

NO. A06-1504

State of Minnesota
In Court of Appeals

Carolyn Sue Moore, petitioner,

Respondent,

vs.

Randall Scott Moore,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUES

1. Did the district court have jurisdiction to modify the appellant's spousal-maintenance obligation under Minn. Stat. §518.64, subd. 2?

Trial court ruled in the affirmative.

Most Apposite Authorities:

Eckert v. Eckert, 299 Minn. 120, 216 N.W.2d 837 (1974)

Miller v. Miller, 409 N.W.2d 870 (Minn. App. 1987)

2. Did the district court abuse its discretion by modifying the appellant's maintenance obligation by awarding the respondent an additional \$151,270 in maintenance absent evidence or findings that a change in the parties' circumstances had occurred which rendered the existing obligation unreasonable or unfair?

Trial court ruled (implicitly) in the affirmative.

Most Apposite Authorities:

Videen v. Peters, 438 N.W.2d 721, 724 (Minn. App. 1989),
review denied (Minn. Jun. 21, 1989)

3. Did the district court's award of the appellant's past wages as additional spousal maintenance constitute a retroactive modification of maintenance in violation of Minn. Stat. §518.64, subd. 2(d)?

Trial court ruled (implicitly) in the negative.

Most Apposite Authorities:

Minn. Stat. §518.64, subd. 2(d)

4. Did the district court abuse its discretion in awarding the respondent need-based attorney's fees of \$12,000 absent any evidence of the respondent's current income, expenses, or ability to pay her own fees?

Trial court ruled (implicitly) in the negative.

Most Apposite Authorities:

Gales v. Gales, 553 N.W.2d 416, 422 (Minn. 1996)

Minn. Stat. §518.14, subd. 1

STATEMENT OF THE CASE

This appeal is taken from an Order issued by the Honorable James T. Swenson of the Hennepin County District Court, Fourth Judicial District, modifying the appellant's spousal-maintenance obligation, despite the appellant's objections (a) that the district court lacked jurisdiction and (b) that his former wife had failed to satisfy the requirements of the modification statute (Minn. Stat. §518.64, subd. 2). The appellant also challenges the award to the respondent of \$12,000 in attorney's fees.

STATEMENT OF FACTS

Introduction and Summary

The parties' marriage was dissolved in 2001. The decree awarded Carolyn temporary spousal maintenance through May of 2005.¹

On May 31, 2005, on what Carolyn characterized as the last day of Randall's maintenance obligation and, according to Randall, after his obligation had already expired, Carolyn filed a motion to extend the maintenance period. In response to that motion, the district court awarded Carolyn an additional \$151,270 in maintenance. The details are the following.

¹ In the interests of simplicity and clarity, the parties will be referred to by their first names.

The Dissolution (2001)

The parties married in 1989 and, as the court noted, Carolyn served her dissolution petition “on the tenth anniversary of their marriage”. (A-30)

The dissolution decree was entered in April of 2001. (A-1) Carolyn was then age 41; Randall was 44. (A-2) Their two children were ages 11 and seven. (A-3)

Randall. Randall holds medical and MBA degrees, and has worked at various times as a physician, a medical-school faculty member, a corporate officer in the private sector, and a self-employed consultant. (A-4) At the time of the decree, he was working as a consultant. (A-4) Based on the evidence at the time of the dissolution, including expert testimony, the court found that Randall’s income, while difficult to predict (A-33), would be between \$110,000 and \$120,000 per year for “the foreseeable future” (A-35).²

Carolyn. The trial court’s findings in the 2001 decree concerning Carolyn included the following:

- That she is “41 years old and in fine fettle. She regularly works out at the health clubs, runs, and pays significant attention to her personal appearance . . .” (A-31)
- That she “did little to contribute to the acquisition or preservation of marital property” (A-30)
- That she was “earning at only a subsistence level when the parties met”

² Although this finding appears in the Memorandum attached to the decree and not in the section of the decree entitled “Findings of Fact”, the trial judge explicitly noted at the end of his 20-page memorandum that “ALL FACTS SET FORTH HEREIN ARE INTENDED AS FINDINGS”. (A-42)

(A-30), and “the highest amount of yearly income ever generated by [her] was either \$17,000.00 or \$21,000.00, depending on which witness is to be believed” (A-28)

- That her employment skills “did not become outmoded during the marriage” (A-30)
- That although she lacks a college degree, she “spent considerable time and money starting her own [interior] design business” during the last few years before the separation, and had “secured a job designing a bank interior and [had also secured] a residential design commission . . .” (A-30)
- That “she could complete the interior design program at the Minneapolis School of Art and Design in two to three years” if she could attend full time and not have to work (A-29)³

³ Other findings made by the trial court, important to an overall understanding of the case, were these:

- That Carolyn “demonstrated time and time again that she has limited command for facts or little respect for the truth . . .” (A-23)
- That she “lied to [Randall] during the courting stage of their relationship when she told him that she had a college degree from Purdue University, when in fact she had little post high-school education.” (A-23)
- That “no purpose would be served by outlining in great detail [her] problems with the facts . . .” (A-23)
- That her post-separation travel expenses “soared to about \$10,000.00 per year, as compared to one-tenth that level in travel related spending before the parties separated.” (A-25)
- That she “spent the parties’ income in a lavish manner” after the parties moved to Minnesota in 1999. (A-10) (As evidence of this, the court referred to evidence offered by Randall that Carolyn had recently undergone at least 15 purely cosmetic surgeries, and spent nearly

The Marital Estate. The marital estate was valued at \$1.2 million and each party was awarded half. (A-9)

Custody. Joint legal custody was awarded, and the court adopted the parties' Parenting Plan. (A-13 & A-44 to A-62) Under that plan, the parties were to share physical custody approximately equally.

