

No. A06-1504

State of Minnesota
In Court Of Appeals

Carolyn Sue Moore, petitioner,

Respondent,

and

Randall Scott Moore,

Appellant.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The Judgment and Decree in this marriage dissolution proceeding was entered in April of 2001, and established an award of temporary spousal maintenance payable by Appellant to the Respondent. Appellant was ordered to pay Respondent \$2,900 per month until June 1, 2005. In 2002, the district court increased the monthly award to \$4,000 per month, based on Appellant's substantial increase in income.

The rationale for the duration and amount of spousal maintenance originally awarded to Respondent under the terms of the decree was expressed at pages 33 and 34 of the memorandum attached to the decree, wherein the district court stated:

In fact, because both [Appellant's] and [Respondent's] future income and earnings are so uncertain, the only realistic and fair thing to do is not make any definitive decision at this time and instead craft a temporary arrangement subject to a later review. As stated earlier, looking at the case from [Respondent's] perspective, an order that allows her to go back to school immediately and complete her design degree as soon as possible would present the optimum short term solution, with the maintenance issue revisited thereafter. However, in order to accomplish this result and not force [Respondent] to spend assets to meet her needs, [Appellant] would have to have the ability to pay about \$8,000.00 per month in net family support, plus fund the schooling. Unfortunately, that is not in the financial cards – it is not even close. Instead, the only remotely realistic possibility is to compel [Appellant] to pay substantially less than \$8,000.00 in family support, knowing that it will not be enough, yet understanding at the same time that [Respondent] will face some difficult choices.

First, in order to avoid spending assets in pursuit of her design degree, and since the Court is unable to award \$8,000 per month in family support, [Respondent] could choose to work part-time to help fund her needs and thus extend the length of her education. If she chose that route, it would take longer to reach her income potential and thus she would need education related support for a longer time, all the while experiencing a decrease in her standard of living. Second, she could drastically reduce her needs on a short-term basis so that she does not need to work part-time. She could accomplish this by selling her house and expensive car, plus making other

cuts, but then she would face an immediate, drastic change in her standard of living. Third, she could choose to spend assets in order to avoid a drastic reduction in her standard of living. In that regard, she would have to decide whether to favor asset retention or standard of living retention. [Respondent] is going to have to make one of these choices unless a Caremark level job materializes for [Appellant] in the very near future.

(A.App. 33-34) The district court went on to determine an amount of maintenance that would essentially require both parties to “share the hardship” caused by the lack of sufficient income to meet both parties’ reasonable needs given the standard of living established during the marriage:

In the scenario where [Respondent] goes to school full time and earns no income, child support at the rate of \$942.00 and spousal maintenance of \$2,990.00 would result in equalized cash flow if [Appellant] earns \$110,000 in 2001. If [Respondent] were to work and generate \$30,000.00 on her own, child support at the rate of \$618.00 and maintenance at the rate of \$2,110.00 would be in order, but this latter alternative is not even remotely acceptable. [Respondent] has never earned \$30,000.00 a year and the prospects of her earning that sum while going to school and providing 50% of the daily care and control for the children are slim and none.

(A.App. 36)

In the original Judgment and Decree, the district court specifically stated that “[i]t is a basic assumption of this temporary maintenance award, that [Respondent] will be attending an interior design school, starting as soon as possible, and will be a full-time student until the curriculum is completed.” (A.App. 14)

In September of 2002, the district court increased Appellant’s maintenance obligation to \$4,000 per month, because Appellant “was enjoying the anticipated substantial increase in his ability to contribute to [Respondent’s] needs, rendering the \$2,990 per month award no longer fair or reasonable.” (A.App. 126)

On May 31, 2005, Respondent brought a motion to extend the term of maintenance and to increase the monthly payments. With her motion, Respondent submitted an affidavit (omitted from Appellant's Appendix) which provided the district court with detailed information about the parties' financial conditions since the prior maintenance orders. (R.App. 3-145)

Respondent explained that one reason for her failure to complete her baccalaureate degree before the end of the term of maintenance was the fact that she was unable to begin her studies at the University of Minnesota until the fall of 2002. (R.App. 5) The original decree was issued in April of 2001, at which point the University had already filled its incoming interior design class for the upcoming academic year. Respondent had no choice but to wait until the following February to apply for acceptance into the program, and when she did, she was promptly accepted. (R.App. 6) She began her study at the University in the fall of 2002, rather than the fall of 2001 as originally anticipated by the district court.

A second factor Respondent gave for her slower-than-anticipated progress toward her degree, one which was not anticipated by the parties or the district court at the time of the decree, was the protracted litigation over the substantial reduction of Respondent's parenting time.¹ Ironically, part of the reason for the parenting consultant's decision to cut back on the time the children would spend in Respondent's care was her determination that Respondent's academic schedule was interfering with her ability to be available for the children. (R.App.7)

¹ Appellant brought a separate appeal from the district court's November 14, 2005 order concerning custody and parenting time, in Court of Appeals File No. A06-212. The district court's order was affirmed in its entirety by this Court's decision filed August 29, 2006.

