

**COURT FILE NOS. A06-1432 & A06-1444**

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***STATE OF MINNESOTA  
IN COURT OF APPEALS***

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**Kenneth King McIntosh, *Appellant*,**

**v.**

**Marjorie Mary McIntosh, *Respondent***

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**APPELLANT KENNETH KING McINTOSH'S BRIEF AND APPENDIX**

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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).

# TABLE OF CONTENTS

<i>TABLE OF CONTENTS</i> .....	i
<i>TABLE OF AUTHORITIES</i> .....	ii
<i>CONSOLIDATION OF APPEALS</i> .....	1
<i>CONSOLIDATED STATEMENTS OF THE CASE</i> .....	1
A. COURT FILE NO. AO6-1432 (Order for Protection).....	1
B. COURT FILE NO. A06-1444 (Dissolution of Marriage).....	2
<i>STATEMENT OF FACTS REGARDING COURT FILE NO. AO6-1432 (ORDER FOR PROTECTION)</i> .....	3
<i>ISSUES REGARDING THE ORDER FOR PROTECTION</i> .....	14
<i>ARGUMENT REGARDING THE ORDER FOR PROTECTION</i> ....	16
<i>STATEMENT OF FACTS REGARDING CASE FILE NO. A06-1444 (DISSOLUTION OF MARRIAGE)</i> .....	24
<i>ISSUE REGARDING DISSOLUTION FILE</i> .....	32
<i>ARGUMENT</i> .....	33
<i>CONCLUSION</i> .....	36
<i>APPENDIX</i> .....	37

## TABLE OF AUTHORITIES

### Minnesota Statutes:

Minn.Stat. §518.17, Subd. 2(a)	16
Minn.Stat. §518.54, Subd. 5	33,34
Minn.Stat. §518.54, Subd. 6	33,34
Minn.Stat. §518.58, Subd 1	34
Minn.Stat. §518B.01, Subd. 6a	16,17,22
Minn.Stat. §518B.01, Subd. 4(b)	17
Minn.Stat. §609.748, subd. 1(a)(1)	20
Minn.Stat. §645.16.	16
Minn.Stat. §645.17	16

### Minnesota Cases:

<i>Beach v. Jeschke</i> , 649 N.W.2d 502, 503 (Minn.App.2002)	20
<i>Burkstrand v. Burkstrand</i> , 632 N.W.2d 206, 208 (Minn. 2001)	16
<i>Chosa ex rel Chosa v. Tagliente</i> , 693 N.W.2d 487, 489 (Minn.App. 2005)	21
<i>Gottsacker v. Gottsacker</i> , 664 N.W.2d 848, 854 (Minn. 2003)	34
<i>Hall v. Hall</i> , 408 N.W.2d 626, 628 (Minn.App. 1987)	22

<i>Hill v. Brockamp</i> , WL 32939 (Minn.App. 1999)	18
<i>Kass v. Kass</i> , 355 N.W.2d 335, 337 (Minn.App. 1984)	17
<i>Pelkey v. Malecha</i> , 2003 WL 21694431 (Minn.App. 2003)	22

# CONSOLIDATION OF APPEALS

By order of the Court of Appeals dated October 16, 2006, the appeals in Case Nos. A06-1432 and A06-1444 were consolidated for briefing and argument.

## CONSOLIDATED STATEMENTS OF THE CASE

A. COURT FILE NO. AO6-1432 (Order for Protection). Marjorie Mary McIntosh (Marjorie), was granted an emergency order for protection against Kenneth King McIntosh (Ken) on December 30, 2002, in Washington County District Court. The parties appeared in court on January 16, 2003. While Ken did not agree with the assertions made by Marjorie, he nonetheless agreed that an order could issue, without findings. Tenth Judicial District Court Judge Gary Meyer presided.

The parties appeared in court a year later on Marjorie's request for an extension of the order for protection. After an abbreviated evidentiary hearing on March 22, 2004, the trial court extended the order for protection for two years. Tenth Judicial District Court Judge Stephen Muehlberg presided.

On April 20, 2005, pursuant to agreement of the parties, the trial court issued an amended order for protection to include language pertaining to mediation and contact pertaining to one of the parties' minor children. Tenth Judicial District Court Judge Stephen Muehlberg signed the order.

In December 2005, Marjorie again filed for an extension of the order for protection. After hearing on March 31, 2006, the court granted an extension for one year. Tenth Judicial

District Court Judge B. William Ekstrom presided.

