

Leap of Faith

Retiring while Paying
Spousal Maintenance

BY KATHARINE LUM



This article discusses the effect of a spouse's good faith retirement on the modification of his or her spousal maintenance obligation. It focuses on the recent Colorado Court of Appeals decision In re Marriage of Thorstad.

The incidence of divorce among couples approaching retirement age has been steadily increasing for more than 20 years: from 1990 to 2015, the incidence of divorce among those 50 years of age and older increased by 109%.¹ Thus, the litigation of spousal maintenance cases (both pre- and post-decree) is increasingly likely to be affected by the impending retirement of one or both parties.

The decision about when to retire is a difficult one for many workers. For workers considering retirement while under an obligation to pay spousal maintenance, the decision is doubly fraught. The payor spouse must contemplate a change in employment that will likely reduce his or her income with no guarantee that the court will reduce the maintenance obligation as a result of the income reduction. To make matters more challenging, retirement is often an irreversible decision, particularly for individuals who are not self-employed.

This article discusses the effect of a spouse's retirement on the modification of his or her spousal maintenance obligation in light of the recent Colorado Court of Appeals decision *In re Marriage of Thorstad*.² The article explores the factors that may influence a court's decision of whether to reduce or eliminate spousal maintenance where the payor has made a good faith decision to retire.

Legal Principles Governing Spousal Maintenance

The initial award of spousal maintenance is governed by CRS § 14-10-114. Modifications of spousal maintenance are governed by CRS § 14-10-122. In 2013, the Colorado legislature enacted substantial revisions to both sections,³ which took effect on January 1, 2014.⁴ For ease of reference, this article refers to 2014 as the date of the change.

CRS § 14-10-114

Before 2014, whether to make an initial award of spousal maintenance was a two-part decision. First, the court determined whether the spouse seeking maintenance lacked sufficient property to meet his or her reasonable needs and was unable to support himself or herself through appropriate

employment.⁵ Second, if the spouse seeking maintenance passed this threshold, the court reviewed the factors then codified at CRS § 14-10-114(4), including:

- the financial resources of the party seeking maintenance, including marital property apportioned to that party, and the party's ability to meet his or her needs independently;
- the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and that party's future earning capacity;
- the standard of living established during the marriage;
- the duration of the marriage;
- the age and physical and emotional condition of the spouse seeking maintenance; and
- the ability of the spouse from whom maintenance was sought to meet his or her needs while meeting those of the spouse seeking maintenance.⁶

The 2014 version of CRS § 14-10-114 introduced the maintenance advisory guideline and substantially changed how courts render an initial decision on whether to award spousal maintenance. Now, the court must first make findings regarding a number of factors, including the amount of each party's gross income; the marital property apportioned to each party; the financial resources of each party, including but not limited to the actual or potential income from separate or marital property; and the reasonable financial need established during the marriage.⁷

Second, the court must determine the amount and term of spousal maintenance that is fair and equitable to both parties after considering

1. the guideline amount and term of spousal maintenance;
2. the factors set forth in subsection (3)(c). These factors slightly modify and expand on the factors previously set forth at CRS § 14-10-114(4), as discussed below; and
3. whether the party seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment.⁸

**Pre-2014 CRS § 14-10-122
and In re Marriage of Swing**

Before 2014, CRS § 14-10-122 offered no specific guidance regarding a request to modify spousal maintenance based on the retirement of one spouse; it simply provided that spousal maintenance could be modified “only upon a showing of changed circumstances so substantial and continuing as to make the terms unfair.”⁹

In 2008, the Colorado Court of Appeals issued *In re Marriage of Swing*.¹⁰ In that case, the husband petitioned the trial court to reduce or eliminate his spousal maintenance obligation due to a voluntary job change he had undertaken in anticipation of his early retirement.¹¹