Child Support. The district court found that Randall's income exceeded the guideline ceiling, resulting in a support calculation of \$1,884 per month "before application of *Valento*". (A-38)⁴ The court also found that, "[s]ince [Carolyn] will be going to school full time, she will have no earned income upon which to base a support calculation." (*Id.*)

\$11,000 on such surgeries in 1998 and 1999 alone. [*Id.*].)

- That she "did little to contribute to the acquisition or preservation of marital property . . . In fact, just the opposite is true . . . [T]here is no doubt that she spent money at a fast and furious pace during the last couple of years." (A-30 to A-31)

⁴ The district court's reference to *Valento* was to what is often referred to as "the *Hortis-Valento* formula", a principle originating in *Hortis v. Hortis*, 367 N.W.2d 633 (Minn.App.1985) and *Valento v. Valento*, 385 N.W.2d 860 (Minn.App.1986), *review denied* (Minn. Jun. 30, 1986). The Minnesota Supreme Court has described the origin and substance of this formula as follows:

[A]n approach called the *Hortis/Valento* formula has evolved out of a series of cases decided by the court of appeals interpreting the guidelines to require courts to treat each parent with joint physical custody as a child support obligor as to the portion of time the child spends with the child's other parent. Each obligor is required to pay the child support obligation indicated under the child support guidelines at Minn.Stat. § 518.551, subd. 5(b) (1998), reduced by the percentage of time that the parent has physical custody of the children.

Rogers v. Rogers, 622 N.W.2d 813, 815-16 (Minn. 2001) (footnotes omitted).

“Therefore”, the court ruled, “application of *Valento* results in a \$942.00 monthly support obligation,” and Randall was ordered to pay that amount. (*Id.*)

Spousal Maintenance. The decree provision at the center of this appeal is that pertaining to spousal maintenance. It provided in relevant part as follows:

6. **Maintenance.** [Carolyn] shall pay no temporary or permanent maintenance to [Randall].

Commencing March 1, 2001, [Randall] shall pay to [Carolyn] as and for temporary maintenance the sum of Two Thousand Nine Hundred Ninety Dollars (\$2,990.00) per month, payable in equal installments of One Thousand Four Hundred Ninety Five Dollars (\$1,495.00) on the first (1st) and fifteenth (15th) day of each month until further order of the Court, [Carolyn’s] remarriage, or [Randall’s] death, whichever first occurs. It is a basic assumption of this temporary maintenance award, that [Carolyn] will be attending an interior design school, starting as soon as possible, and will be a full-time student until the curriculum is completed.

The court specifically reserves jurisdiction to revisit [Randall’s] spousal maintenance obligation as set forth herein . . .

* * *

No later than 18 months from the date of this Order, counsel for the parties shall arrange a conference call with the Court to discuss the status of [Carolyn’s] design school progress and [Randall’s] employment. This conference is not intended to preclude either party from exercising their section 518.64 rights at an earlier time.

If the matter does not come back to the Court at an earlier date, either by telephone conference call or a section 518.64 motion, a motion to revisit the maintenance award shall be properly noticed and served by [Carolyn], with a hearing scheduled prior to June 1, 2005. If the matter does not come back before the Court prior to June 1, 2005, the maintenance ordered herein shall cease and the Court’s reservation of jurisdiction shall end.

* * *

(A-14 to A-15)

The court found that to duplicate the marital standard of living, Carolyn would need combined support (maintenance and child support) of some \$8,000 per month, or \$96,000 per year. (A-28)⁵

Because Randall's income at the time of the decree was inadequate to make such an award, the district court calculated its maintenance award by equalizing the cash flow between the parties. (A-38) By so doing, the court had the parties "share the hardship", and promised to "revisit the maintenance issue in eighteen months". (A-38)

The First Increase in Maintenance (2002)

In June of 2002, Randall was hired as Chairman and CEO of a small telecommunications company at a salary of \$175,000 per year. (A-116 to A-117) As the decree required, he provided Carolyn with copies of his pay stubs disclosing this rate of

⁵ Randall had high-paying corporate positions from 1991 to 1999 with Caremark International, Inc. and MedPartners, Inc., but his position was eliminated in 1999, the year he began to work as a consultant. (A-4) During his years of corporate employment, Randall's earnings reached as high as \$500,000 per year, although only briefly. (A-25) As the district court found:

The parties did not enjoy a half-million dollars per year in income on a consistent enough basis that spending commensurate therewith was representative of their "standard" of living, although [Carolyn] made every effort to elevate that amount of cash flow to a "standard" by continuing to spend as though the parties were generating a half-million dollars in income long after that ceased to be the case.

(A-25)

compensation. (*See* A-15, para. 6[b]).

Two months later, in August of 2002, about 16 months after entry of the decree, Carolyn filed a motion seeking a variety of relief, including an order “increasing the amount of spousal maintenance . . . based upon the paystubs provided to [Carolyn] by [Randall]. (A-64)

Based upon this post-decree increase – from \$110,000 to 120,000 at the time of the decree, to \$175,000 with the new job – the district court granted Carolyn’s motion, increasing maintenance from \$2,990 to \$4,000 per month. The court’s order, issued in September of 2002, provided as follows:

Commencing September 1, 2002, as and for temporary spousal maintenance [Randall] shall pay to [Carolyn] the sum of \$4,000 per month in the same manner and under the same conditions set forth in conclusion 6 of the Decree.

(A-71, para. 4)⁶

**Carolyn’s Second Motion to Modify Maintenance
(May 31, 2005)**

On May 31, 2005, Carolyn filed a motion seeking an order “extending the term of temporary spousal maintenance”. (A-73) The hearing date in the motion was June 23, 2005.