Respondent described the ways in which she had attempted to increase her income while maintaining her ability to be available for the boys. She sold the homestead property awarded to her in the dissolution proceeding and purchased a smaller, less expensive home. (R.App. 5) She used some of the excess sale proceeds to invest in rental real estate with the expectation that it would ultimately yield income while allowing her to focus her energies on raising the children. (R.App. 5-6) Further, while awaiting the start of the 2002-2003 academic year, Respondent took courses at Normandale Community College, and received credits that transferred to the University. (R.App. 5) Respondent also completed a different facet of her anticipated future career by obtaining her real estate license. (R.App. 6)

Respondent had not been able to effectively work and attend school full-time at the same time (R.App. 6-7), and her only significant source of income was maintenance and child support payments, which, as at the time of the decree, were still insufficient to meet all of her reasonable needs and to pay her educational costs. Respondent provided the district court with calculations which showed that she had net monthly income from child support and spousal maintenance totaling \$4,818, (R.App. 10, 96-103) and that her monthly expenses totaled \$7,257.50, including the anticipated cost of attending school full-time. (R.App. 11, 107-117) Respondent explained that she had to take premature withdrawals from retirement assets awarded to her in the dissolution proceeding to assist her in meeting her needs. (R.App. 11)

The evidence revealed that Appellant, on the other hand, had the ability to continue to assist Respondent in meeting her needs until she could complete her degree by continuing to

pay maintenance of at least \$4,000 per month as ordered in 2002. Respondent provided Appellant's 2003 income tax returns and calculations which revealed that while paying \$4,000 in spousal maintenance and \$972 in child support, he still had net income of at least \$6,954 per month. (R.App. 12-13, 96-103) This amount did not include more than \$66,000 of capital gains income reported on respondent's 2003 tax returns. Respondent also informed the court that at that time, it appeared that certain stock awarded to Appellant in April of 2001 at a value of \$75,000 might be worth \$1.9 million. (R.App. 13) Appellant subsequently acknowledged that he had sold the stock and received gross sale proceeds of just under \$1,000,000. (A.App. 107)

Appellant countered Respondent's argument that he still had the ability to pay maintenance with the assertion that he had not been drawing a salary since October of 2004. Appellant has been Chairman, President and CEO of American TeleCare, Inc. since June of 2002, and at the time of the motion earned an annual base salary of \$175,000. (A.App. 116) Appellant asserted that in November of 2004 he and the company entered into an agreement to defer his salary because of the small company's financial situation. (A.App. 117) He essentially argued that if he had no income, he could not be required to continue paying spousal maintenance.

Appellant complained that Respondent had refused to provide documents pertaining to her income and expenses since the 2002 increase in maintenance. In fact, as Respondent's response to Appellant's later motion for reconsideration reflects, in addition to all of the financial information provided with her May 27, 2005 Affidavit in support of her motion to

extend maintenance, Respondent produced virtually everything Appellant requested that was in her possession. (*See generally* R.App. 290 – 313)

The district court weighed all of the information presented to it with a critical eye. It found that while Respondent clearly still was not self-sufficient, part of the blame for that fact lay with her, in that she had not been more aggressive in completing her degree and in fact had eventually dropped out of school. (A.App. 129-130) The court examined its original findings as to the amount of maintenance it would have awarded Respondent at the time of the decree had Appellant been earning income in keeping with his historical earning level. It concluded that its original intent was to award Respondent a total of \$444,000 over five years, but its award of \$2,900 per month for five years only gave Respondent \$179,400 of the intended award. (A.App. 128) When maintenance was increased in 2002, the amount Respondent would receive at the conclusion of 5 years rose to \$212,730, leaving her short of the court's original determination by \$231,270. (A.App. 128, 131) The court balanced Respondent's decisions to reduce her academic courseload and to eventually leave school by reducing the amount she was still entitled to receive by \$80,000, leaving maintenance of \$151,270 left from the originally intended award. (A.App. 131)

Ultimately, although it denied Respondent's request for an *increase* in the level of monthly maintenance payments, it reserved the issue of *extending* the maintenance duration. It ordered that if Appellant could produce attested, documentary proof that American TeleCare was not obligated to pay the salary he had deferred since November of 2004, temporary maintenance would be reserved. (A.App. 125) Absent that proof, the court suspended

Appellant's temporary maintenance obligation and, once American TeleCare resumed paying his salary, Appellant was ordered to provide the court with attested, documentary evidence of his rate of pay, at which time the court would issue an amended, temporary maintenance order. (A.App. 124-125)

The Appellant requested reconsideration of the October 26, 2005 Order, which request was granted by the district court. Appellant took the opportunity to attempt to introduce a multitude of new assertions, which are also restated in Appellant's Brief herein, including the allegation that "from 2000 onward, the amount of spousal maintenance and child support [Appellant] has paid [Respondent] has amounted to 79.5% of his earned income." (Appellant's brief, page 11, A.App. 148) He also alleged that "[Respondent] admitted in her deposition to having traveled 227,795 miles since entry of the decree." (Appellant's brief, page 11, A.App. 106). However, the district court did not credit either of Respondent's allegations, which had scant, if any, support in the record.² Not only did the district court deny Appellant's motion to reconsider the award of additional maintenance, it went through a new set of calculations to demonstrate that it had actually made errors in its October 26, 2005 Order. It noted that its prior determination that Respondent was entitled to total maintenance of \$444,000 should

² As to the "excessive travel" allegation, the July 22, 2005 deposition transcript clearly indicated that at the deposition, Respondent produced a Northwest Airlines statement, and the record also reflects that Respondent produced a second NWA statement dated August 31, 2005, which was subsequently attached to Appellant's September 29, 2005 submissions to the district court (the attachments to Appellant's September 29, 2005 Memorandum are in the district court file but were not provided to this Court in Appellant's Appendix). The NWA statement shows that Respondent's *cumulative* mile total from the time she initially signed up as a frequent flyer with NWA is 227,795. That document also reflects that through August 31, 2005, Respondent had only flown 10,045 miles that year.

actually have reflected a \$546,000 total, and that it erred in calculating the amount of maintenance Respondent had actually received when it found she had received \$212,730, and that she really had only received \$185,820. (A.App. 157-160) The district court concluded that if it had agreed to reconsider the maintenance order, “any recalculation by the Court would be adverse to [Appellant]” and that by correcting those two errors Respondent would be entitled to \$280,180 of unpaid maintenance, not \$151,270 as found in the October 26, 2005 Order (A.App. 157, 159)

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS BROAD DISCRETION IN EXTENDING RESPONDENT’S RIGHT TO RECEIVE TEMPORARY SPOUSAL MAINTENANCE FROM THE APPELLANT.

