

*In re Marriage of Kochan* (2011) 193 Cal.App.4th 420

Retirement: Whether it conjures up idealistic visions of leisure time, travel, second careers, golf, time with grandchildren, volunteering, or other long-sought options glorified in mass media advertising, it meant something else to the trial judge in the *Kochan* case. What happens when a 40-year employee of the California State University system is told by the trial court that he can earn more money by taking his retirement benefits and returning to work part time so he can have an enhanced earning capacity upon which a higher spousal support order will be based? What happens is called a reversal.

The issue, as framed by the appellate court, is may the family law court, in fixing the level of spousal support, consider the added income a party would earn by taking retirement and then returning to work part time? The answer is no. The Court of Appeal held that the family law trial court "...abuses its discretion when it bases an order for spousal support on a finding that a spouse's present earnings from long-term employment can be *increased* by taking retirement, and returning to work in an available, but different, position." Phrased another way: "In the final analysis, we are satisfied that a spouse who continues working in a long-held position, should not have his or her support obligation based on his or her earning capacity measured by some alternative employment scenario." In so holding, the Court of Appeal emphasized that actual earnings should be the basis for spousal support, not earning capacity based on retirement and added income from returning to work part time.

The Court of Appeal determined that *In re Marriage of Reynolds* [1998 Cal.Fam. Law Monthly 192 (July 1998)], offered the more analogous reasoning in considering how to evaluate the retirement factor relating to a spousal support order and where child support is not a concern. To refine the point, the *Kochan* court held that the family law court should no more enter an order that will require a spouse to take retirement than it should enter a support order that effectively compels a spouse to forego retirement. The Court expressed concern that a rule that allowed consideration of increased income from a retirement/re-employment scenario may be troublesome in many different scenarios. Selected examples illustrate the concern: In the event a judicial officer divorced, could the family law court consider the likelihood that he/she would earn significantly more income by becoming a private judge? If a physician at a public health clinic divorced, could the family law court consider the likelihood that he or she would earn significantly more income by taking employment with a private hospital and use an earning capacity justification for an increased amount of spousal support? Based on such concerns, the Court of Appeal declined to accept the proposition that consideration of increased earning capacity from alternative employment compared to long-held employment income is similar to consideration of the income a party foregoes by walking away from his or her current employment.

Retirement planning, elections, and benefit choices, are an important element of divorce and financial planning. The *Kochan* trial court's improper intrusion into the retirement phase of the husband's employment, which caused a forced and enhanced earning capacity scenario, underscores the care with which such retirement decisions must be exercised. Here, Ramon Kochan's decision not to retire and to keep working, even though it diminished community pension benefits, was rectified and stamped with approval by the reversal from the Court of Appeal.

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