(*Id.*)

In response, Randall moved to dismiss, pointing out that the decree required the hearing on any such motion to be held prior to June 1, 2005, that Carolyn had failed to meet

⁶ Randall does not challenge (and has never challenged) this order.

that deadline, and that the court was therefore without jurisdiction. (A-75 to A-76)

The district court ruled that the deadline in the decree applied only to the right to seek a *de novo* review of maintenance, and not to a statutory modification motion. (A-77 to A-81)

It ruled as follows:

1. To the extent that [Carolyn's] pending maintenance motion is treated as a section 518.64 modification motion, [Randall's] motion to dismiss for lack of jurisdiction is denied.
2. To the extent that [Carolyn's] motion may be construed as a request to revisit the initial temporary spousal maintenance award, without [her] needing to satisfy section 518.64, the motion to dismiss is granted.

(A-77, paras. 1 & 2.)

Evidence Pertaining to Carolyn's Motion

Among the evidence placed before the district court with respect to Carolyn's modification motion was the following:

- That Randall's employer had ceased paying Randall his salary in November of 2004, resulting in his income dropping from \$175,000 per year to zero (A-116)
- That despite that development, Randall continued to make timely and full maintenance payments to Carolyn through May of 2005, when his obligation was to end under the decree (A-117 & A-148)
- That he also continued to pay timely and in full all child support amounts which had become due through the present (*Id.*)
- That from November of 2004 onward he has made these payments of maintenance and child support from his assets, since he has had no income from employment since that time (*Id.*)
- That from 2000 onward, the amount of spousal maintenance and child

support Randall has paid Carolyn has amounted to 79.5% of his earned income (A-148)

- That (a) one of the assets awarded Randall in the 2001 decree was stock in a company called “Medical Card Systems”, (b) that investment greatly increased in value in the three years since the decree was issued, and (c) when the company was sold in November of 2004, Randall became entitled to \$970,000 in sale proceeds before any deduction for federal, state, and Puerto Rican taxes (A-117; A-132; A-149)
- That although Carolyn was supposed to attend school full time following entry of the 2001 decree, she never did, and failed to take any classes at all during the following semesters: Summer and Fall of 2001; Spring and Summer of 2002; Summer of 2003; Summer and Fall of 2004; Spring, Summer, and Fall of 2005 (A-105; *see also* A-129 to A-130)
- Carolyn admitted in her deposition to having traveled 227,795 miles since entry of the decree (A-106)

Randall’s Motion in Limine

With Carolyn’s modification motion proceeding under Section 518.64, Randall attempted to engage in discovery with respect to changes in Carolyn’s income and expenses since the 2002 increase in maintenance. Carolyn refused or neglected, despite specific, Rule-authorized requests, to provide many documents and much information pertaining to those matters. (*See generally* A-82 to A-103) She even signed a stipulation that she would provide the missing information, but never did. (A-97, para. 4) As a result, Randall filed a motion in limine to exclude from the district court’s consideration any evidence pertaining

to her income or expenses. (A-82 to A-103)⁷

**The Maintenance Order
(October 26, 2005)**

In ruling on Carolyn's motion, the district court noted that her failure to complete her education could not constitute a change in circumstance under the modification statute since her failure was the result of her own "self-imposed hiatus from school", and that she had "already enjoyed over a year and a half of spousal maintenance at \$4,000 per month without making any effort at finishing her degree". (A-130) The court found as follows:

The Court never expected that she would drop out of school all together, and is dismayed to discover that she dropped from 12 credits a semester during fall 2002 to 8 credits a semester during Spring 2003, took no credits in the summer of 2003, resumed school in the fall, but only took 8 credits, and then ceased attending school at all starting with Spring 2004 . . .

[Carolyn] suggests that she needs about 76 more credits to graduate and suggests that she will need six semesters, at 12 credits a semester, to complete her education . . . If [she] had started school earlier and gone full time, it is likely that she would have graduated by now. (A-129 to A-130)

The district court also discussed at length why the sale proceeds from Randall's interest in Medical Card Systems constituted an asset, and not "income or earnings," and could not therefore be viewed as a source of spousal maintenance. (A-132 to A-135) The

⁷ Among the documents and information Carolyn refused to provide were (a) her educational expenses for 2004 and 2005, (b) copies of her credit card statements, (c) documents pertaining to revenue from her rental properties, (d) information on and copies of 175 checks, and multiple pages from her bank statements, and (e) her frequent-flyer statements. (A-82 *ff.*, especially A-91 to A-95, and A-97 to A-100)

court explicitly noted that it “has no jurisdiction to take post-valuation date, asset appreciation and transfer even one penny to the spouse to whom the asset was not awarded in the Decree.” (A-133) In addition, the court explicitly ruled that maintenance obligors, like Randall, cannot be required under Minnesota law to use assets awarded them in the dissolution decree, even post-decree appreciation on those assets, to pay spousal maintenance. (A-135)⁸ The district court’s treatment of this issue was not challenged by Carolyn after the order was issued, and she has not filed a Notice of Review.⁹

With respect to the decision of Randall’s employer to suspend paying his salary in November of 2004, the district court found that the explanation offered was both “logical” and “credible”. (A-136)¹⁰

Nevertheless, the court awarded Carolyn an additional \$151,270 in maintenance in its Maintenance Order of October 26, 2005. (A-124 *ff.*) The court focused on the fact that Randall’s employer had stopped paying his salary in November of 2004, and ordered

⁸ At the end of a detailed analysis of Minnesota case law, the district judge wrote: “All of these cases have a common thread: obligees should not be forced to spend assets, even post-decree appreciation in order to relieve an obligor of his/her support obligation, and there is no logical or fair reason to treat obligors in a different manner.” (A-135)

⁹ See Minn.R.Civ.App.P. 106 (“A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of the appellate courts.”).