A. Standard of Review.

Appellant challenges the district court’s modification of the temporary spousal maintenance award. The appellate court reviews a district court’s decision to modify a maintenance award under an abuse-of-discretion standard. Kemp v. Kemp, 608 N.W.2d 916, 921 (Minn. App. 2000). A district court abuses its discretion regarding maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. Dobrin v. Dobrin, 569 N.W.2d 199, 202 (Minn. 1997). Otherwise, “[f]indings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous.” Gessner v. Gessner, 487 N.W.2d 921, 923 (Minn. App. 1992).

B. Respondent's motion to extend her temporary maintenance award was filed before the end of the term of maintenance and the district court correctly determined it had jurisdiction to hear motion for modification.

In this proceeding, the district court ordered Appellant to pay Respondent temporary spousal maintenance until June 1, 2005. Specifically, the original Judgment and Decree states, in pertinent part:

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 [Respondent], 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.App. 15) Appellant asserts that although Respondent scheduled a motion and served her motion to modify maintenance prior to June 1, 2005, the district court lost jurisdiction over the issue of spousal maintenance because it conditioned Respondent's right to bring a modification motion on the scheduling of a motion to take place before June 1, 2005.

The issue of whether the failure to meet a seemingly mandatory hearing deadline affects a court's jurisdiction to entertain a motion was recently addressed by the Minnesota Supreme Court. In Rubey v. Vannett, 714 N.W.2d 417 (Minn. 2006), *rehearing denied* (June 8, 2006) the Court held that the 60-day time limit specified in Minn. R. Civ. P. 59.03³ for holding a hearing on a motion for amended findings was a procedural tool, and not a jurisdictional requirement. In that case, following the entry of a judgment and decree in a

³ Rule 59.03 provides: "A notice of motion for a new trial shall be served within 30 days after a general verdict or service of notice by a party of the filing of the decision or order; and the motion shall be heard within 60 days after such general verdict or notice of filing, unless the time for hearing be extended by the court within the 60-day period for good cause shown."

marriage dissolution proceeding, Rubey properly served a timely motion for amended findings within 30 days of service of the notice of filing. However, Rubey scheduled the hearing on that motion outside the 60-day time period set forth in the Rule, due to the district court's lack of available hearing dates within the 60-day time frame, but did not obtain an order extending the time for hearing as required by the Rule. Id. at 419-421.

Because the hearing on the motion occurred outside of the 60-day time frame required by Rule 59.03 and no order had extended the time for hearing for good cause, the district court found that it lacked jurisdiction and dismissed the motion. Rubey appealed, but because of the supposed jurisdictional defect at the district court level, the Court of Appeals dismissed the appeal, determining that the time to appeal from the underlying judgment and decree had not been tolled by Rubey's motion for amended findings due to the untimely hearing, and that under Minn. R. Civ. App. P. 104.01, subd. 2, the appeal was therefore untimely. Id. at 421.

The Minnesota Supreme Court reversed the lower courts on the jurisdiction question. The Court recognized that its prior caselaw on this issue was confusing, and held that the 60-day hearing rule was a procedural tool and did not affect the district court's jurisdiction to entertain the motion for amended findings. Id. at 421-422.

Thus, the Supreme Court interpreted a seemingly mandatory hearing date requirement imposed by the Rules of Civil Procedure and deemed it to be merely a procedural tool, and not a jurisdictional element. In the instant proceeding, the district court essentially determined the same thing, finding that it had jurisdiction to entertain a motion that was

properly served and filed prior to the expiration of the term of temporary maintenance, even though its prior order had contained the procedural directive that the hearing should take place prior to June 1, 2005.

As it is clear that the order regarding the hearing date did not represent a jurisdictional element, it cannot be disputed that the district court had the authority to hear Respondent's motion to extend the term of spousal maintenance. When a court awards temporary spousal maintenance, it retains jurisdiction to entertain a motion to modify that award if a motion is brought before the expiration of the maintenance term. *See Poach v. Poach*, 392 N.W.2d 749 (Minn. Ct. App. 1986) (stating that a party may bring a motion to reserve maintenance at any time before the maintenance order expires); *Wibbens v. Wibbens*, 379 N.W.2d 225, 226 (Minn. Ct. App. 1985) (concluding court may modify an award of maintenance, whether temporary or permanent, before it expires).

Appellant's interpretation of the district court's order—that the court would not entertain a motion to modify maintenance if the hearing on a timely motion was not held before the expiration of the term of maintenance—would essentially mean that the district court divested itself of jurisdiction it otherwise would have to hear a motion served but not argued to the Court prior to the end of the term of maintenance. When a trial court awards temporary spousal maintenance, it may not divest itself of jurisdiction over the modification of that award, except when the parties expressly stipulate to such a provision. *See Toughill v. Toughill*, 609 N.W.2d 634, (Minn. Ct. App. 2000) (divestiture improperly prevents the parties from seeking modification of maintenance even if their circumstances materially

change); Loo v. Loo, 520 N.W.2d 740, 743 (Minn. 1994) (concluding courts have continuing jurisdiction over dissolution proceeding unless parties create an enforceable waiver of statutory right to seek modification). No such stipulation exists in this case. Respondent's right to seek modification of the maintenance award would have expired when the award expired, on June 1, 2005. Her motion was properly served and filed on May 31, 2005.

Appellant cites to Eckert v. Eckert, 216 N.W.2d 837 (Minn. 1974) as support for his position that the district court did not have jurisdiction to hear Respondent's motion, but because the Respondent filed her motion to modify maintenance on May 31, 2005, prior to the expiration of the term, Appellant's reliance on Eckert is misplaced.