The wife argued that her spousal maintenance payments should not be reduced because the husband’s job change and upcoming retirement constituted voluntary underemployment.¹² The Court concluded that an obligor spouse’s reduced income that resulted from early retirement may be a basis to modify spousal maintenance if (1) the obligor’s decision was made in good faith (i.e., not primarily motivated by a desire to decrease or eliminate maintenance); and (2) the decision was objectively reasonable based on factors such as the obligor’s age and health, and the practice of the industry in which the obligor was employed.¹³ The *Swing* court noted specifically that its analysis applied to early retirement and suggested, but did not directly address, the possibility of a more limited analysis if the obligor retired at age 65 (or the normal retirement age in the relevant industry).¹⁴

**Post-2014 CRS § 14-10-122
and In re Marriage of Thorstad**

The 2014 version of CRS § 14-10-122 did not change the overall standard governing the modification of spousal maintenance. The statute continues to direct courts to modify maintenance only if there has been a substantial and continuing change in circumstances that renders the original award unfair.¹⁵

However, CRS § 14-10-122 now specifically addresses the possibility of the payor spouse retiring during the term of the maintenance obligation, stating “[a] payor spouse whose income is reduced or terminated due to his or her retirement after reaching full retirement age is

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entitled to a rebuttable presumption that the retirement is in good faith.”¹⁶ The statute notes that “full retirement age” means “the payor’s usual or ordinary retirement age when he or she would be eligible for full United States social security benefits, regardless of whether he or she is ineligible for social security benefits for some reason other than attaining full retirement age.”¹⁷ “Full retirement age” varies depending on the retiring party’s birth year.¹⁸

In January 2019, the Court of Appeals decided *In re Marriage of Thorstad*, the first appellate case to address the retirement-related revisions in CRS § 14-10-122.¹⁹ In *Thorstad*, the husband filed a motion to terminate his spousal maintenance obligation in 2017 based on his decision to retire due to his declining health.²⁰ The magistrate automatically terminated the husband’s maintenance obligation upon finding that he had reached “full retirement age,” without any further analysis.²¹ The district court subsequently affirmed the magistrate’s decision.²²

The Court of Appeals examined CRS § 14-10-122 and reached the following conclusions about its application in the retirement context:

- CRS § 14-10-122 does not operate to automatically terminate the spousal maintenance of an individual who meets the statutory criteria of a “good faith” retirement. Rather, it merely establishes that such individual is entitled to a rebuttable presumption that his or her decision to retire was made in good faith.²³
- Once the payor satisfies the rebuttable presumption, the burden shifts to the payee to show that the payor’s decision was not made in good faith. If the payee does not meet this burden, the court will presume “as a matter of law, that the payor’s decision to retire was made in good faith.”²⁴
- The payor’s “good faith retirement” then becomes one factor among many that a court must consider when deciding whether circumstances have changed in such a substantial and continuing way as to make the terms of the existing maintenance order unfair.²⁵
- To make its final determination of whether to modify or terminate maintenance,

the court should then examine “all circumstances pertinent to an initial maintenance award, including all relevant circumstances of both parties” under the version of CRS § 14-10-114 that was in effect at the time of the original maintenance award.²⁶ The party seeking modification bears the burden of demonstrating the changed circumstances to the court.²⁷

Interaction of Good Faith with Other Modification Factors

Appellate courts have not yet applied the *Thorstad* framework to other modification of maintenance cases in Colorado. Thus, there is little guidance on the interaction of a good faith decision to retire with the other relevant circumstances that would ordinarily affect an initial award of spousal maintenance. Out-of-state cases that have analyzed a good faith decision to retire in conjunction with other relevant circumstances shed some light on this analysis, as do Colorado cases that analyze the financial circumstances of the parties in other maintenance modification contexts. The circumstances courts have reviewed in these cases generally fall into two broad categories: (1) the payor’s ability to continue paying spousal maintenance despite the reduction in employment income, and (2) whether the payee’s ability to provide for his or her own reasonable needs has improved since the original maintenance award.

Payor’s Ability to Continue Paying Spousal Maintenance Despite Retirement

One of the most important factors courts consider when determining whether to modify or terminate spousal maintenance in light of a good faith decision to retire is whether the payor has the ability to continue paying spousal maintenance at the current level, in spite of his or her retirement. In evaluating this continued ability to pay, courts take a broad look at the parties’ income and assets.