¹⁰ The explanation was, in essence, that despite some major accomplishments and awards, Randall’s employer was a small company in a new field, and was continuing to struggle with operating capital; it faced a choice between laying off key people or making other sacrifices, including suspending Randall’s salary, to keep the company going. (A-116 to A-117)

Randall, as additional maintenance, to assign to Carolyn his right to his unpaid salary.

Specifically, the district court ordered as follows:

1. [Carolyn's] motion to increase her temporary maintenance award is denied.
2. [Her] motion to extend her temporary maintenance until June 2009 is denied;
3. [Randall's] temporary maintenance obligation is temporarily suspended.
4. Within 21 days of the date of this letter [sic], [Randall] shall provide to [Carolyn] an irrevocable assignment, assigning to [Carolyn] the following after-tax portion of his \$175,000 salary for the months of November 2004 through the date on which American TeleCare, Inc. resumes paying his salary: \$4,000 times the number of months during which [Randall's] salary remained unpaid up to a maximum of \$151,270, plus interest at the statutory judgment rate on each \$4,000 installment commencing with June 2005 until the full \$151,270 has been paid . . .

(A-124 to A-125)

Randall's Motion for Reconsideration

Puzzled by this ruling, Randall filed a motion for reconsideration, believing the district court must have been under the (mistaken) impression that, when Randall's salary was stopped in November of 2004, he had stopped paying maintenance and accumulated arrearages. (A-139 *ff.*)

The Order of February 2, 2006

In denying Randall's reconsideration motion, the district court denied believing that there had been arrearages, and explained its rationale for awarding \$151,270 more in

maintenance. It explained that the court had wanted at the time of the 2001 dissolution to award Carolyn family support of \$8,000 per month, but had been unable to do so because Randall did not make enough money. (A-156 to A-160) The figure of \$151,270 was, in essence, the difference between what Carolyn had received from Randall in maintenance since the decree and what the district court would have awarded her if Randall's income had been large enough at the time of the decree to justify such an award. (*Id.*)¹¹

Absence of Findings on Changes of Circumstances

Nowhere in any of the district court's orders on Carolyn's modification motion is there any finding that a substantial change in the parties' earnings has occurred since the 2002 increase in maintenance (other than the fact that Randall's salary was suspended in November of 2004). Nor is there any finding of any other substantial change in the parties' circumstances that falls within the scope of the modification statute (Minn. Stat. §518.64, subd. 2). Nor is there any finding that the maintenance award, as amended in 2002, has been rendered unreasonable or unfair by any such change in circumstance.

¹¹ Randall's appeal from the Order of February 2, 2006 was dismissed by this Court as premature. (A-173). On remand, the district court issued an Order dated May 31, 2006 which incorporated both the October 26, 2005 Maintenance Order (A-180, para. 14) and its order of February 2, 2006 (A-181, para. 21), and rendered both of them "final" for purposes of appeal (A-187, para. 4 ["final" order]).

ARGUMENT

Summary Introduction.¹² The award of \$151,270 in additional spousal maintenance must be vacated for three independent reasons. *First*, under the terms of the original award, the district court had already lost jurisdiction over Randall's maintenance obligation by the time Carolyn filed her motion on May 31, 2005 to extend it. *Second*, even if the district court had jurisdiction, Carolyn's proof did not meet the requirements of the statute for modifying spousal maintenance, and the district court's orders are devoid of the findings essential to support a modification. That the district court might have wanted to award more maintenance in 2001 does not justify modifying the award in 2005 in the absence of a change in circumstance, cognizable under Minn. Stat. §518.64, subd. 2, that made the original award unreasonable or unfair. Here, there was no such change, no evidence of any such change, and no finding that such a change had occurred or that such a change had rendered the "existing" award unreasonable or unfair. In effect, after ruling that a *de novo* review could not be conducted, and that Carolyn had to meet the far-heavier burden of proof under the statute, the court conducted what amounted to a *de novo* review, without mention of or appeal to the statutory requirements. *Third*, even if the court had jurisdiction and even if there had been evidence to support a modification, the modification ordered was retroactive,

¹² "The argument may be preceded by a summary introduction . . ." (Minn.R.Civ.App.P. 128.02, subd. 1[d])

in clear violation of Minn. Stat. §518.64, subd. 2(d).¹³

The maintenance order cannot stand. No remand for additional findings is appropriate. The record simply cannot support any modification or extension. The order must be vacated.¹⁴

I. THE APPELLANT’S MAINTENANCE OBLIGATION HAD EXPIRED BY THE TIME THE RESPONDENT FILED HER MODIFICATION MOTION, AND THE DISTRICT COURT THEREFORE HAD NO JURISDICTION TO MODIFY THE AWARD.

Subject-matter jurisdiction is an issue of law, and an appellate court therefore owes no deference to the ruling or reasoning of the court below. *Miller v. Miller*, 469 N.W.2d 483, 487 (Minn. App. 1991), *review denied* (Minn. Jul. 31, 1991). A lack of jurisdiction may be raised at any time. *Berens v. Berens*, 443 N.W.2d 558, 562 (Minn. App. 1989), *review denied* (Minn. Sept. 27, 1989).

In the case of temporary maintenance, jurisdiction is lost when the obligation to pay maintenance has ended.¹⁵

¹³ The cited statute in relevant part provides that “[a] modification of . . . maintenance . . . may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party . . .” (Minn. Stat. §518.64, subd. 2[d])

¹⁴ In addition, the award of need-based attorney’s fees of \$12,000 was made without the statutory requirements having been met and must be reversed.