In Eckert, the Supreme Court affirmed the trial court's determination that it had no jurisdiction to modify a maintenance obligation that had expired before a party filed a motion requesting an extension of the term of maintenance. In that case, maintenance was awarded through "the end of December 1972" and the maintenance order stated that "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. at 838. The ex-wife sought an extension of the term of maintenance in a motion she filed in January of 1973. But because her motion was not filed on or before the maintenance term ended on December 31, 1972, the Supreme Court affirmed the trial court's determination that jurisdiction to revisit the issue of maintenance had been lost. Id. at 840.

Here, of course, Respondent served and filed her motion to extend the term of maintenance on May 31, 2005, which clearly falls "on or before" the term's June 1, 2005

expiration date. The holding in Eckert does not govern the jurisdictional question in this case.

Indeed, there are numerous appellate court cases that involve motions to extend temporary maintenance which were filed immediately before the expiration of the term. For example, in Santillan v. Martine, 560 N.W.2d 749 (Minn. Ct. App. 1997), the former wife served a motion to extend temporary maintenance *two days* before the expiration of the 20 month obligation. Likewise, in Miller v. Miller, 458 N.W.2d 105 (Minn. 1990), temporary maintenance was awarded from September 15, 1984 through August 15, 1989, and “*immediately before the expiration of that temporary award*,” the former wife brought a motion to increase the award and render it permanent. In Rapacke v. Rapacke, 442 N.W.2d 340 (Minn. Ct. App. 1989), maintenance was scheduled to terminate after an April 1988 payment, the former wife brought her motion to modify maintenance in April of 1988, and discovery was conducted into September 1988. Not one of these cases was dismissed due to a perceived lack of subject matter jurisdiction on the part of the trial court merely because the hearing on the motion was held after the expiration of the maintenance term.

Essentially, all of the cases dealing with modifying temporary maintenance assert either explicitly or implicitly that if the maintenance recipient wishes to extend the term of maintenance, or seek a reservation after the end of the term, or render the award permanent rather than temporary, that party may do so by filing a motion at any time prior to the expiration of the term of maintenance. Absent an express stipulation of the parties, the trial court may not divest itself of jurisdiction to consider motions to modify temporary

maintenance which are brought before the end of the maintenance term. Here, the maintenance term expired on June 1, 2005. Respondent served and filed a motion to modify the temporary maintenance award on May 31, prior to the expiration date. There can be no question but that the district court maintained jurisdiction to consider Respondent's motion.

Appellant last asserts that despite the language in the decree providing that the spousal maintenance term would end on June 1, 2005, his last payment due to the Respondent was paid on May 15, 2005, and that his obligation ended on that date, rendering Respondent's May 31, 2005 motion untimely, and divesting the district court of jurisdiction to entertain her motion. By this logic, if Appellant had paid the 12 payments due each month through June 1, 2005 in one lump sum on June 1, 2004, his argument is that the term of maintenance would have ended one year earlier than ordered by the trial court, and that the court could no longer entertain a motion to modify maintenance. Appellant cites no authority in support of the proposition that when a maintenance obligor pays his remaining obligation prior to the expiration date specified in the decree, the term of maintenance ends earlier than was ordered. Appellant cannot cite any authority for his argument because there is none. The district court ruled that Appellant had to pay Respondent of \$2,990 per month (later amended to \$4,000 per month) until June 1, 2005. Whether Appellant paid all remaining payments due to Respondent on May 15, 2005, on June 1, 2004, or one day following the entry of the decree, the district court retained jurisdiction to consider a modification motion until the date it ordered that the maintenance term would end. The date on which Appellant made final

payment of the amount owed to Respondent during that period of time is irrelevant to when the maintenance term expired.

All of Appellant's jurisdictional arguments that hinge on the failure to hold a hearing prior to June 1, 2005 must fail, as the district court's stated hearing deadline is merely a procedural tool, not a jurisdictional element. Rubey, *supra*. His argument that his last payment on May 15, 2005 concluded the term of maintenance despite the district court's specified termination date of June 1, 2005, has no support in law or in logic. The district court did not exceed its jurisdictional authority by considering Respondent's timely motion to extend the term of temporary spousal maintenance.

C. The district court had the discretion to design an equitable, individualized solution in a unique, non-traditional set of circumstances.

As always, it is important to be mindful of the Supreme Court's caution in Dobrin v. Dobrin, 569 N.W.2d 199 (Minn. 1997): "We take this opportunity to remind counsel that each marital dissolution proceeding is unique and centers upon the individualized facts and circumstances of the parties and that, accordingly, it is unwise to view any marital dissolution decision as enunciating an immutable rule of law applicable in any other proceeding."

The district court explained that this case presented "a very non-traditional scenario, which suggested a non-traditional award" and that "[i]n ten years as a full-time Family Court judge this Court has never encountered a situation that remotely resembles this one." (A.App. 165, 166) It explained:

First, [Appellant] was unable to contribute to [Respondent's] needs to the degree warranted by the facts (which by itself would not have made the case non-traditional).

Second, his inability to fully contribute was attributable to what the Court perceived as a temporary drop in his earning capacity (which anticipation proved to be accurate when his income substantially increased shortly after the Decree and the award was modified upward, but still short of extricating [Respondent] from a monthly hardship position during her retraining period). Third, [Appellant's] ability to contribute remained artificially low in relation to his earned salary because his company, with whom he is a key player, chose to suspend that salary in order to benefit the company's cash position, a decision for which [Appellant] could well be one of the ultimate beneficiaries.

(A.App. 165-166) The district court continued: "the ability to achieve equity in highly unusual situations requires the ability to craft non-traditional remedies. It is unproductive to analyze the Court's October 2005 decision in the parlance of traditional scenarios." (A.App. 166) And finally, the court stated "Reasonable minds can differ, but this Court has already stated what it believes to be an equitable resolution. Attacking the details without attacking the big picture, as [Appellant] has done in his motion for reconsideration, is not productive."