On July 31, 2006, Ken appealed the decision to grant the extension of the order for protection. The matter is pending in Court File No. A06-1432.

**B. COURT FILE NO. A06-1444 (Dissolution of Marriage).** Marjorie commenced a dissolution of marriage action against Ken. The case was tried in front of the Honorable Stephen Muehlberg, Judge of the Tenth Judicial District Court on June 28, 29 and 30, 2005. The trial court issued its *Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree* on September 12, 2005.

On March 31, 2006, the Honorable B. William Ekstrom issued *Amended Findings of Fact, Conclusions of Law and Order*.

On July 31, 2006, Ken filed his appeal, disputing the division of property and an award to Marjorie for past medical expense reimbursement. On August 8, 2006, Marjorie filed a notice of review seeking review of the trial court's calculation and division of debt, determination of nonmarital property and valuation and division of assets.

After filing the appeal the Court of Appeals questioned whether the medical reimbursement issue was appealable since it had not been reduced to judgment. It was determined that Ken had paid the amount ordered which rendered the issue moot.

## STATEMENT OF FACTS REGARDING COURT FILE NO. AO6-1432 (ORDER FOR PROTECTION).

The parties appeared in Washington County District Court on January 16, 2003, in front of the Honorable Gary Meyer, on Marjorie's request for an order for protection. In her petition dated December 27, 2002, Marjorie alleged that she was afraid that Ken would physically harm her. Marjorie alleged that on October 15, 2002, the parties' teenage daughter Rebecca told Ken that she had sex with a boy she had been seeing. Marjorie alleged that Ken became angry with her, berated her and called her names. Marjorie alleged that this led to Rebecca being suicidal. [A 114] Marjorie alleged that approximately ten times between October 15, 2002, and December 24, 2002, Ken had confronted her and Rebecca and "lectured" them. Marjorie alleged that on December 24, 2002, Ken had been "growling" at her and "blaming" her for problems in his life. [A 114] She alleged that on December 25, 2002, Ken was angry and "raged" at her and that Ken had gotten into an argument with Rebecca and that he had again berated her.<sup>1</sup>

Marjorie alleged that on December 26, 2002, Ken "rammed" her with his shoulder (while he had his hands in both of his pockets) and caused her to fall down.<sup>2</sup> [A 114] She also

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<sup>1</sup> No explanation was ever given for what she meant by Ken "raged" at her. In any event, there was no allegation that the alleged "raging" contained a threat of physical harm.

<sup>2</sup> Ken stands short in stature, is 66 years of age and weighs less than 150 pounds. The primary allegation made by Marjorie in January 2003 was that Ken had *rammed* her with his shoulder and blocked her exit from a bathroom. The police arrived and Ken was not arrested (which was within the authority of the officer had he believed Marjorie).

asserted that Ken had blocked her exit from a room. [A 114] After calling the police Ken was not charged with assault and Marjorie left the house with four of the parties' children. [A 114]

Marjorie alleged in her petition that Ken "had a history of shaking [her] at the shoulders, starting slowly and then speeding up, then apparently realizing what he [was] doing, and stopping."<sup>3</sup> [A 115] She also alleged in her petition that he had threatened to hit her and that "one time" he hit her with a glancing blow on her chin.<sup>4</sup> [A 115] Finally, Marjorie alleged (in general terms) that she was afraid that Ken would cause her emotional and physical "damage" and that he would take away, "all means of her support." [A 115]

Ken appeared at the hearing and did not object to the issuance of an order, but more importantly, he did not admit the allegations in the petition. [T 4] There were no findings of abuse made by the trial court. [T 540] Pursuant to stipulation, Marjorie was awarded temporary physical custody. Ken was granted liberal visitation. Ken was ordered to have no contact with Marjorie except by telephone to arrange visits. [T 5] Ken was allowed to call his son's cell phone, or the children were allowed to call Ken. Ken was not allowed to enter the parties' lakeside homestead, and initially had to stay 140 yards away. While Marjorie

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Marjorie also alleged that Ken had been *growling* at her for several days and that he would not talk to her to coordinate Christmas gifts for their children.

<sup>3</sup> Marjorie does not identify when this allegedly occurred.