¹⁵ “Once maintenance payments end, the court is without jurisdiction to modify maintenance.” *Loo v. Loo*, 520 N.W.2d 740, 745 (Minn. 1994) (citation omitted; emphasis added). *Accord, Santillan v. Martine*, 560 N.W.2d 749, 751 n. 1 (Minn. App. 1997) (“[T]he expiration of a term of maintenance automatically deprives the court of authority to award further maintenance . . .”); *Wibbens v. Wibbens*, 379 N.W.2d 225, 226-27 (Minn. App. 1985)

The issue of jurisdiction in the instant case is governed by *Eckert v. Eckert*, 299 Minn. 120, 216 N.W.2d 837 (1974), a case that involved a maintenance termination provision similar to the one involved here. In *Eckert*, a permanent alimony award had been amended to provide for monthly payments:

“commencing with the first Monday of January, 1968, and continuing for a period of five years thereafter, until the end of December 1972, at which time either party may petition the Court to review the requirement for the payment of alimony. *If no petition or motion is filed with the Court by December 31, 1972, the obligation to pay alimony shall terminate as of December 31, 1972.*”

(*Id.*, 299 Minn. at 122, 216 N.W.2d at 838 [emphasis added; quoting the trial court].) The ex-wife filed a motion under Section 518.64, but after the deadline. In affirming the trial court’s ruling that it was stripped of jurisdiction when that deadline was not met, the *Eckert* Court quoted with approval the following excerpt from the lower court’s ruling:

“Once that date passed without petition, the parties were no longer under any obligation imposed by the court. The court was then without jurisdiction to reinstitute an award of alimony the same as if no alimony had been granted in the first instance.”

(*Id.*, 299 Minn. at 123, 216 N.W.2d at 839.) As the *Eckert* Court stated, “. . . the basis for the rule herein announced is . . . that there cannot be modification of something that has ceased to exist.” (*Id.*, 299 Minn. at 125, 216 N.W.2d at 840.)

The power conferred on trial courts to modify maintenance (then alimony) under Minn. Stat. §518.64, the *Eckert* Court ruled, includes the power to set the conditions under

(there is jurisdiction to modify temporary maintenance only “before its expiration”, that is, “before the maintenance obligation cease[s]”).

which the obligation will be extinguished (just as the trial court has the power to do at the time of the original award). When the deadline passed in that case without a reservation of jurisdiction, jurisdiction to modify the award under Minn. Stat. §518.64 was lost. As the *Eckert* Court stated:

[W]e hold that the statutory power to modify an allowance of alimony conferred upon the trial court includes the power to terminate the obligation to pay alimony, and where this power is exercised by the trial court, it is without jurisdiction to thereafter reinstate alimony unless jurisdiction in the matter is reserved.

Id., 299 Minn. at 126-27, 216 N.W.2d at 841.

Eckert controls the issue of jurisdiction in the instant case. Here, in the 2001 decree, the court made an award of temporary maintenance, and explicitly described the circumstance under which that obligation would terminate. Unlike the lower court in *Eckert*, which simply required that a motion “be filed” by a particular date to preserve the right to seek modification, the district court in the instant case required that a hearing on a motion be held by a particular date. If it were not, the decree was clear: “*the maintenance ordered herein shall cease and the Court’s reservation of jurisdiction shall end.*” (A-15; emphasis added.) It was clear well before May 31, 2005 when Carolyn filed her motion that jurisdiction had already been lost.

The decree in the instant case ordered maintenance payments to be made “on the first (1st) and fifteenth (15th) day of each month”. (A-14) By May 15, 2005, Randall had made his last maintenance payment. When that last payment was made, his obligation ended, and

jurisdiction under Minn. Stat. §518.64, subd. 2 was lost.¹⁶

The district court side-stepped this result by ruling that the “hearing” deadline in the decree applied only to Carolyn’s right to obtain a *de novo* review of maintenance, and not to her right to seek modification under Minn. Stat. §518.64, subd. 2. (A-77 to A-81) That ruling, however, conflicts directly with the language of the decree.

The termination condition set forth in the maintenance award makes it clear that the May 31st hearing deadline applied both to Carolyn’s right to *de novo* review and to her right to seek modification under the statute. The relevant language is the following:

Commencing March 1, 2001, [Randall] shall pay to [Carolyn] as and for temporary maintenance the sum of Two Thousand Nine Hundred Ninety Dollars (\$2,990.00) per month, payable in equal installments of One Thousand Four Hundred Ninety Five Dollars (\$1,495.00) on the first (1st) and fifteenth (15th) day of each month until further order of the Court, [Carolyn’s] remarriage, or [Randall’s] death, whichever first occurs . . .

* * *

[A] a motion to revisit the maintenance award shall be properly noticed and served by [Carolyn], with a hearing scheduled prior to June 1, 2005. *If the*

¹⁶ See the authorities cited in n. 15, *ante*. The Court should also note the following. For Carolyn to meet the decree’s hearing deadline, she would have had to place on the court’s calendar a hearing to be held no later than May 31st. At the time she scheduled the hearing, she would have had to notify Randall of the hearing date. (*See* Minn.Gen.R.Prac. 303.01[a][2]: “[A] party who obtains a date and time for hearing a motion shall promptly give notice of the hearing date and time . . . to all other parties to the action.”) In addition, Carolyn would have had to serve Randall with her motion papers specifying the hearing date no later than May 17th (for a May 31st hearing date, the last date the hearing could be held under the decree). (*See* Minn.Gen.R.Prac. 303.03[a][1], requiring service and filing of all motion papers “at least 14 days prior to the hearing”.) **None of that occurred here.** Here, the motion was not served until May 31st, and the hearing date she scheduled was set for June 23rd. (A-73 to A-74)

matter does not come back before the Court prior to June 1, 2005, the maintenance ordered herein shall cease and the Court's reservation of jurisdiction shall end.