Income from other sources. In reviewing the payor’s ability to continue making spousal maintenance payments, courts considered all of the payor’s financial circumstances, including income from other sources.

Even where courts unequivocally found a reduction in the payor’s income due to retirement, they have upheld spousal maintenance awards where they found that the payor had sufficient income from other sources to continue making maintenance payments. For example, an Idaho court refused to modify the payor’s maintenance obligation where the payor no longer received income from his medical practice but received income from a trust and from social security in an amount equal to approximately 50% of his employment income.²⁸

Existing assets. Courts have also reviewed the payor’s existing assets as a source of funds from which to make maintenance payments, including investments, rental properties, and retirement accounts.²⁹ Notably, courts have included illiquid and non-income producing assets in their consideration, including farms and other real property.³⁰ Courts further reviewed the payor’s post-retirement spending habits in determining whether the payor could continue making spousal maintenance payments using existing resources.³¹ Thus, a payor attempting to modify spousal maintenance as a result of retirement should be mindful of his or her spending during and after the retirement process.

Courts in other states have also analyzed access to funds derived from assets awarded to the party in the original divorce proceeding. Whether a Colorado court might consider such assets as part of the financial resources of the payor (or payee) is discussed below.

Assets of a new spouse. In *In re Marriage of Bowles*, the Colorado Court of Appeals considered the relevance of a new spouse’s financial resources to a motion to modify maintenance brought by the payor due to his claimed inability to work.³² The Court held that the current spouse’s financial resources may not be used as either a source of income for the payor spouse or as a source from which maintenance payments could be made.³³ However, the opinion also noted that a court considering the modification of spousal maintenance must consider “all relevant circumstances.”³⁴ Thus, the Court additionally held that a court may consider “the existence or use of [a new spouse’s] assets as one factor of many in determining whether there has been a continued change of circumstances,”

but cautioned that the court is to do so only if the assets of the new spouse are “otherwise relevant.”³⁵

In the context of *Bowles*, the new spouse’s assets were relevant because there was an issue regarding whether the payor’s income was reduced due to disability or whether his decision to work only part time was a “voluntary decision based, at least in part, on the financial contributions of his current wife.”³⁶

Courts in other states have also grappled with the relevance of a new spouse’s income or assets in the modification-due-to-retirement context. An Ohio court found that a new spouse’s assets and income were relevant because the payor spouse had included the new spouse’s expenses in the payor’s financial affidavit.³⁷ The court observed that the payor did not seem to have suffered any financial consequences as a result of his reasonable decision to retire, and he stated he did not need to work because of his current wife’s income.³⁸ The court ultimately denied the payor’s request to modify the maintenance award. Notably, the payor also had social security income and income from part-time work, which could be used to meet his spousal maintenance obligation.³⁹

In *Pratt v. Pratt*, a Florida court found cause to consider the business resources of the payor’s new spouse in deciding not to modify or terminate spousal maintenance.⁴⁰ The Florida court carefully noted that the financial status of a successor spouse was not ordinarily relevant to a modification of spousal maintenance.⁴¹ However, in *Pratt*, the court found that the payor had deliberately limited his income by establishing the business in the new wife’s name.⁴² Moreover, the business income was deposited into a joint account from which the payor had a “unilateral right to withdraw.”⁴³

The line between permissible consideration of the new spouse’s assets as “one factor among many” and impermissible consideration of such assets as a source from which to pay spousal maintenance may be a fine one under some circumstances. For example, the current version of CRS § 14-10-114 directs the court to consider “any other source or ability of the payor spouse to meet his or her reasonable needs while paying maintenance.” It appears

that the income or assets of the new spouse would be relevant to the consideration of that factor, particularly if the new spouse is the party paying the household expenses. This would diminish or eliminate the need to use the payor's income for those expenses, thus "freeing up" the payor's income to continue making spousal maintenance payments. But it seems uncertain where the consideration crosses the line from the new spouse's income/assets as a source to meet the payor's own needs to the new spouse's income/assets as a source from which to pay spousal maintenance.