<sup>4</sup> There was no time frame mentioned for when this allegedly occurred, i.e., the year before, five years before, ten years before.

wanted the children to walk 350 feet (even in cold weather) down their long driveway, the Court thought it was better to follow Ken's suggestion that he be able to drive onto the property and stay in his vehicle. [T 7, 11] Ken was not allowed to contact Marjorie's employer, was ordered to pay \$5,000 a month temporary support and was ordered to continue to pay uncovered medical expenses. [T 8] The Court recognized that there had been no admission of abuse or finding of abuse. [T 13]

On February 13, 2003, the trial court issued an amended order that primarily modified the parenting schedule and allowed for pick up and drop off at the end of the driveway. [A 122]

A year later Marjorie sought an extension of the order for protection. Ken appeared *pro se*. Ken refused to consent to a continuation of the original order and requested a hearing. On March 22, 2004, the hearing was held in front of the Honorable Stephen Muehlberg.<sup>5</sup> Marjorie alleged that the basis for the extension was that Ken had called her home in violation of the existing order and that he had pled guilty to a violation of the order for protection on September 23, 2003. In response, Ken asserted that the "guilty plea" was based upon a plea negotiation that he had accepted based on promises made to him by Judge Cass. The plea was conditional, meaning the charges would be dropped if Ken complied

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<sup>5</sup> For reasons noted below, Ken's due process rights were violated in a number of respects.

with the conditions of the plea.<sup>6</sup> [T 36] Ken related that it was his understanding that with the plea the charges would be dropped. [T 37]<sup>7</sup> Ken related how he had called the home a number of times to talk to children and that Judge Armstrong had given him permission to do so. [T 39- 40]

As noted above, Ken's due process rights were violated repeatedly during the hearing in front of Judge Muehlberg. Marjorie was represented by legal counsel and Ken was not. At one point the trial court admonished Ken for giving a narrative answer (even though opposing counsel had not objected to his testimony). When Ken asked the trial court for some guidance as to how to properly answer, he was again admonished and told that no guidance would be provided. [T 44] When opposing counsel moved to enter into evidence hearsay third-party letters, Ken was not even asked if he objected and the trial court simply summarily admitted the letters. [T 46]

The "violation" alleged by Marjorie occurred when Ken showed up to take the children fishing. [T 47] The parties' homestead is lakeshore, located on a large parcel of land. The children could not find their life jackets (which as Ken explained, should have been on the boat). Ken proceeded to look in the fish house and shed for them. [T 48] They

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<sup>6</sup> The charges were dismissed. Ken has never been convicted of violating an order for protection.

<sup>7</sup> While Judge Muehlberg did not give him a chance to further explain the "plea", the record reflects that Ken has *never* been convicted of any crime, including violating an order for protection. The negotiation was that there would be no conviction if Ken had no other violations. [T 163]

were not there either. Ken had the children go and ask their mother where they were. She did not disclose their location and told the children to tell Ken that he should go and buy new ones. The violation alleged by Marjorie was that Ken had looked for the life jackets in the storage shed and fish house, which are separate and apart from the home itself. As noted above, there was no conviction arising from the charge.

After Marjorie's counsel put in *her* case, she moved for a directed verdict. Judge Muehlberg stated that the statute was very clear and that,

*"if there is a violation that results in a conviction, then [the order] can be extended."*<sup>8</sup>

The problem was there was no conviction. There was no evidence submitted to the court that there had been a conviction. The trial court merely assumed that there had been a conviction and extended the order solely on that basis. The trial court extended the order for two years on the false premise of a "conviction" that never occurred. Once again, there was no finding of abuse by Ken nor was there a finding that Ken had threatened abuse.<sup>9</sup> [A 130-37]

In December 2005, Marjorie filed for yet another extension. In her petition she alleged that Ken had two violations of the order for protection; however, during the evidentiary hearing, after being pressed on the issue, she conceded that both alleged

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<sup>8</sup> Judge Muehlberg established the law of the case. He made it clear that it took a conviction for a violation to be used to subsequently extend an order.