(A-14 to A-15 [emphasis added])

The final sentence in the excerpt quoted above clearly applies to any kind of review of maintenance. If it did not, the decree would contain *no end at all* to Randall's maintenance obligation, and the award would have constituted a permanent, not a temporary, award. The only other termination conditions in the decree were "until further order of the Court, [Carolyn's] remarriage, or [Randall's] death, whichever first occurs." Those are termination conditions which also apply to permanent awards.¹⁷ For this award to be temporary, which it clearly was, it had to have a cut-off date. The *only* cut-off date in the decree was that set forth in the last paragraph of the excerpt quoted above. For jurisdiction to be retained, a motion had to be made, and the hearing on that motion had to be held, no later than May 31, 2005.

Another way to view the matter is this. There were two explicit consequences to a failure to comply with the May 31st hearing deadline: the "reservation of jurisdiction" over maintenance would end and "*the maintenance ordered herein shall cease*". (Emphasis added.) Absent the phrase "the maintenance ordered herein shall cease", there would be

¹⁷ The presumption is that all maintenance awards, including permanent ones, terminate upon remarriage or death. "Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." (Minn. Stat. §518.64, subd. 3)

nothing in the decree to make the maintenance award temporary instead of permanent.

Here, the district court focused only on the “reservation-of-jurisdiction” language, and ignored the “maintenance-shall-cease” language, committing an error similar to that involved in *Miller v. Miller*, 409 N.W.2d 870 (Minn. App. 1987).¹⁸

Thus, the district court erred in ruling that “[w]hat [Carolyn] lost by not following the Court’s order was [only] her ability to have the Court revisit the maintenance award, and perhaps extend the duration or increase the amount, without demonstrating a substantial change in circumstances.” (A-81) Here, under *Eckert* and the other authorities cited above,

¹⁸ In *Miller*, the former husband’s maintenance obligation was to run “until such time as [the former wife] no longer has a minor child of the parties residing with her through the payment due September 1, 1990.” (*Id.* at 872 [emphasis omitted]) Despite uncontested evidence that both of the parties’ minor children had stopped living with their mother in 1986, the district court denied the ex-husband’s motion to terminate his maintenance obligation. This Court held that ruling was erroneous, stating: “The [district] court failed to acknowledge the leading requirement by interpreting the provision only to mean ‘Husband is to pay Wife \$500.00 in maintenance on the first and fifteenth of each month *through [the] payment due . . . September 1, 1990.*’” (*Id.* at 873 [emphasis by the Court].) The trial court had ignored the other termination condition. As the *Miller* Court stated: “[T]he trial court clearly erred by failing to acknowledge the express requirement [that] maintenance terminates when the parties’ minor children no longer live with respondent. Because the court specifically found both children were no longer living with respondent, but with appellant on a ‘permanent basis’ on June 6, 1986, appellant’s maintenance obligation terminated on that date.” [*Id.* at 874.]

The error made by the trial court in *Miller*, namely, reading language out of the maintenance provision, is similar to the error of the district court here. In the instant case, the district court simply ignored the language that “*the maintenance ordered herein shall cease*” if a hearing on a maintenance motion were not held by May 31st. When the obligation ends, of course, so does jurisdiction, and that loss of jurisdiction is for all purposes, including the bringing of modification motions under Section 518.64.

the termination conditions applied both to Carolyn's right to a *de novo* review and her right to seek a modification under the statute. Therefore, the lower court lacked jurisdiction over Carolyn's motion, and the order awarding her additional maintenance is void.

II. THERE IS NO EVIDENCE IN THE RECORD OF ANY CHANGE IN CIRCUMSTANCE THAT MADE THE MAINTENANCE AWARD UNREASONABLE OR UNFAIR.

While the lack of jurisdiction disposes of the maintenance issue, the appellant will nevertheless address a second, independent ground for reversal of the maintenance award, namely, that Carolyn simply did not meet her statutory burden of proof, and the district court's findings do not support any kind of modification.

The portion of the modification statute relevant to this proceeding is the following:

Minn. Stat. §518.64

* * *

Subd. 2. Modification. (a) The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following: (1) substantially increased or decreased earnings of a party; [or] (2) substantially increased or decreased need of a party . . . , [either] of which makes the terms unreasonable and unfair . . .

This statute "places a dual burden on the party seeking modification – first, to demonstrate that there has occurred a substantial change in one or more of the circumstances identified in the statute and second, to show that the substantial change has the effect of rendering the original award unreasonable and unfair." *Hecker v. Hecker*, 568 N.W.2d 705,709 (Minn. 1997) (citations omitted). "Unreasonable and unfair' are 'strong terms which place upon the claimant a burden of proof more than cursory.'" *Kielley v. Kielley*, 674

N.W.2d 770, 779 (Minn. App. 2004).

Before a maintenance obligation may be modified, the district court must make explicit findings that each prong of this dual burden has been met.

[T]he modification of the original maintenance award must meet both of the statutory requirements specified in Section 518.64, subd. 2. That is, the trial court must find both that there has been a significant change in the parties' circumstances and that the change renders the terms of the original decree unreasonable and unfair. Finally, the trial court must make particularized findings supporting the amount of modification granted.

Videen v. Peters, 438 N.W.2d 721, 724 (Minn. App. 1989), *review denied* (Minn. Jun. 21, 1989) (emphasis added). In *Videen*, this Court reversed an extension of a temporary maintenance obligation where the court failed to make the necessary findings, stating:

In the present case, the trial court's findings justifying the extension of the maintenance award are not fully explained in the record. The decision should indicate which of the statutory factors for modification the court considered in its decision to extend the period for spousal maintenance payments. It should also indicate whether a substantial change in circumstances has occurred since the original decree was issued, and should specify why extending the maintenance payments is required to avoid unreasonableness or unfairness.

Id. at 724.

In ordering modifications, trial courts are to proceed “cautiously and only upon clear proof of facts showing . . . a substantial change in circumstances”. *Wiese v. Wiese*, 295 N.W.2d 371, 372 (Minn. 1980).

