's Maintenance Statute

As distinguished from Colorado's child support statute, Colorado's maintenance statute does not provide the client or counsel with any guidance as to the duration measured in years for an original maintenance order.(fn8) In contrast to jurisdictions that have adopted somewhat dissimilar versions of the Uniform Marriage and Divorce Act ("UMDA"), in Colorado, an obligor spouse's age is not a stated statutory factor for a court to consider in deciding the duration of a maintenance award. Further, the legislatures of these other UMDA jurisdictions have, by amendment, added additional duration factors for a court to consider in regard to fixing, modifying or terminating a maintenance order when a spouse is at or near retirement age.(fn9) In light of the fact that a customary purpose of a uniform law is to have a uniformity of interpretation, a Colorado practitioner may be able to ask a court to construe (as to the early retirement issue) this state's maintenance and modification statutes in a manner consistent with these other jurisdictions.

Colorado's maintenance statute provides *inter alia* that "the maintenance order shall be in such amounts and *for such periods of time as the courts deem 'just'*. . . after considering all relevant factors. . . ."

Other than the subjective equity analysis of a particular judge, which lends itself to a lack of uniformity of decision, the only statutory factor that could be relied on by a Colorado court in having an original order terminate at retirement age is "the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."(fn10)

A review of the Colorado modification statute also provides no assistance to the practitioner representing the spouse contemplating voluntary early retirement.(fn11) While this statute provides for a termination of noncontractual maintenance on the death of either party or the remarriage of the recipient spouse, it does not state whether a spouse's early retirement or, for that matter, retirement at normal retirement age will be

deemed to be a "change in circumstance so substantial and continuing as to make the terms unfair, thereby warranting a modification or termination of maintenance."(fn12)

The Colorado practitioner seeking greater statutory clarity as to the early retirement issue will derive no benefit in a review of the Colorado statute's antecedent. Neither the original nor amended versions of the UMDA, nor the pertinent interpretive comments, address the early retirement issue.(fn13)

Colorado Case Law

While there exists Colorado case law that addresses the issue of a spouse's self-imposed limitations on his or her ability to pay spousal support, none of these cases is factually concerned with an obligor spouse voluntarily electing retirement when he or she is at or near retirement age. The leading case in Colorado on self-imposed limitations is the Supreme Court decision in *Rapson v. Rapson.*(fn14)

In this annulment action, the husband, during the pendency of the proceeding, retired as a painter and returned to college. He then argued he had no income and that the trial court erred in establishing a support order. The Supreme Court disagreed and held that

the fact that a person is without profitable employment has been held not to preclude the allowance of reasonable alimony and support where nothing but a disinclination to work, regardless of motive therefor, interferes with his ability to earn a reasonable living.(fn15)

This holding, if taken literally, suggests that regardless of age, an obligor spouse, otherwise in good health, cannot obtain a modification or termination of a maintenance obligation by electing to retire if the obligor continues to have the potential to earn a reasonable living.

Similarly, in the case of *In re the Marriage of McCarthy*,(fn16) a husband, in good health, who had obtained his law degree only six years before the divorce, decided to retire (presumably at a young age) from the practice of law and was unemployed at the time of permanent orders. Nevertheless, the court entered a maintenance order and husband appealed. The appellate court held that the amount and duration language of Colorado's maintenance statute allows a court to consider not only a spouse's actual income at time of trial but also his or her reasonable potential earning capacity.(fn17)

Particularly noteworthy in *McCarthy* was the court's *dicta*, which stated:

Michael is free to choose his own lifestyle and to cease to be a productive individual in our social structure if he can afford such luxury. However, by his own training and experience he should understand, better than the average layperson, that certain responsibilities assumed must be met within the confines of the law.(fn18)

Resources for Counsel Of the Obligor

In light of the foregoing case law and the heavy burden imposed on a spouse seeking to modify a maintenance order, a real peril exists to a maintenance obligor who unilaterally elects to retire without first obtaining court approval. The practitioner representing such a client should be familiar with the following legal authorities.