<sup>9</sup> It is unclear how the trial court decided to check the boxes on the form (¶c). The trial court found that Marjorie was reasonably in fear of physical harm from Ken and that Ken had engaged in acts of harassment or stalking, even though these issues were not even litigated. While Ken is not appealing the March 22, 2004, order, it is important to note the prior deficiencies in this matter.

violations had been dismissed by the Forest Lake City Attorney. [T 73] Marjorie's counsel explained that the reason she needed an extension was to "enforce [the schedule] that was currently in place." [T 137, 524] The trial court responded that, "extensions are not granted simply to enforce what is currently in place." [T 138, 525] Marjorie's counsel responded,

*"Well, according to the application we can take some testimony if the court requests, but [Marjorie] is asking for an extension based on a couple of reasons. One is that there have been violations of the Order for Protection."* [T 525]

The Court asked the question, *"When? You have noted two citations. When?"* [T 525]

Marjorie's counsel requested that Marjorie advise the court pertaining to the violations cited in the petition for the extension. She answered,

*"It's been within the last year two times he was ticketed by the Forest Lake police. One for calling the main line and one for keeping a child overnight and returning him without permission."* [T 526]

The trial court pressed Marjorie's counsel once again to identify when the two alleged incidents had occurred. In response her counsel indicated,

*"I believe more than six months ago was the last incident. Both of those - - just to be clear - - they were reported to the police. Both of them have been dismissed. Citations were sent. Both of them dismissed."* [T 526]

Prior to commencing testimony, Ken's counsel moved the trial court for a *motion in limine* to restrict the testimony to the allegations contained in Marjorie's petition. [T 527]

The trial court granted the request with the caveat that while it would be restricted to the two alleged violations of the existing order in the petition, and alleged incidents on December 28, 2005 and on February 6, 2006. Marjorie could also testify beyond the petition as to why she

felt she was in reasonable fear. [T 527]

Marjorie began her testimony by discussing the alleged incident from December 28, 2005. [T 528] She had called the parties' son's cell phone (while Ken and the children were vacationing in Michigan over the Christmas holiday break). Marjorie alleged that Ken had answered the phone and that he "raged" at her and told her to "repent." Marjorie claimed that when she called the cellphone "someone" answered and said, "hello." She claimed that she thought it was her son Eric and that she replied, "*Hi, how are you, can I talk to the kids.*"<sup>10</sup> [T 142, 529] In response she claims that Ken said that he was surprised that she was "sure being nice to me now." Marjorie claimed that she then said, "*I thought it was Eric, can I talk to the kids?*" Marjorie claimed that Ken, "*went into a rage that [she] had never repented and other things he said to [her].*" [T 143, 529]

Marjorie's testimony was entirely inconsistent. While on the one hand she testified that she thought she was talking to her son Eric, on the other hand she said that during that call she asked the person on the other end to, "*talk to the kids.*" She also contradicted prior complaints about Ken having inappropriate phone contact with her. When asked why she didn't initially recognize Ken's voice, she stated, "*I hadn't talked to him for many years.*" [T 143, 530]

At no time did Marjorie testify that she was in fear of physical harm from Ken as a

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<sup>10</sup> That statement demonstrates the clear inconsistency in Marjorie's testimony. As noted above, she first testified that she when called, she thought that she was talking to her son; however, why then would she ask to "talk to the kids?"

result of the conversation.<sup>11</sup> The one and only “fear” she mentioned was the “fear” that she was, “*afraid that she could not even talk to [her] own kids.*” [T 530]

Marjorie also alleged that Ken had refused to accept a letter from her. [T 145, 533] She did not expound on why that would constitute domestic abuse.

Marjorie expounded on the alleged violations of the order for protection that she had reported to the Forest Lake Police Department. She made it clear that in her petition for an extension she was referring to two incidents that had occurred since the last extension in March 2004. The first alleged incident was in the Spring of 2005 when Ken allegedly had not brought the parties’ older son home until a day late, and Ken was sitting in his car in the driveway. Marjorie alleged that she walked up to Ken’s car and wanted to know what he was doing there and Ken advised her that he was waiting for their son Cory.<sup>12</sup> [T 534] The other alleged violation occurred when Marjorie allegedly picked up the phone and heard Ken talking to the parties’ daughter on the “wrong” line. [T 535] Again, it is important to note that Marjorie’s counsel conceded at the commencement of the proceeding that neither of the alleged violations were pursued by the Forest Lake Police Department.

Marjorie was then asked the generic question (without reference to any particular

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<sup>11</sup> Again, bear in mind that Ken has never been found to have physically abused Marjorie and the last *allegation* of abuse occurred in 2002.