(A.App. 167)

D. The record is replete with evidence supporting the district court's decision that the termination of Respondent's award of maintenance under the prior order was unreasonable and unfair.

While the district court properly exercised its discretion in resolving the parties' requests in a non-traditional, yet equitable manner, Appellant's arguments on appeal follow a strict application of Minnesota case law concerning requests for extension of temporary awards of spousal maintenance. Even under Appellant's narrow interpretation of the district

court's authority to fashion equitable relief, a review of the record undeniably supports a determination that Respondent is entitled to an extension of the term of maintenance.

A request for an extension of temporary spousal maintenance constitutes a motion to modify the award of maintenance, and the person seeking modification must show that a substantial change in circumstances has made the original maintenance award unreasonable and unfair. Minn. Stat. § 518.64, subd. 2(a); Hecker v. Hecker, 568 N.W.2d 705, 709 (Minn. 1997). In applying this analysis courts must consider “in addition to all other relevant factors, the factors for an award of maintenance under section 518.552 that exist at the time of the motion.” Minn. Stat. § 518.64, subd. 2(c).

After temporary maintenance has been awarded, the recipient generally has a duty to rehabilitate by making reasonable efforts to become self-supporting. In re Marriage of Youker, 661 N.W.2d 266 (Minn. Ct. App. 2003), *citing Hecker*, 568 N.W.2d at 710 n.4. If, despite the recipient's reasonable efforts, she fails to become fully rehabilitated, that failure can constitute the requisite substantial change in circumstances needed to warrant a modification of maintenance. Id.

- 1. Respondent's inability to complete her education and secure employment that would allow her to meet her reasonable needs constitutes a change of circumstances warranting an extension of temporary spousal maintenance.**

Even when creating its initial award of maintenance, the district court appreciated the difficulty Respondent would have in juggling three important tasks—completing her design degree, supplementing the family support paid by Appellant so that she could maintain a

reasonable standard of living, and providing 50% of the children's care. The district court envisioned the possibility that Respondent would be unable to attend school full time, or that she would have to deplete her assets in order to maintain an appropriate home and reasonable lifestyle for herself and the children.

When Respondent returned to court to request an extension of the duration of spousal maintenance, it was because she had not been able to complete her degree within the term of maintenance awarded to her. The question, then, was whether her efforts to do so were reasonable, and if so, whether terminating the maintenance award as originally provided under the decree would be unreasonable and unfair.

Review of the law on the question of whether temporary maintenance should be extended or made permanent reveals that in a number of cases, even where the maintenance recipient has failed to make any reasonable effort to achieve self-sufficiency within the original term of maintenance, the courts have still found it appropriate to extend the term of maintenance, or even render the maintenance award permanent. For example, in Hecker v. Hecker, 568 N.W.2d 705 (Minn. 1997), the parties had been married for less than ten years when the dissolution proceeding commenced. The parties stipulated to a ten year term of maintenance. Four months before the term was to expire, the wife moved the court to increase her maintenance award and designate it as a permanent award. The trial court, the Court of Appeals, and the Supreme Court all ultimately concurred that the wife had failed to make any reasonable effort toward rehabilitation. Yet in the end, the Supreme Court

affirmed the trial court's decision to increase maintenance (though not to the full extent requested by the wife) and to make the maintenance obligation permanent.⁴

As in the cited cases, the reason for Respondent's continued need for spousal maintenance is the fact that she has failed to achieve self-sufficiency within the time contemplated by the district court. She was unable to begin her studies at the University of Minnesota until the fall of 2002 because in April of 2001, when the decree was issued, the University had already filled its incoming interior design class for the upcoming academic year. She did obtain her real estate sales license and took courses at Normandale College that would transfer to the University.

Once she did commence her studies, her progress was hampered by the protracted litigation over the parties' custody and parenting time arrangements, and the parenting consultant's questioning Respondent's ability to be available to the children given her academic schedule. Although Respondent managed to decrease her necessary expenses and attempted to find creative ways to earn some level of supplemental income without that did

⁴ See also Stephenson v. Stephenson, 1997 WL 309470 (Minn. App. 1997) (attached hereto and originally provided with Respondent's September 29, 2005 trial court submissions) (affirming trial court's decision to extend a 33-month term of temporary maintenance for an additional 18 months, even though the recipient had not "made a genuine effort towards rehabilitation" and had shown "an unwillingness to seek full time employment."); McManus-Chase v. Chase, 1996 WL 192981 (Minn. App. 1996) (attached hereto and originally provided with Respondent's September 29, 2005 trial court submissions) (affirming trial court's decision to extend six-year term of maintenance for an additional 18 months where the original award contemplated the recipient would complete school within the six year period, recipient "made no effort to rehabilitate during the six-year period," and failed to even apply to an academic program).

not interfere with her ability to care for the children, she was forced to invade her assets just to meet her needs.

Respondent was simply unable to complete her degree and become self-sufficient prior to June 1, 2005. Respondent took reasonable steps to make progress toward this goal. Respondent's circumstances are much like those present in Charlsen v. Charlsen, 1999 WL 326151 (Minn. App. 1999). In Charlsen, the trial court extended the term of maintenance by 39 months because the wife had failed to rehabilitate. Although the wife had not gotten vocational training for a year and a half after the dissolution, her only income since the dissolution had been maintenance and child support in an amount less than her reasonable monthly expenses, and she was the custodian of two children, one of whom had health problems. The Court of Appeals appreciated the fact that "wife has regularly had a financial deficit, making the financing of vocational training problematic."

Here, as in Charlsen, the bulk of Respondent's income has been only her maintenance and child support payments—which the district court knew was not sufficient to enable her to meet her reasonable expenses in light of the standard of living during the marriage, and she has had difficulty funding her academic endeavors while running a monthly deficit and providing care for two children.