First, the author of the treatise *The Law of Domestic Relations* states:

The traditional view of the courts was that a voluntary reduction of income on the husband's part, as for example when he retired from active employment, did not warrant a reduction in alimony. This is too broad a rule to fit contemporary circumstances in which early retirement and abrupt career changes are not uncommon. A husband who is paying alimony ought to be entitled to make in "good faith," the same decisions about his career that he could have made if the divorce had not occurred. The question always is the meaning and application of the term "good faith." If the husband's primary purpose in making the change is to frustrate his ex-wife's claim for alimony, then the change should not result in a reduction. If that is not the primary purpose, the reduction may be appropriate, depending in part, of course, upon the wife's circumstances. Determining what the purpose of the changes are and distinguishing between proper and improper purposes are the kinds of factual issues that trial courts are accustomed to resolving in all kinds of contexts. Very often there will be external circumstances which are helpful in resolving them, such as the age, health and work situation of the husband and his conduct of his financial affairs.(fn19)

Another resource that is frequently relied on by Colorado courts of appeal in deciding cases of first impression are cases from other jurisdictions that have adopted the UMDA. For example, Illinois addressed the early retirement issue in several cases, including the leading case of *In re the Marriage of Smith.*(fn20) In *Smith,* the petitioner husband, at age fifty-four and in good health, elected to take voluntary retirement during the pendency of the dissolution proceeding. The court, in questioning the husband's motives, stated that

whether a spouse may voluntarily retire or cut back on his income depends on the circumstances of each case. Relative factors are the age, health of the party, his motives in retiring, the timing of the retirement, his ability to pay maintenance even after retirement and the ability of the other spouse to provide for himself/herself.(fn21)

Relying on Colorado's *McCarthy*(fn22) decision, the Illinois court found it appropriate in *Smith* to impute to the husband the earning potential he had prior to his taking retirement for purposes of entering a maintenance order.(fn23)

The Supreme Court of Missouri, in *Leslie v. Leslie,* also addressed the issue of a spouse obligor's voluntary early retirement.(fn24) In *Leslie,* the husband elected to take early retirement based on rumors that his employer was planning to lay off the shift on which he worked. Following the traditional approach, the Missouri Supreme Court held:

Missouri courts have consistently held that a voluntary loss of employment is not a substantial and continuing change of circumstance such as to allow modification. . . .

Even where retirement is induced by rumors of impending layoffs, courts have nonetheless found the loss of employment voluntary and therefore, not a substantial and continuing circumstance that would allow modification. . . . Furthermore, in spite of a reduction in income as a consequence of

retirement, the trial court may impute income to a spouse according to the spouse's ability to earn by using his or her best efforts to gain employment suitable to the spouse's capabilities.(fn25)

In addition to Illinois and Missouri, Arizona and Minnesota cases have addressed the voluntary early retirement issue, with varying results.(fn26)

The practitioner also should be aware that two UMDA jurisdictions have taken measures to assist their trial courts in obtaining support money from obligors who unilaterally decide to take voluntary early retirement to the detriment of their former spouses. Minnesota, by case law, allows its courts to invade property previously awarded to a supporting spouse as part of a property division where the early retirement has been in bad faith.(fn27) Illinois has enacted legislation allowing a court to order an unemployed spouse owing a duty of support to seek employment and to report periodically to the court with a diary listing his or her efforts in accord with the support order. The court also may order the spouse to report to the Illinois Department of Employment Security for job search services and to make application for local job training.(fn28)

The Pivotal Issue

While it is unclear what approach Colorado courts will take when addressing a voluntary early retirement case, when a spouse is at or near retirement age, one thing is certain. A spouse seeking to modify or terminate a maintenance obligation in Colorado will never acknowledge that the sole or primary purpose for the early retirement was to reduce his or her alimony obligation. As was noted in the case of *Deegan v. Deegan*, a party will always be able to advance at least one legitimate reason for retirement.(fn29)

Thus, there exists a fly in the ointment for those courts that seek to apply the good faith, sole purpose or primary purpose standard in these types of cases. In a thoughtful analysis, the *Deegan* court suggests that a trial court will ultimately be required to apply a balancing test as to one pivotal issue:

Whether the advantage to the retiring spouse (of voluntary early retirement) substantially outweighs the disadvantage to the payee spouse. Only if that answer is affirmative should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing support obligation. . . . Where the interests are in equipose, the payor spouse's application will fail because he or she is unable to show that the advantage substantially outweighs the disadvantage to the payee.(fn30)

Conclusion

While Illinois courts have indicated in *dicta* that they recognize that a maintenance obligor has a right at some point to retire or to reduce his or her working hours substantially, this assertion has never been made in a Colorado decision.(fn31) Thus, a maintenance obligor who elects to read poetry or hawk roses at DIA by retiring without court approval may, in effect, be pleading guilty to an indefinite sentence.