<sup>12</sup> Ken later testified that his son Cory had gotten out of the car and his doors and windows were locked as he waited in the driveway. Ken further testified that Marjorie walked up to the car and started screaming and yelling at him, at which point he simply backed out of the driveway. Cory had asked Ken for a ride to work but due to Marjorie’s conduct he left and Cory got a ride with a neighbor instead. [T 542]

incidents) of whether she had, “*fear of physical harm from [Ken].*” [T 536] In response, she stated only the following:

- ▶ “*Because I did my best to give to him and do everything right by him, and he turned it all against me. So I don’t have the clues to what he is going to do next. The things he said on the phone to the kids, tell your mother this, tell your mother that, she doesn’t love you;*” and [T 536]
- ▶ “*Also in dealing with the police department and neighbors, they also encouraged me to get the Order for Protection to begin with in 2002. When he won’t stop calling me, and he won’t stay away, should I not be afraid of him?*”<sup>13</sup> [T 537]

Other than those two “explanations” for the alleged “fear,” Marjorie only noted that when she received the initial order for protection more than three years before, she had *alleged* physical abuse, which was never found by the court; and, there were *prior* violations of the order, all of which were dismissed. [T 547]

At the end of Marjorie’s case, Ken moved for dismissal. Ken’s counsel argued that there was no evidence that Ken had violated the order for protection (especially with Marjorie’s concession that the alleged violations had been dismissed); that Marjorie did not testify that she was in fear of physical harm from him; and, that failing to accept mail does not constitute harassment. Ken’s counsel also pointed out that the existing order allowed for phone calls between the parties to discuss matters regarding the children [T 539]. The Court

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<sup>13</sup> Marjorie did not testify that Ken had called her in the prior two years and she did not testify that he had come near her. The only “incident” reported by Marjorie that would remotely come close to the allegation was when Ken was parked in the driveway waiting for their son and Marjorie approached him. The police did not pursue that alleged violation.

denied the request to dismiss without comment.

Ken took the stand and testified that the first *alleged* violation of an order for protection occurred in May 2003 and involved the life jackets. As noted above, that allegation was dismissed. [T 157] The second *alleged* violation occurred in January 2004. Ken called and left a message that he had received notice that Marjorie's auto insurance was being cancelled. That alleged violation was dismissed. [T 158] The third *alleged* violation occurred in May 2004. Ken was watching his son play soccer and didn't know that his daughter was playing on another field with Marjorie. That alleged violation was dismissed. [T 155] The fourth *alleged* violation occurred in August 2005. Ken was sitting in his car in the driveway waiting for their son. Marjorie came home and she started screaming and yelling at him. Ken drove off. That alleged violation was dismissed. [T 155] The final alleged violation was in September 2005 when Ken *allegedly* called the home number and talked to the parties' daughter while Marjorie eavesdropped. That alleged violation was dismissed. [T 156] While Ken acknowledged that there had been a "plea" on the first alleged violation, it was part of a negotiation that would keep it off his record. The record reflects that Ken has no convictions for violating an order for protection. [T 551]

Ken testified that Marjorie never called the police about the December 28, 2005, phone call, even though she was obviously never shy about calling the police before, as evidenced by the above five alleged violations, all of which were dismissed. [T 159] Ken testified that the conversation with Marjorie on December 28<sup>th</sup> last ten or fifteen seconds,

while all of the children were present in the same room, and that the content was “nondescript.” [T 547, 548] He denied “raging” and denied telling Marjorie to “repent.” [T 160, 546, 547] In fact, Ken did not recall any conversation other than Marjorie asking to speak with the children. [T 546] Ken indicated that he merely handed the phone to his son after Marjorie asked to speak with the children and that he was not even aware that the telephone call was in issue until after he was later served with the petition for yet another extension. [T 546]

The trial court issued its *Order Extending Order for Protection* on May 25, 2006. In support of the extension the trial court made the following findings:

- ¶5: “On March 31, 2006, [Marjorie] testified that she is reasonably in fear of physical harm from the Respondent. [Marjorie] testified that on December 28, 2005, she unintentionally had a conversation with Respondent when he answered the cell phone of one of their children. [Marjorie] indicated that [Ken] “raged” at her. [Ken] denies “raging” at her. The parties also dispute how long the conversation lasted. [Marjorie] testified that this conversation created fear of [Ken].”
- ¶6: “The Court finds that [Marjorie’s] testimony was credible and that she evidenced an obvious fear of physical harm from [Ken]. [Marjorie] indicated that [Ken] had violated the previous Order for Protection on the basis of a violation, the prior incidents along with incidents as recent as December 2005 taken as a whole support [Marjorie’s] assertion that she is in reasonable fear of physical harm from [Ken].”