In sum, Respondent's failure to achieve self-sufficiency at this point, despite her reasonable efforts to do, constitutes a change of circumstances justifying a modification to the duration of Appellant's temporary maintenance obligation.

2. Consideration of the factors necessary to support an award of spousal maintenance justifies the district court's decision to extend the term of temporary spousal maintenance.

In considering a motion to modify maintenance, the court is required to consider the relevant factors set forth in Minn. Stat. §518.552. Spousal maintenance may be extended if the recipient spouse lacks sufficient property or earnings to provide for that spouse's reasonable needs, and in determining the proper level of maintenance, the court must consider the financial resources of both parties and the time necessary for the recipient to acquire sufficient education to find appropriate employment and become fully or partially self-supporting. Santillan v. Martine, 560 N.W.2d 749, 751-52 (Minn. Ct. App. 1997), *citing* Minn. Stat. §518.552, subd. 1. and subd. 2(a), (b), (g).

In determining what modification to maintenance is warranted, the district court must consider the statutory factors set forth at Minn. Stat. § 518.552, subd. 2. See Minn. Stat. Sec. 518.64, subd. 2(c). Of these, the factors most relevant to the parties' circumstances include: (1) the financial resources of the party seeking maintenance; (2) the time necessary for the payee spouse to acquire sufficient education; and (4) the ability of the payor spouse to contribute maintenance payments. Id. Many of the same considerations the district court gave to those factors when it originally awarded maintenance in April of 2001 are still relevant to the parties' current circumstances.

Respondent attached her 2001, 2002 and 2003 income tax returns to her May 27, 2005 Affidavit, and these documents only show that she still does not have income from sources other than Appellant that is sufficient to meet her needs. (R.App. 37-95) Respondent also

provided documentation of her only cash assets – three IRA accounts with April 30, 2005 balances totaling \$117,231.55. (R.App. 104-106) The funds in those accounts were awarded to Respondent under the terms of the 2001 Judgment and Decree. Respondent owns her current home, and rental property in Canada and in Norway, which were either purchased with the proceeds from the sale of the marital homestead she was awarded under the Decree or with equity drawn from her current home. At the time of Respondent’s motion, the rental properties had not yet begun to generate sufficient income to enable her meet her needs without working outside the home.

Respondent documented her living expenses in her May 27, 2005 Affidavit. Exhibit 13 attached to that affidavit included a thorough, itemized budget and some of the documentation that verified her fixed expenses such as the mortgage payment, property taxes, home and automobile insurance, utilities, and health insurance. (R.App. 107-117) Respondent’s reasonable living expenses total \$7,257.50, which is nearly \$1,000 less than the district court found was her reasonable budget in 2001. Her budget includes the cost of her health insurance and her out-of-pocket medical expenses, the average amount she has had to pay the parenting consultant, and the cost of attending school full-time (12 credits per semester), all of which are necessary but none of which were accounted for in the district court’s assessment of respondent’s budget in 2001. Respondent clearly cut her expenses and reduced her lifestyle from that which she and the Appellant enjoyed during the marriage.

Documentation of the academic credits Respondent has completed and the total number she needs for her degree was also provided in her May 27, 2005 Affidavit. (R.App. 9-10, 33-

36) If Respondent completes 12 credits per semester (the minimum required for full-time status) it will take her six semesters (three years) to complete the 76.33 she needs to graduate.

Without continued receipt of maintenance, Respondent cannot sustain herself until she can finish her degree.

While Appellant has asserted that he is not presently receiving any income from employment, his financial circumstances reveal that he is more than able to continue paying maintenance. It is worth noting that in 2001, when the district court initially awarded spousal maintenance, Appellant similarly asserted that he was working (consulting) but earning no income, and he continued under those circumstances for two and a half years. Appellant has never asserted that he is not entitled to receive his deferred salary at some point in the future, which is one of the key factors the district court relied upon in ordering temporary maintenance suspended (or reserved) until Appellant's salary resumed, and in directing Appellant to assign a portion of his deferred income to Respondent as security for the suspended spousal maintenance payments.

As the district court noted, Appellant did not take much of a risk in choosing to defer his salary, because at the time, he knew he was about to cash in on a significant windfall in the form of the sale of Medical Card Systems, a Puerto Rican company in which Appellant held stock that had been awarded to him in the original Decree at a value of \$75,000. On December 9, 2004, petitioner's Piper Jaffray account was wired \$950,162.75, representing the gross proceeds he received from the sale of this stock. (R.App. 273)

All of these facts, viewed under the most stringent application of traditional maintenance modification analysis, support the district court's decision to extend the term of temporary maintenance, to reserve jurisdiction to issue an order concerning temporary maintenance once Appellant resumes receiving his salary, and to suspend Appellant's obligation to make maintenance payments until his salary resumes. The district court's decision does not defy logic or the facts on record and should be affirmed.

II. THE DISTRICT COURT PROPERLY EXERCISED THE AUTHORITY ESTABLISHED UNDER MINN. STAT. SEC. 518.24 TO ORDER APPELLANT TO ASSIGN TO RESPONDENT INCOME HE HAD EARNED, BUT HAD NOT YET RECEIVED, AS SECURITY FOR ONGOING MAINTENANCE PAYMENTS.

The courts are authorized to fashion an appropriate form of security for maintenance payments due in the future, and have great discretion in doing so. Minn. Stat. Sec. 518.24 provides that “[i]n all cases when maintenance or support payments are ordered, the court may require sufficient security to be given for the payment of them according to the terms of the order.” The appellate courts review the subject of security “as almost wholly within the trial court’s discretion.” Zagar v. Zagar, 396 N.W.2d 98, 102 (Minn. Ct. App. 1986).