Given these considerations, attorneys should advise payor spouses approaching retirement to (1) avoid commingling assets with their new spouse to the greatest possible extent, and (2) continue making direct payments toward household expenses from their own accounts.

Deliberate asset restructuring. Out-of-state courts have refused to modify spousal maintenance following retirement on a finding that the payor deliberately disgorge himself or herself of assets that could have been used to pay spousal maintenance. In 2003, a Tennessee court reversed a modification of maintenance because, although the payor's decision to retire was objectively reasonable due to his deteriorating health, the payor's actions over the previous five years established a pattern of deliberate attempts to avoid his maintenance obligation through asset restructuring.⁴⁴ For example, the payor substantially drew down an investment account and used it to purchase illiquid and non-income producing assets, gift funds to his children, and make charitable contributions.⁴⁵ The payor also sold a parcel of real property but testified that he had no recollection of what happened to the proceeds.⁴⁶

A payee's dependence on maintenance. In general, courts that have analyzed maintenance modification in the context of retirement are reluctant to completely eliminate maintenance where the evidence demonstrates that the payee remains dependent on spousal maintenance to meet his or her reasonable needs.⁴⁷ Even where the payor's financial circumstances have worsened due to retirement, out-of-state courts have found it more equitable to reduce, rather than eliminate, spousal maintenance,

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with one court reasoning that it is inequitable for the payee to bear the brunt of the financial burden caused by the payor's retirement.⁴⁸ This is consistent with the Colorado Court's analysis of the parties' financial circumstances in *Swing*. In *Swing*, the trial court found that the payor's retirement constituted a substantial and continuing change in circumstances but nevertheless did not completely eliminate

spousal maintenance payments, given the payee's inability to meet her reasonable needs without them.⁴⁹

This effect seems to be amplified where the needs of the payee have increased, typically due to declining health. In one case, a retiring payor's maintenance payments were actually *increased* where the payor had built a large estate following the dissolution and the payee had no ability to work and increased expenses due to breast cancer.⁵⁰

Whether a payee can provide for his or her reasonable needs by earning employment income is a difficult question. Where both spouses are at retirement age, it is difficult to justify reducing a maintenance award due to the payor's retirement while at the same time expecting the payee to meet his or her reasonable needs by obtaining employment. On the other hand, where the payee has made no effort to better his or her economic circumstances since the original maintenance award, it seems inequitable for the payor to be forced to continue working (or to face economic disadvantage) due to the payee's ongoing needs. In general, courts seem reluctant to find that a payee spouse is capable of full-time employment when he or she is also at or above retirement age;⁵¹ however, courts will consider the earning capacity of payees who are below retirement age.⁵²

Perhaps unsurprisingly, courts seem most likely to terminate rather than reduce a payor's maintenance obligation where the payor's retirement results in a worsening of the payor's financial circumstances, while the payee's financial circumstances have improved.⁵³

Other Considerations in Light of *Swing* and *Thorstad*

Swing and *Thorstad* indicate that other factors may potentially affect maintenance modifications. Practitioners should pay particular attention to assets awarded in the divorce, the effect of early retirement, and prior maintenance orders.

Assets Awarded in the Divorce

One issue that has not yet been expressly considered by Colorado courts is whether a court could consider access to assets awarded to a

party in the original divorce proceeding when determining the party's economic circumstances during a modification. Such a consideration would likely provoke a claim that the court was "double-dipping" from the marital assets awarded to that party.