The change in circumstances the moving party must establish must have occurred since “the time the award was last modified”. *Id.*

Where the moving party has failed to carry his or her burden, or where the court's findings do not address the essential statutory elements, orders increasing or extending maintenance or support obligations must be reversed.¹⁹

Here, there is absolutely no evidence in the record of any change in circumstance that meets the statutory requirements. The only relevant change since the September, 2002 increase in maintenance was that Randall's employer *stopped paying his salary in November*

¹⁹ See *Miller v. Miller*, 409 N.W.2d 870, 874 (Minn. App. 1987) (reversing extension of temporary maintenance beyond the termination event specified in the decree where the extension "is not supported by the requisite findings"); *Videen v. Peters*, 438 N.W.2d 721, 724 (Minn. App. 1989), *review denied* (Minn. Jun. 21, 1989) (reversing extension of temporary maintenance where district court failed to make findings addressing the required statutory factors of changed circumstances and whether they made the existing award unreasonable or unfair); *Santillan v. Martine*, 560 N.W.2d 749, 752 (Minn. App. 1997) (reversing extension of temporary maintenance based on wife's failure to complete education as contemplated in the decree where the district court failed to make findings on both parties' income and needs and failed to address whether that change had rendered original award unreasonable or unfair); *Wiese v. Wiese*, 295 N.W.2d 371, 372 (Minn. 1980) (reversing increase in maintenance where required findings were not made and the underlying record revealed "no facts to support a finding that a clear and substantial change in circumstances, as contemplated by statutory and decisional authority, has occurred."); see also *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986) (reversing increase in child support where the district court's findings addressed some, but not all, of the factors courts are required by the modification statute to address, namely, increased or decreased earnings and needs of both parties, and whether any such changes have rendered the existing order unreasonable or unfair); *Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989) (reversing increase in child support where the district court's findings failed to compare both parties' needs between time of decree and time of modification motion); *Giencke v. Haglund*, 364 N.W.2d 433, 436 (Minn. App. 1985) (reversing an increase in child support where, despite changed circumstances, those changes had not made the existing award unreasonable or unfair, the Court stating: "If the terms of child support as set out in the original decree are not found to be unreasonable and unfair by reason of changed circumstances, then changed circumstances alone do not support an upward or downward child support modification.").

of 2004. This is hardly the kind of change that suggests his maintenance obligation should be *increased or extended*. It suggests the opposite. In effect, the court here increased and extended Randall's maintenance obligation based on a change in circumstance that should have dictated the opposite result.²⁰

The illogic of the district court's ruling becomes apparent when one reads the court's later descriptions of its rationale. For example, the district judge explained his maintenance ruling of October, 2005 in his order of May 31, 2006. Here's what he said:

[Carolyn's] motion to increase her temporary maintenance, and extend it until June 2009, was denied, [Randall's] maintenance obligation was temporarily suspended because his employer was not paying his earned salary, and [Randall] was ordered to assign to [Carolyn] a portion of that earned, but unpaid salary in order to compensate her for what she would have received had [Randall's] employer not temporarily ceased paying his earned salary.

(A-180, para. 14 [emphasis added]) This simply makes no sense.

If Randall's employer had not stopped paying his salary, the parties' respective circumstances would have been precisely what they were in 2002 when the maintenance amount was increased from \$2,990 to \$4,000 per month. The issue before the court in 2005 was this: What change, if any, occurred since the 2002 increase that makes that award unreasonable or unfair? The answer, clearly, is "none". Randall is no longer getting his

²⁰ See *Christenson v. Christenson*, 490 N.W.2d 447, 450 (Minn. App. 1992), review granted (Minn. Jan. 15, 1993), review dismissed (Minn. Feb. 16, 1993) (where in affirming the denial of the husband's maintenance-modification motion, this Court stated: "Here all changes in circumstances suggest any modification should be in favor of respondent, not appellant.")

salary, but that's not unfair to *Carolyn* because she was *still getting paid* her maintenance of \$4,000 per month.

Two other "changes" occurred, but neither was of the kind to invoke Section 518.64. One was that Carolyn did not complete her education. However, the court made clear that was her own fault, and could not serve as grounds for modification under the statute. (*See* A-30 [Carolyn "should not be able to take advantage of her self-imposed hiatus from school"].) The second change was that one of the assets awarded Randall under the 2001 decree, his interest in Medical Card Systems, had appreciated in value by 2005. Again, however, the court made clear, after a detailed and lengthy analysis, that that development could not serve as a change in circumstance under the statute. (*See* A-132 to A-135) The appellant concurs in the court's analysis of that issue, and the respondent never challenged it.

Thus, the only change relevant to the statute was the cessation of Randall's salary. That change, however, could only support a *refusal* to increase or extend maintenance. Clearly, there is a fundamental confusion at work here, and the Maintenance Order of October 26, 2005 – which was rendered "final" by the Order of May 31, 2006 – simply cannot stand.

III. THE ASSIGNMENT OF THE APPELLANT'S PAST WAGES TO THE RESPONDENT AS ADDITIONAL MAINTENANCE CONSTITUTED AN IMPERMISSIBLE, RETROACTIVE MODIFICATION OF MAINTENANCE.

Each of the foregoing grounds – jurisdiction, and insufficiency of evidence and

findings – requires reversal. However, the lower court’s order is subject to a third fatal defect.

As mentioned above, Randall continued to pay Carolyn all court-ordered maintenance and child support, and did so in timely fashion, even though his salary stopped in November of 2004. His payments covered, among others, the two months that remained in 2004 and the first five months of 2005 (the only months that remained of his maintenance obligation under the decree).

The district court has now ordered him to pay Carolyn another \$4,000 per month for each of those months, and to do so with salary he earned during those months; that time period, however, is one during which no maintenance motion was pending. (Carolyn’s motion was not filed until May 31, 2005.)