Because Appellant’s company had not yet resumed paying him the income he had voluntarily deferred in November of 2004, the district court “temporarily suspended” Appellant’s obligation to pay temporary maintenance, but because it determined that Respondent was entitled to receive an additional \$151,270 in maintenance, it issued the

following order to secure payment of the additional obligation at such time that ATC paid Appellant the deferred salary:

Within 21 days of the date of this letter, [Appellant] shall provide to [Respondent] an irrevocable assignment, assigning to [Respondent] 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 Respondent'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.App. 124-125) (emphasis added)

In his motion to reconsider the maintenance award, Appellant made various vague and bizarre arguments against the propriety of the "irrevocable assignment" provision:

[Appellant] has paid all maintenance owed pursuant to the Judgment and Decree through May 2005....Therefore, the Court's order that [Appellant] execute an irrevocable assignment of future wages to satisfy those arrearages is in error. (A.App. 139)

It is unclear at this time whether or not [Appellant] will ever receive the amounts owed to him from the company that is totally dependent on proper funding of the company and its future success....It is submitted that an order that he pay maintenance out of future earnings is unconscionable and unfair. (A.App. 145)

Furthermore, there is no statutory or case law provision for an "irrevocable assignment of future wages" to fund a temporary maintenance award, when the Court's finding was that [Appellant] was not underemployed or employed in bad faith. (A.App. 145)

It is first submitted that an irrevocable assignment of future wages is not within the Court's power or discretion. Furthermore, if it is intended to be maintenance, the Order does not so indicate, and then "irrevocable assignment" of [Appellant's] future wages makes it an unmodifiable Order. (A.App. 147)

The district court addressed Appellant's complaints in its February 3, 2006 Order:

The Court agrees that there were no arrearages, but never found that there were any, and never ordered [Appellant] to assign future wages in order to satisfy arrearages....In addition, the provision that requires [Appellant] to execute an irrevocable assignment does not suggest that the assignment was intended to satisfy arrearages. Instead, the irrevocable assignment was pegged to the remaining obligation that would have been imposed in the original Decree if Respondent had the ability to pay; \$151,270 to be exact. (A.App. 156-157)

Returning to the arrears claim, the language that apparently led [Appellant] to conclude that he was being charged with maintenance arrears is likely the following underlined language from paragraph 4 of the October 26, 2004 Order:

Within 21 days of the date of this letter, [Appellant] shall provide to [Respondent] an irrevocable assignment, assigning to [Respondent] 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 Respondent'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. This paragraph of the Order assumes that American TeleCare, Inc. has deferred payment of [Appellant's] salary since November 2004, but remains obligated to pay the salary.

If indeed the underlined language is the focus of [Appellant's] complaint, then he ignores the key language that specifically added interest from and after June 2005, which date would be inconsistent with any suggestion that arrears accumulated prior thereto. (A.App. 160-161)

Maintenance is defined as support paid from future earnings and income. Salary deferred as of November 4, 2004 but paid in the future, i.e. after the October 26, 2005 Order, would qualify as "future" income or earnings. (A.App. 161)

From an analytical perspective, it appeared to the Court that since American TeleCare, Inc. remained liable for [Appellant's] earned, but unpaid salary, [Appellant] could have assigned his payment prospects to a lender as security or sold the payment prospects to a third party at a discounted level. (A.App. 161)

The district court then went into a lengthy, detailed explanation of its logic in creating the assignment order. (A.App. 161-163) It found that Respondent agreed to defer his income

from American TeleCare at a time when he was in a position to accept that proposition because he had just received nearly \$1,000,000 from the sale of MCS stock awarded to him at the time of dissolution, and that “the salary deferment program gave [Appellant] a wonderful opportunity to leave [Respondent] in the lurch, without experiencing any short term hardship himself.” (A.App. 163)

Now, on appeal, the Appellant again goes to great lengths to confuse the plain meaning of the court’s order, even after the district court’s patient and thorough efforts to “clarify” the assignment order.

Appellant does not bother to explain to this Court how the district court’s findings, conclusions, and explanations concerning the assignment order lack support in the record. Instead, he merely states the repeatedly acknowledged and undisputed fact that he paid all court-ordered maintenance through May of 2005 even though he stopped receiving a salary in November of 2004. He then asserts that “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.” (Appellant’s Brief, page 28) He goes on to argue that retroactive modifications of maintenance awards to a date prior to service of a motion are precluded, and concludes that “the district court’s order amounts to an award of maintenance from income earned from November of 2004 onward.” (Appellant’s Brief, pages 29-30)

Nowhere in the plain meaning of the district court’s order did it retroactively modify any part of its maintenance award to a period prior to service of Respondent’s motion. The

district court already explained that the period for which Appellant would continue to owe maintenance begins with June of 2005. He is not, as asserted in his Brief, “being ordered to pay another \$4,000 for each month during that same period [from November 2004 through May 2005].” He has been ordered to pay maintenance starting with June 2005 once he, at some future point in time, receives income. When that income was earned does not change anything.

The argument that the court cannot order Appellant to pay maintenance due in the future from income he earned in past months is nonsensical. If an obligor working as a car salesman owes a maintenance recipient \$4,000 for the month of June 2005, and he receives a commission check in June earned in connection with a sale made in April 2005, he cannot argue that the fact that he had already paid his maintenance obligation for April means that he cannot be required to make the June 2005 payment from earnings attributable to his work efforts in any period other than June 2005.

The district court has had a clear understanding of the parties’ respective financial circumstances and motives ever since it presided over the trial at the time of the marriage dissolution. The court’s security requirement effectively prevents Appellant from avoiding payment of maintenance to Respondent while he lives off of his investments and then collecting his deferred salary in a lump sum at some later point in time, giving him the full benefit of his earned income and voiding Respondent’s entitlement to maintenance from that income. The district court ordered Appellant to provide a very effective form of security, and this Court should not disturb the district court’s decision.