A Michigan court opined on this issue in 1994.⁵⁴ In that case, the payor retired and requested a modification due to the subsequent drop in his employment income.⁵⁵ Without considering retirement income from a fund awarded to the payor in the original dissolution proceeding, there was no question that the payor would have been entitled to a modification due to the change in circumstances.⁵⁶ However, the appellate court held that it was proper for the trial court to consider all of the circumstances when modifying spousal maintenance, including income derived from assets awarded in the original dissolution proceeding.⁵⁷

How a Colorado court might consider a payor or payee's access to assets awarded in the original dissolution proceeding may depend on the version of CRS § 14-10-114 that applied at the time of the original maintenance award.⁵⁸ Although the pre- and post-2014 versions of CRS § 14-10-114 have different language regarding the scope of financial circumstances a court may review (and thus entail slightly different analyses), a Colorado court could probably consider assets awarded in the original divorce under both versions of the statute. This is because the pre-2014 version of CRS § 14-10-114 directs the court to consider the financial resources of the party seeking maintenance, including *marital property apportioned* to such party, and the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.⁵⁹ The broad nature of these considerations would allow a Colorado court to take into account the assets awarded to a party in the underlying dissolution proceeding.

The post-2014 version of CRS § 14-10-114 is slightly more nuanced—it directs the court to consider the application of the advisory guidelines and the financial resources of each spouse, including the "potential income from separate or marital property or any other source," and the payee's ability to meet his or her needs

independently, or the payor's ability to meet his or her reasonable needs while continuing to pay spousal maintenance.⁶⁰ Further, the current version of CRS § 14-10-114 excludes from the definition of "income" "pension payments and retirement benefits" that were previously divided, as in the dissolution proceeding.⁶¹ However, there does not seem to be any such restriction on retirement accounts, so a court may consider as "income" distributions taken on retirement accounts as well as distributions that an individual chooses not to take, but which could be taken without incurring an early distribution penalty.⁶²

Thus, a court analyzing a modification for a maintenance award entered after 2014 will not be able to consider as "income" any pension or other defined benefit payments arising from plans divided in the original dissolution of marriage action. This will preclude the use of such payments in analyzing potential income and in calculating the amount of maintenance due under the advisory guidelines. However, the current version of CRS § 14-10-114 also provides that the court may consider "the distribution of marital property" in awarding spousal maintenance⁶³—this factor appears sufficiently broad to permit the general consideration of access to any asset awarded as part of the original property division.

Early Retirement

Neither the current version of CRS § 14-10-122, nor *Thorstad*, stands for the premise that retirement before "full retirement age" is automatically in bad faith. Rather, it simply means that a spouse retiring "early" bears the burden of proving that his or her retirement is in good faith under the *Swing* analysis.

Effect of Prior Maintenance

Thorstad also explained that spousal maintenance may be modified in the event of retirement pursuant to CRS § 14-10-114 (rather than CRS § 14-10-122) if the court reserves jurisdiction to do so.⁶⁴ A payor approaching retirement at the time of the original dissolution proceeding might find reserving jurisdiction desirable because, unlike a proceeding under CRS § 14-10-122, a payor requesting to modify spousal maintenance

under reserved jurisdiction pursuant to CRS § 14-10-114 will not have the high burden of proving a substantial and continuing change in circumstances that makes the original maintenance order unfair. Rather, upon retirement, a court would review the present circumstances of the parties as if making an original award of spousal maintenance in any other proceeding.

To reserve jurisdiction in such cases, the court must "(1) explicitly state its intent to reserve jurisdiction; (2) describe the future event upon which the reservation of jurisdiction is based; and (3) set forth a reasonably specific future time within which maintenance may be considered under section 14-10-114."⁶⁵ The *Thorstad* court clarified that the prior orders must *specifically* include the payor's retirement as a basis for reserving jurisdiction.⁶⁶

Conclusion

Current CRS § 14-10-122 and *Thorstad* together make it easier for a retiring spouse to establish that his or her retirement is a good faith career change that the court should consider in determining whether to modify spousal maintenance. However, the burden still rests heavily on the retiring spouse to present evidence about his or her own abilities and needs in relation to the abilities and needs of the payee spouse, and to establish that the retirement is one component of an overall change in circumstances for one or both parties that justifies reduction or termination of spousal maintenance. CL