A Colorado practitioner and his or her client would be well-served by following the words of admonition contained in *Deegan:*

It goes without saying that issues of possible voluntary early retirement and the like should be resolved in the first instance at the time of the divorce in a negotiated agreement. No thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject his/her client to lengthy future proceedings. . . .(fn32)

NOTES

Footnotes:

1. Anderson, 198 *New York Law Journal* 1, col. 2 (Aug. 28, 1987).

2. Vogeler, 105 *The Los Angeles Daily Journal* 1, col. 1 (Dec. 1, 1992).

3. H.B. 1299, 1971 Colo. Sess. Laws at 520; codified at CRS § 14-10-101 *et seq.*

4. *Green v. Green,* 198 *New York Law Journal* 12, col. 4 (N.Y.Sup.Ct., Aug. 28, 1987).

5. *Id.*

6. *In re the Marriage of Meegan,* 92 *Daily Journal* DAR 15838 (4th District) 1992, *cited in* Vogeler, *supra,* note 2.

7. Neither New York nor California has adopted a version of the Uniform Marriage and Divorce Act. In addition to Colorado, the following seven states have adopted versions of the Uniform Marriage and Divorce Act: Arizona (1973), A.R.S. §§ 25-311 to 25-339; Illinois (1977), S.H.A. 750 ILCS §§ 5/101 to 5/802; Kentucky (1972), K.R.S. 403.010 to 403.350; Minnesota (1974), M.S.A §§ 518.002 to 518.66; Missouri (1973), V.A.M.S. §§ 452.300 to452.416; Montana (1975), MCA §§ 40-1-101 to 40-1-404, 40-4-101 to 40-4-225; Washington (1973), Wes's RCWA §§ 26.09.002 to 26.09.914.

8. CRS § 14-10-114(2).

9. The Illinois maintenance statute provides that the court must consider the age, physical and emotional condition of *both* parties as factors in deciding the duration of a maintenance order, whereas under the Colorado statute, only the age, physical and emotional condition of the spouse seeking maintenance is to be considered. *See* S.H.A

750 ILCS § 5/504, as amended in 1993. The Arizona maintenance statute lists as a duration factor not only age but employment history and the comparative earning abilities of both spouses in the labor market. A.R.S. § 25-319 (1973), as amended. The Minnesota maintenance statute provides that where uncertainty exists as to the duration of an award of maintenance, the court should enter a permanent award with the court, leaving the order open for later modification. Among the duration factors set forth in the statute are loss of earnings, *retirement benefits* and other employment opportunities foregone by the spouse seeking maintenance. M.S.A. § 518.522 (sub2). Minnesota also lists as factors for modifying a maintenance award the same factors used for an award of maintenance, plus additional factors, including decreased earnings of a party. M.S.A. § 518.64, as amended in 1994. Missouri allows a court to consider the conduct of the parties during marriage, which presumably would include plans for retirement. V.A.M.S. § 452.335(3) (1973), as amended in 1988.

10. CRS § 14-10-114(2)(f).

11. CRS § 14-10-122(1)(a), as amended in 1993.

12. *Id.* Undoubtedly, it can be argued that the obligor spouse's retirement, regardless of age, is a continuing change of circumstance warranting a modification or termination of maintenance. However, such an argument may not necessarily be accorded much weight

under the holding enunciated in the case of *Rapson v. Rapson,* 437 P.2d 780 (Colo. 1968). *See* discussion in the text at note 13.

13. *See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings,* 1970 Edition; *Family Law Quarterly,* Vol. V, No. 2 (June 1971); *see also* Uniform Marriage and Divorce Act (U.L.A.) (1987 ed.) §§ 308, 316.