III. THE PARTIES' FINANCIAL CIRCUMSTANCES SUPPORT THE DISTRICT COURT'S DECISION TO AWARD RESPONDENT A REASONABLE LEVEL OF NEED-BASED ATTORNEY FEES.

A. Standard of Review.

“The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion.” Gully v. Gully, 599 N.W.2d 814, 825 (Minn. 1999). “An abuse of discretion will be found only if there is a . . . conclusion that is against logic and the facts on record. The award must not be disturbed if it has a reasonable and acceptable basis in fact and principle.” Reinke v. Reinke, 464 N.W.2d 513, 514 (Minn. App. 1990) (quotations omitted).

B. The district court properly awarded Respondent \$12,000 in need-based attorney fees and supported the award with appropriate findings.

Attorney-fee awards in dissolution cases are generally governed by Minn. Stat. § 518.14, subd. 1, which provides for both need- and conduct-based awards. Geske v. Marcolina, 624 N.W.2d 813, 816 (Minn. App. 2001). Section 518.14 provides in pertinent part:

[T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it 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.

Nothing in this section precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.

Minn. Stat. § 518.14, subd. 1 (2006).

When awarding attorney fees in a dissolution case under section 518.14, the district court must indicate whether the award is based on need or conduct and address the factors set out in the statute for the type of award involved. Geske, 624 N.W.2d at 816. Conduct-based fees may be awarded regardless of the recipient's need or the payor's ability to pay. Id. at 818.

The district court made findings as to each of the required factors in awarding Respondent \$12,000 in need-based attorney fees. With respect to Appellant's ability to pay, the court stated:

There have been many other instances of overly zealous litigation herein, such as [Appellant's] claim for need-based fees, due to his "lack of income since November 2004." He earned substantial income during this period but did not receive it because his employer, for which he is a key player, chose not to pay it to him in order to enhance company cash flow. There was no indication that [Appellant] would not receive that income at a later date. At about the same time that his income was being deferred by his employer, [Appellant] received nearly \$1,000,000 for his interest in Medical Card Systems.

(A.App. 184) The court commented that the Appellant "continues to incur attorney's fees litigating this case as though his counsel has been provided with a blank check." (A.App.

184) The record firmly supports the district court's findings.

The district court determined that Respondent, on the other hand, does not have the ability to pay her attorney fees:

From a need-based perspective, the Court already found that [Respondent] did not have enough income at the time of the Decree to meet the standard of living established during the marriage. The Court also found that even with the receipt of spousal maintenance and child support, [Respondent] would remain unable to meet her needs. Nothing has changed in the interim to suggest that [Respondent] has been anywhere close to meeting her needs, let alone able to set aside significant money to pay attorney's fees.

(A.App. 184) This finding is also amply supported by the evidence. As discussed above, the Respondent provided ample financial information that supports the finding that she has no resources from which she could reasonably be expected to pay her own attorney fees. She has had to invade her retirement assets simply to meet her own living expenses and does not have any income other than rental income from her Canadian rental property, which at the time of her motion was only allowing her to break even against the costs of that property. Appellant cannot now attack the district court's findings as to Respondent's need and ability to meet her own expenses at the time of the Decree, and the district court's finding that her circumstances have not improved since that time is supported by the record.

Finally, the district court found that Respondent had not unreasonably contributed to the length or expense of the proceeding. Indeed, the district court commented:

The Court should also add here that it has had far too many opportunities to observe [Appellant] throughout these proceedings and as between [Appellant] on one hand and [Respondent] on the other hand, the party that has acted most unreasonably herein has been [Appellant].

(A.App. 183) As the district court noted, “ ‘[m]aintaining reasonable control over the procedure and assessing the sincerity or lack of sincerity in arguments or causes for delay is peculiarly within the province of the district court. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 199 (Minn 1995)’ ” and “[t]he district court is best situation to assess the reasonableness of the parties’ conduct during litigation, such as this, which has continued for several years. *See Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 124 (Minn. 1981).” (A.App. 182) (unpublished case citations in trial court’s order omitted)

The court then reviewed the amount of fees respondent had incurred (\$19,747.17) and made its own independent determination of the reasonableness of those fees:

From a cost perspective, the \$200 per hour rate charged by Susan Daudelin, an attorney who performed a large share of the work on [Respondent’s] behalf, is a bargain. That said, \$19,747.17 is a relatively large number, especially for these post-decree proceedings.

...This Court has been in the position to observe this litigation and assess performance and sincerity of arguments. Although the Court did not grant [Appellant’s] motion to dismiss [Respondent’s] recent maintenance motion for lack of jurisdiction, there is no doubt that [Respondent] spent more on that motion than she reasonably needed to spend. Had she made a more timely motion, she would not have subjected herself to the jurisdiction motion and, perhaps more important, would not have placed herself in the situation where she had to carry the difficult section 518.64 substantial change in circumstances burden of proof in order to prevail. Also, timely and complete discovery responses would have obviated the need to address [Appellant’s] motion in limine. Overall, based on the Court’s experience, the Court finds that [Respondent] could have reasonably prosecuted her interests here for \$12,000.

(A.App. 184-185)

In sum, the district court made findings as to each of the factors for a need-based award of attorney fees, each of which is solidly supported by the evidence. The district

court's conclusion that Respondent was in need of attorney fees in the face of Appellant's over-zealous litigation is not "against logic and the facts on record." Because the district court's decision has "a reasonable and acceptable basis in fact and principle," this Court should not disturb the award of fees.

CONCLUSION

Because the district court acted well within its broad authority to extend a term of temporary spousal maintenance, to fashion adequate security for the maintenance payments, and to award need-based attorney fees to the Respondent, this Court should affirm the district court's Orders dated October 26, 2005, February 2, 2006, and May 31, 2006 in their entirety.

Respectfully submitted,

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