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NOTES

1. Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population* (Pew Research Center 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population>.
2. *In re Marriage of Thorstad*, 434 P.3d 165 (Colo. App. 2019).
3. See HB 13-1058.
4. Both sections of Article 10 have gone through additional revisions since 2014; however, those revisions were smaller in scope and do not affect the main content of this article.
5. CRS § 14-10-114(3)(d) (2013).
6. CRS § 14-10-114(4) (2013).
7. CRS § 14-10-114(3)(a)(I).
8. CRS § 14-10-114(3)(a)(II).
9. CRS § 14-10-122(1)(a) (2013).
10. *In re Marriage of Swing*, 194 P.3d 498 (Colo. App. 2008).
11. *Id.* at 499.
12. *Id.* at 500.
13. *Id.* at 501.
14. *Id.*
15. CRS § 14-10-122(1)(a).
16. CRS § 14-10-122(2)(b).
17. CRS § 14-10-122(2)(c).
18. <https://www.ssa.gov/planners/retire/agereduction.html>.
19. *Thorstad*, 434 P.3d 165.
20. *Id.* at 170.
21. *Id.* at 173.
22. *Id.* at 171.
23. *Id.* at 171-72.
24. *Id.* at 172.
25. *Id.* at 173.
26. *Id.*
27. *Id.*
28. *Olsen v. Olsen*, 557 P.2d 604, 605 (Idaho 1976). See also *Gunn v. Gunn*, 505 N.W.2d 772, 774-75 (S.D. 1993) (finding that despite the payor's retirement, the income from his pension and social security disability payments was sufficient to continue meeting his obligation to payee).
29. See, e.g., *Swain v. Swain*, 660 So. 2d 1356, 1357 (Ala.Civ.App. 1995) (refusing to decrease spousal maintenance following retirement where payor continued to own "considerable assets," including a \$100,000 CD, stocks, rental property, a farm, and other real property); *Jameson v. Jameson*, 600 N.W.2d 577, 582 (S.D. 1999) (overturning the trial court's reduction in spousal maintenance where, although payor's income had decreased, payor still had a high value IRA, a \$110,000 stock portfolio, and a residence valued at \$180,000).
30. *Swain*, 660 So. 2d at 1357; *Jameson*, 600 N.W.2d at 582; *Burris v. Burris*, 852 P.2d 616, 619-20 (Mont. 1993) (refusing to modify maintenance even though payor's income was diminished, where payor had "in excess of \$120,000" in assets. Notably, the majority of the payor's net worth comprised illiquid real property and an interest in a corporation).
31. See, e.g., *Voter v. Voter*, 109 A.3d 626, 633 (Me. 2015) (upholding refusal to modify spousal maintenance based on the fact that payor's spending did not change following retirement); *Malkin v. Malkin*, 475 S.W.3d 252, 261-62 (Tenn. Ct.App. 2015) (no change in circumstances where evidence regarding payor's expenses

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showed “considerable discretionary spending and that he had no trouble paying for luxuries”).

32. *In re Marriage of Bowles*, 916 P.2d 615 (Colo. App. 1995).

33. *Id.* at 618.

34. *Id.*

35. *Id.*

36. *Id.* The same voluntariness argument could be used by a spouse attempting to rebut the “good faith” presumption granted to a retiring spouse under CRS § 14-10-122.

37. *Scott v. Scott*, 2002 WL 31105403 at *2 (Ohio Ct.App. 2002).

38. *Id.*

39. *Id.*

40. *Pratt v. Pratt*, 645 So. 2d 510 (Fla. Dist. Ct.App. 3d 1994).

41. *Id.* at 512.

42. *Id.*

43. *Id.*

44. *Maples v. Maples*, 2003 WL 22794474 at *2 (Tenn.Ct.App. 2003). See also *Pratt*, 645 So. 2d 510 (finding that payor had deliberately reduced his income by establishing a business in new spouse’s name); *Mann v. Mann*, 1978 WL 814 (Ark. 1978) (modifying downward but refusing to eliminate spousal maintenance where payor had transferred \$40,000 in property to his sons following retirement). But see *Gordon v. Gordon*, 2002 WL 31310195 at *1 (Conn.Super. Ct. 2002) (unpublished) (substantial change in circumstances found and maintenance substantially modified even though payor had transferred \$1.5 million in assets to present wife).