14. *Rapson, supra,* note 12.

15. *Id.* at 782.

16. 533 P.2d 928 (Colo.App. 1975) (n.s.o.p.). Despite the fact that this case was denominated n.s.o.p., it has been cited as precedent by the Illinois Appellate Court. *See In re the Marriage of Smith,* 396 N.E.2d 859 (1979).

17. *McCarthy, supra,* note 16; *see also In re the Marriage of Udis,* 780 P.2d 499 (Colo. 1989), which held that a party seeking to modify a maintenance order has a "heavy burden" of proving that those provisions have been unconscionable under all relevant circumstances.

18. *McCarthy, supra,* note 16 at 930; *see also Deegan v. Deegan,* 603 A.2d 542 (N.J.Super A.D. 1992), a voluntary early retirement case (husband age sixty-two) where the court stated "any party is free to retire, take a vow of poverty, write poetry or hawk roses in an airport, if he or she sees fit. The only limitation is discontinuance of the financial aid the former spouse requires. The reason for this is that the duty of self-fulfillment must give way to the pre-existing duty which runs between spouses who have been in a marriage which has failed."

19. Clark, II *The Law of Domestic Relations in the United States,* Practitioner's Edition (1987), Ch. 17, § 17.6 at 281; *see also* Deitz, 4 *Family Law and Practice,* § 52.02 at 52-24 to 52-25. Levy, "Modification for Early Retirement," X *The Matrimonial Strategist* 1 (May 1992).

20. *Supra,* note 16; *see also In re the Marriage of Waldschmidt,* 608 N.E.2d 1299 (Ill.App. 4 Dist. 1993) (husband took early retirement at age fifty-five and filed a motion to terminate maintenance based on employer's early retirement program); *In re the Marriage of Waller,* 625 N.E.2d 363 (Ill.App. 1 Dist. 1993) (husband took early retirement at age sixty-three and filed a motion to terminate maintenance).

21. *Smith, supra,* note 16 at 863.

22. *McCarthy, supra,* note 16.

23. *Smith, supra,* note 16 at 864.

24. 827 S.W.2d 180 (Mo. 1992); *see also Hughes v. Hughes,* 761 S.W.2d 274 (Mo.App. 1988).

25. *Leslie, supra,* note 24 at 183.

26. *Shaugnessy v. Shaugnessy,* 793 P.2d 1116 (Ariz.App. 1990) (voluntary retirement does not in and of itself provide grounds for reduction of maintenance); *McNeil v. McNeil,* 818 P.2d 198 (Ariz.App. 1991); *Reeves v. Reeves,* 706 P.2d 238 (Ariz. 1985); *Chauncey v. Chauncey,* 699 P.2d 398 (Ariz.App. 1985); (good faith approach); *Linton v. Linton,* 449 P.2d 174 (Ariz.App. 1972) (if permanent orders contemplates imminent future retirement, then actual retirement not a change of circumstance); *Kate v. Kate,* 48 N.W.2d 551 (Minn. 1951) (appropriate for trial court to consider that a sixty-three-year-old husband's income not likely to continue at present rate); *In re the Marriage of Richards,* 472 N.W.2d 162 (Minn.App. 1991) (motive and good faith approach); *Kruschel v. Kruschel,* 419 N.W.2d 119 (Minn.App. 1988) (court found change of circumstance even though pension income was the same as wage income).

27. *Richards, supra,* note 26; *see also Mackey v. Hall,* 694 P.2d 1275 (Colo. 1985) (absent extraordinary circumstances, a trial court may not order the use of property awarded to one party in a dissolution proceeding in order to pay maintenance awarded to the other party); *In re the Marriage of Gray,* 813 P.2d 819 (Colo.App. 1991) (where it

appears that an open question exists in Colorado whether income from a retirement account, awarded as part of a property division, may be considered as an additional resource to pay maintenance).

28. 750 ILCS § 5/505.1.

29. *Supra,* note 18 at 545.

30. *Id.* at 546.

31. *Smith, supra,* note 16 at 864; *Waller, supra,* note 20 at 365.

32. *Deegan, supra,* note 18 at 546.