COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA2295
El Paso County District Court No. 93DR266
Honorable M. Flynn Feeney, Judge
Honorable Ronald G. Crowder, Judge

In re the Marriage of

Ellen B. Cohen, n/k/a Ellen Betsy Haskins,

Appellee,

and

Jeffrey S. Cohen,

Appellant.

ORDER REVERSED

Division II
Opinion by: JUDGE CONNELLY
Taubman and Carparelli, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: November 13, 2008

Susemihl, McDermott & Cowan, P.C., Gary R. Cowan, Colorado Springs, Colorado, for Appellee

Kane Law Firm, P.C., Hayden W. Kane, II, Colorado Springs, Colorado, for Appellant

In this post-dissolution of marriage proceeding, Jeffrey S. Cohen (husband) appeals an order requiring him to cooperate with Ellen B. Cohen (wife) to obtain life insurance to secure her share of his military retirement pay in the event of his death. We reverse.

I. Background

The parties' twelve-year marriage was dissolved in 1993. Their separation agreement was incorporated in the decree. It provided wife with a share of husband's military retirement based upon a formula; the court "retain[ed] jurisdiction only to the extent necessary to determine the number of months of Husband's total active military service retirement." The agreement further stated:

> [F]rom this date forward, neither of the parties hereto shall have any claim of any kind against the other or against the estate of the other . . . . Husband and Wife acknowledge that this Separation Agreement has been read over by each of them separately and apart and that they are now fully familiar with the terms and conditions hereof, and that they each state and agree that this Separation Agreement is and shall be a full, complete, adequate and final settlement of their property rights and financial obligations each to the other, each in accordance with the terms and conditions thereof.

On May 31, 2007, husband retired from the military. Shortly before then, wife filed a motion seeking entry of an order awarding her the appropriate percentage of husband's military retirement pay. In July 2007, wife filed a second motion claiming an insurable interest in husband's retirement pay, and requesting an order allowing her to purchase insurance on his life.

Following an evidentiary hearing, the court awarded wife a percentage of husband's disposable military retired pay consistent with the formula in the parties' separation agreement and commencing on the date of his retirement. It also granted wife's motion regarding the insurance policy; it rejected husband's argument that wife's request to obtain insurance impermissibly sought to modify the property division. The court found wife was simply seeking to enforce the earlier order by protecting her right to property she was awarded in the division. The court added that requiring insurance was equitable to wife, and only a minimal burden on husband. The court ordered husband to cooperate in taking a medical examination, and it limited policy coverage to $400,000.

II. Discussion

Husband challenges the court's order allowing wife to take out an insurance policy on his life. He apparently has now satisfied the immediate obligation imposed upon him, to cooperate in an insurance examination, under pain of a contempt citation. A motions division of this court previously rejected wife's motion to dismiss the appeal as moot for this reason. We agree the case is not moot, given husband's continuing objections to wife's right to take out an insurance policy on his life.

The trial court's authority to issue its order, some fourteen years after the parties' separation agreement became final, depends on whether the order is properly viewed as a modification or enforcement of the original order. Once final, a property division is not subject to modification absent conditions justifying relief from judgment under C.R.C.P. 60. § 14-10-122(1)(a), C.R.S. 2008; *In re Marriage of Jones*, 627 P.2d 248, 253 (Colo. 1981); *In re Marriage of Burns*, 717 P.2d 991, 993 (Colo. App. 1985). Moreover, separation agreements may expressly prohibit the modification of terms involving property division. *In re Marriage of Rosenthal*, 903 P.2d

1174, 1176 (Colo. App. 1995); *Aldinger v. Aldinger*, 813 P.2d 836, 838 (Colo. App. 1991). On the other hand, a trial court may enforce, rather than modify, a property division. § 14-10-112, C.R.S. 2008; *In re Marriage of Sinkovich*, 830 P.2d 1101, 1102 (Colo. App. 1992).