45. *Maples*, 2003 WL 22794474 at *2.

46. *Id.*

47. *Pratt*, 645 So. 2d at 512 (payee should not be required to dissipate marital assets to meet her needs where payor continued to have the ability to pay despite retirement); *Scott v. Scott*, 2002 WL 31105403 (no modification of maintenance where, although payor’s income decreased, terminating award would place payee’s income at or near the poverty level); *Enix v. Enix*, 1993 WL 26775 (Ohio App. 1993) (no modification of spousal support upon retirement of payor where payee testified that she was unable to work due to her health).

48. *Smith v. Smith*, 1994 WL 814265 at *6 (Del. Fam.Ct. 1994) (payor’s retirement constituted change in circumstances justifying modification; however, in light of payee’s dependence on spousal maintenance to meet her reasonable needs, maintenance payments could not be substantially reduced. The court noted that even though there was not enough income to provide for both parties’ needs, the payee should not be forced to bear the brunt of the financial burden caused by retirement).

49. *Swing*, 194 P.3d at 499–500.

50. *Austin v. Austin*, 766 So. 2d 86 (Miss.Ct.App. 2000).

51. *Bickel v. Bickel*, 2004 WL 2199543 at *2–3 (Ky.Ct.App. 2004) (although payee had made no effort to obtain employment post-divorce, court

found she was not capable of earning beyond minimum wage, and it was unreasonable for her to be expected to live off minimum wage employment while allowing the payor to enjoy retirement at the same age); *Smith*, 1994 WL 814265 (finding that it was not reasonable to expect payee to return to full-time employment at age 72); *In re Marriage of Halsey*, 41 P.3d 1119, 1124 (Or.App. 2002) (payee did not have the ability to work where payee was 64 and suffered from health problems); *Katz v. Katz*, 759 S.W.2d 857, 858 (Mo.Ct.App. E.D. 1988) (upholding reduction, but not termination, in spousal maintenance where payee had been unable to find work since the dissolution due to health problems and lack of marketable skills).

52. *Bracken v. Bracken*, 787 S.W.2d 678 (Ark. 1990) (upholding termination of spousal maintenance where payor had the ability to pay maintenance despite retirement but payee had obtained advanced degrees since the divorce and was capable of supporting herself); *Hickman v. Hickman*, 558 S.E.2d 607 (W. Va. 2001) (termination of maintenance upheld where payor’s income was reduced and payee had skills to obtain gainful employment).

53. See, e.g., *Hickman*, 558 S.E.2d at 609 (maintenance eliminated where payor’s income was substantially reduced from time of dissolution and payee was earning income with potential to earn more); *Chaney v. Chaney*, 699 P.2d 398, 402 (Ariz.App. 1985) (abuse of discretion to not find change of circumstances warranting modification where payor retired with numerous health conditions and payee earned income from payor’s pension); *Marx v. Marx*, 2004 WL 1576414 (Ohio Ct.App. 8th 2004) (maintenance eliminated where payor’s income decreased while expenses increased and payee earned more than payor at time of modification).

54. *McCallister v. McCallister*, 517 N.W.2d 268 (Mich.App. 1994).

55. *Id.* at 269.

56. *Id.*

57. *Id.*

58. Recall that *Thorstad* requires a court modifying maintenance to make its “change in circumstance” determination using the version of CRS § 14-10-114 in place at the time of the original divorce proceeding. *Thorstad*, 434 P.3d at 169.

59. See CRS § 14-10-114(4)(a) and (f) (2013).

60. CRS § 14-10-114(3)(c)(I)-(II).

61. CRS § 14-10-114(8)(c)(I)(H).

62. CRS § 14-10-114(8)(c)(II)(E).

63. CRS § 14-10-114 (3)(c)(IV).

64. *Thorstad*, 434 P.3d at 173–74.

65. *Id.*

66. *Id.* at 174.

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