Subject to exceptions inapplicable here, Minnesota law precludes retroactive modifications of maintenance awards to a date prior to service of the modification motion. (Minn. Stat. §518.64, subd. 2[d].)²¹

²¹ The full text of this portion of the statute, with the relevant portion in italics, follows:

Minn. Stat. §518.64

* * *

Subd. 2. Modification . . .

- (d) *A modification of support or maintenance, including interest that accrued pursuant to section 548.091, may be made retroactive only with respect to any period during which the petitioning party has pending a motion for*

The district court's order amounts to an award of maintenance from income earned

modification but only from the date of service of notice of the motion on the responding party and on the public authority if public assistance is being furnished or the county attorney is the attorney of record. However, modification may be applied to an earlier period if the court makes express findings that:

- (1) the party seeking modification was precluded from serving a motion by reason of a significant physical or mental disability, a material misrepresentation of another party, or fraud upon the court and that the party seeking modification, when no longer precluded, promptly served a motion;
- (2) the party seeking modification was a recipient of federal Supplemental Security Income (SSI), Title II Older Americans, Survivor's Disability Insurance (OASDI), other disability benefits, or public assistance based upon need during the period for which retroactive modification is sought;
- (3) the order for which the party seeks amendment was entered by default, the party shows good cause for not appearing, and the record contains no factual evidence, or clearly erroneous evidence regarding the individual obligor's ability to pay; or
- (4) the party seeking modification was institutionalized or incarcerated for an offense other than nonsupport of a child during the period for which retroactive modification is sought and lacked the financial ability to pay the support ordered during that time period. In determining whether to allow the retroactive modification, the court shall consider whether and when a request was made to the public authority for support modification.

The court may provide that a reduction in the amount allocated for child care expenses based on a substantial decrease in the expenses is effective as of the date the expenses decreased.

(Emphasis added)

from November of 2004 onward. In fact, the court ordered Randall to give Carolyn a written and formal “assignment” of that very income. Randall already paid \$4,000 for each month during that period. Now he is being ordered to pay another \$4,000 for each month during that same period. The court’s order is nothing short of a retroactive doubling of the maintenance award in direct violation of the statute.

IV. THE AWARD OF \$12,000 IN ATTORNEY’S FEES WAS AN ABUSE OF DISCRETION.

What must be shown before an award of need-based attorney’s fees can be made is well known.

Under Minnesota law, a court may award attorney fees, costs and disbursements "in an amount necessary to enable a party to carry on or contest" a proceeding, providing the court finds:

- (1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Gales v. Gales, 553 N.W.2d 416, 422 (Minn. 1996), *quoting* Minn.Stat. § 518.14, subd. 1.

No fee award can be made unless the moving party provides the court with “current information on her income and expenses”. *Gales* at 423.

Here, Carolyn's refusal to cooperate in discovery deprived Randall of much information about her current financial situation, and did so to such an extent that Randall was forced to file a motion in limine. Curiously enough, in denying Randall's motion to reconsider the order awarding Carolyn \$151,270 in additional maintenance, the district court addressed the motion in limine, and justified its denial by pointing out that it considered Carolyn's current income and expenses to be irrelevant to any issue pending before it. The court stated:

Had the Court made any findings regarding Carolyn's current income and expenses that were adverse to [Randall], he might have cause to complain that [Carolyn's] discovery shortcomings compromised his ability to defend himself. However, the October 26, 2005 Order and attached Memorandum are devoid of any such adverse findings.

(A-169 [emphasis by the Court].)

Carolyn was awarded more than \$600,000 in the 2001 property division (A-9) and received \$355,582 from Randall in support and maintenance between 2000 and 2005 (A-148, para. 3). She sold the parties' homestead, awarded to her and valued at \$485,000 in the 2001 decree (A-9), for \$650,000 within months of the decree becoming final (A-150, para. 7). She has flown more than a quarter million miles since the decree, and spent little time in the classroom. The appellant does not know what, if anything, evidence of her current financial circumstances would show – had he been allowed to discover and submit it – other than that she is perfectly able to pay her own fees.

What can be said with certainty, however, is this. Under Minnesota law, absent evidence of her current financial circumstances, it cannot be determined whether Carolyn has the means to pay the attorney's fees she incurred and, absent such a determination, no need-based fee award can stand.

CONCLUSION

Based upon the entire record in this proceeding, including the foregoing points and authorities, the appellant Randall Moore respectfully requests that this Court grant the following relief:

1. Vacating in its entirety the Maintenance Order of October 26, 2005 on the grounds:
 - A. That the district court lacked jurisdiction to modify the appellant's maintenance obligation, or in the alternative,
 - B. That the record contains no evidence of any change in circumstance that rendered the then-existing maintenance obligation unreasonable or unfair, as well as no findings to that effect, or in the alternative,
 - C. That the order constituted an impermissible, retroactive modification of maintenance; and
2. Reversing the need-based attorney-fee award of \$12,000 in the Order dated May 31, 2006 on the ground that the record contains no evidence of the respondent's current income, expenses, or ability to pay her own attorney's fees.

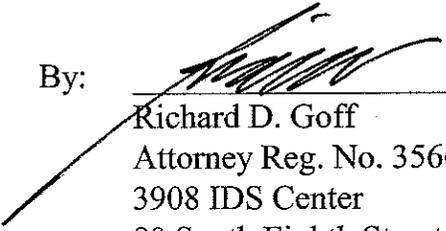
Certification of Brief Length

The foregoing brief complies with Rule 132.01, subd. 3(a)(1) of the Minnesota Rules of Civil Appellate Procedure in that it was prepared using WordPerfect Version 12 and Times New Roman 13-point proportional font, and contains (exclusive of the Table of Contents, Table of Authorities, and Appendix) no more than 14,000 words.

Dated: September 7, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).