We conclude the court substantively modified, and did not simply enforce, the 1993 order. The parties expressly provided that their "Separation Agreement is and shall be a full, complete, adequate and final settlement of their property rights and financial obligations each to the other." The agreement added that after entry of the final decree, "neither of the parties . . . shall have any claim of any kind against the other."

The original order did not reserve jurisdiction to make substantive modifications of this kind. Where jurisdiction is reserved, later orders may be considered to have enforced rather than modified the original order, even when the later orders effect substantive changes. *See In re Marriage of Hiner*, 710 P.2d 488, 491 (Colo. 1985); *Sinkovich*, 830 P.2d at 1102. Here, however, paragraph sixteen expressly limited the court's reserved jurisdiction

over the retirement benefit "to the extent necessary to determine the number of months of Husband's total active military service for retirement." This reservation is far more limited than the jurisdiction reserved for other matters: for example, paragraphs nine and twenty-two impliedly ("until further order of this court") and expressly ("these dissolution proceedings may be reopened if") reserve jurisdiction in the court to address issues of maintenance and undisclosed assets, respectively.

The trial court issued the insurance order because it deemed it equitable to wife and only a minimal obligation on husband. Those assessments may be correct, but this new obligation nevertheless went beyond what the agreement required.

Our conclusion that the order impermissibly modified a final order obviates the need to resolve husband's contentions that wife had no insurable interest in his life and that it would violate public policy to allow her to take out insurance on his life without his consent. There are instances, particularly involving child support or maintenance, in which courts in dissolution actions properly may require a party to take out life insurance. *See, e.g., In re*

Marriage of Icke, 189 Colo. 319, 540 P.2d 1076 (1975); *In re Marriage of Graff*, 902 P.2d 402, 406 (Colo. App. 1994) (citing *In re Marriage of Koktavy*, 44 Colo. App. 305, 612 P.2d 1161 (1980)). But there may be public policy or insurance law limits on requiring third-party insurance without the insured's consent. *See, e.g., Davis v. Davis*, 750 N.W.2d 696 (Neb. 2008); *Browning v. Browning*, 621 S.E.2d 389 (S.C. Ct. App. 2005); *Hopkins v. Hopkins*, 614 A.2d 96 (Md. 1992); 3 *Couch on Insurance* § 41:22 ("Requirement that Insured Consent to Issuance of Policy Procured by Third Party"); Peter Swisher, *The Insurable Interest Requirement for Life Insurance: A Critical Reassessment*, 53 Drake L. Rev. 477 (2005).

These difficult issues are raised now in this case only because the property division order became final more than fourteen years ago. Had the court ordered insurance at the time of the original order, and had husband objected, the court could have considered other ways to address the concerns, including a different division of marital property. Because the original decree contained no survivor protection, the court's order amounts to a substantive modification of the decree.

Accordingly, the only basis for modifying the decree after it became final is under C.R.C.P. 60. *Jones*, 627 P.2d at 253. But the permanent orders in this case were entered fourteen years prior to the trial court's order permitting modification – well outside the six-month time limit for Rule 60(b) motions based on "mistake" or "fraud." The rule allowing consideration "within a reasonable time" of "any other reason justifying relief from the operation of the judgment," C.R.C.P. 60(b)(5), does not apply to situations covered by other subsections. *McElvaney v. Batley*, 824 P.2d 73 (Colo. App. 1991); *see In re Adoption of P.H.A.*, 899 P.2d 345 (Colo. App. 1995). Regardless, wife has established no basis in this case, under C.R.C.P. 60 or otherwise, for relief from a final decree.

III. Conclusion

The order permitting wife to obtain life insurance on husband's life and requiring husband to cooperate in helping wife obtain that insurance is reversed. Wife's request for appellate attorney fees is denied. *See* C.A.R. 39.5.

JUDGE TAUBMAN and JUDGE CARPARELLI concur.