In support of those findings the trial court concluded

- ¶1: “Pursuant to Minn.Stat. §518B.01, Subd. 6a, the court may extend the terms of an existing order for protection if it finds the “petitioner is reasonably in fear of physical harm from the respondent” and such is the conclusion of this Court.”

The Court's findings were not consistent with the evidence. While the Court claimed that Marjorie testified that she was reasonably in fear of physical harm from Ken, that misstates the record. Marjorie testified only that Ken had told the kids to tell her they didn't love her;<sup>14</sup> that her neighbors and friends had told her to obtain an order for protection three years earlier in 2003; [T 536, 537] and, that it had been *alleged* (but not proven) three years before that Ken had assaulted her (in 2002 or earlier), and that there had been prior violations, all of which were ultimately dismissed. In fact, the two alleged violations that had occurred since the last extension in 2004 were not even pursued by the police. Therefore, the finding that her fear was "reasonable" was not supported by the record.

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<sup>14</sup> This was objected to as hearsay.

## ISSUES REGARDING THE ORDER FOR PROTECTION

1. WHEN AN ORIGINAL ORDER FOR PROTECTION IS STIPULATED TO WITHOUT ANY FINDINGS OF ABUSE, MUST THERE BE A PRESENT SHOWING OF ABUSE OR THREAT OF ABUSE TO EXTEND AN ORDER FOR PROTECTION? The trial court did not address this argument which Ken raised in final arguments.

### Apposite Cases and Statutes:

Minn.Stat. §518B.01, subd. 4a;

Minn.Stat. §518B.01, Subd 6a;

*Hill v. Brockamp*, WL 32929 (Minn.App. 1999);

*Kass v. Kass*, 355 N.W.2d 335, 337 (Minn.App. 1984).

2. DID MARJORIE DEMONSTRATE ANY OF THE SPECIFIC STATUTORY GROUNDS FOR AN EXTENSION? The trial court found that Marjorie demonstrated that she was in reasonable fear of domestic abuse by Ken.

### Apposite Cases and Statutes:

Minn.Stat. §518B.01, Subd. 6a;

*Chosa ex rel Chosa v. Tagliente*, 693 N.W 2d 487 (Minn.App. 2005)

# ARGUMENT REGARDING THE ORDER FOR PROTECTION FILE

## 1. WHEN AN ORIGINAL ORDER FOR PROTECTION IS STIPULATED TO WITHOUT ANY FINDING OF ABUSE, THERE MUST BE A PRESENT SHOWING OF ABUSE OR THREAT OF ABUSE TO

### EXTEND AN ORDER.

In an order for protection proceeding, statutory interpretation is a question of law and subject to *de novo* review. *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 208 (Minn. 2001). In interpreting statutes, it is the goal of the reviewing court is to ascertain and effectuate the intent of the legislature. Minn.Stat. §645.16. In doing so there is a presumption that the legislature does not intend an absurd result. Minn.Stat. §645.17. Here, Ken challenges the application of the lesser standard of proof that is applied to extensions of orders for protection under Minn.Stat. §518B.01, Subd. 6a, where there has not been a prior finding of abuse, to-wit: in this case Ken stipulated to the initial order, *without* a finding of abuse. Ken argues that there is a distinct difference between the status of an individual who has consented to the issuance of an order and one who has been determined to be guilty of abuse.<sup>15</sup>

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<sup>15</sup> This difference is found in other areas of family law as well. For example, under Minn.Stat. §518.17, Subd. 2(d), the presumption of joint legal custody can be defeated if there is a showing that domestic abuse as defined in Minn.Stat. §518B.01 has occurred. However, nothing in §518.17 indicates that the presumption can be defeated solely on the basis of the existence of an order for protection. In other words, the existence of an order is not the same as a finding of abuse. Obviously, a *finding* of

When the initial stipulated order for protection was continued in March 2004, Ken was not represented by legal counsel. In retrospect that was a mistake since a key legal issue was overlooked by the trial court. The domestic abuse statute identifies two separate standards of proof. The first standard applies to an initial seeking of an order. A party seeking an order in the first instance must demonstrate either present domestic abuse, or the present threat of abuse. (*See*, Minn.Stat. §518B.01, Subd. 4(b))<sup>16</sup>. On the other hand, a party seeking an extension of an order, or the issuance of a subsequent order, has a lower standard. Minn.Stat. §518B.01, Subd. 6a, provides as follows:

*“Upon application, notice to all parties, and hearing, the court may extend the relief granted in an existing order for protection or, if a petitioner's order for protection is no longer in effect when an application for subsequent relief is made, grant a new order. The court may extend the terms of an existing order or, if an order is no longer in effect, grant a new order upon a showing that:*

- (1) the respondent has violated a prior or existing order for protection;*
- (2) the petitioner is reasonably in fear of physical harm from the respondent;*
- (3) the respondent has engaged in acts of harassment or stalking within the meaning of section 609.749, subdivision 2; or*
- (4) the respondent is incarcerated and about to be released, or has recently been*

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domestic abuse can support the issuance of an order as well as defeat the presumption, while the mere issuance of an order *without a finding of abuse*, is not sufficient to defeat the presumption. Therefore, a respondent who agrees to the issuance of an order without findings should not be treated the same as a respondent whom is found to have abused the petitioner.

<sup>16</sup> In the first instance there must be a showing that the offender *intended* to put the petitioner in fear of domestic abuse with an overt act. *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn.App. 1984).

*released from incarceration.*

*A petitioner does not need to show that physical harm is imminent to obtain an extension or a subsequent order under this subdivision.”*

While the language of the statute appears to relax the requirement whenever an order has been issued, case law has interpreted the statute otherwise. The one factor that went unnoticed when Marjorie first sought an extension was the fact that there has *never* been a finding of domestic abuse on Ken’s part. Absent violating an order, recent release from incarceration or harassment, the standard for extending an existing protective order is a showing that a petitioner is, “*reasonably in fear of physical harm*” from a respondent. According to the plain language of the statute, a petitioner does not need to show that physical harm is imminent to obtain an extension under the subdivision; however, that presupposes that there has been a finding that domestic abuse has occurred. In *Hill v. Brockamp*, WL 1999 32939 (Minn.App. 1999),<sup>17</sup> the Court of Appeals held that in subsequent applications for an order for protection, there does not have to be a present finding of domestic abuse, “*because such a finding is made as part of the initial order.*” The statute therefore contemplates that in order to obtain an extension of an order for protection or a new, subsequent order for protection, under the relaxed standard of Subd. 6a, there must first be a finding of abuse (either actual physical abuse or the threat thereof), not merely an agreement to the issuance of an order in the first instance. Otherwise, the

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<sup>17</sup> [A 147]

petitioner should be held to the same standard as a petitioner seeking an order in the first instance.

When a respondent appears in court to answer to a petition for domestic abuse he/she is given the option of: (1) admitting the allegations; (2) denying the allegations and having an evidentiary hearing; or, (3) allowing an order to issue without any findings. A respondent is not advised that if he/she waives a hearing and allows an order to issue without findings, he/she is consenting to a lower standard of proof in a subsequent hearing. There has *never* been a finding of abuse in this case. There is not even a present allegation that Ken threatened Marjorie with abuse.<sup>18</sup> In truth, the only *abuse* that has taken place here is an abuse of process. The clear implication in the *Hill* decision is that where there has been no prior showing of abuse, there must be a present showing of actual physical abuse or threat thereof to extend an order. Since there has never been a finding of abuse, and since Marjorie did not even allege a threat of abuse by Ken<sup>19</sup>, the request for an extension should have been denied.

**2. MARJORIE DID NOT DEMONSTRATE ANY OF THE SPECIFIC STATUTORY GROUNDS FOR AN EXTENSION OF THE ORDER.** Even in the absence of the lack of a showing of abuse the request for an extension should have

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<sup>18</sup> Marjorie's testimony was simply that Ken allegedly "raged" at her and told her to "repent."

<sup>19</sup> At no time at the March 2006 hearing did Marjorie testify that Ken threatened any abuse against her.

been denied. Marjorie alleged in her petition, as the basis for an extension, that there were "two citations of record." However, her counsel conceded prior to the hearing that there had not been any judicial determinations of violations of the existing order for protection. While Marjorie complained to the police about *alleged* violations, it was undisputed that both of those complaints were dismissed without further action.

Marjorie alleged that Ken's failure to sign for a letter on February 6, 2006, constituted "harassment" as contemplated by the statute. While Ken did not give his reasons for not accepting the letter, it was rather ironic that Marjorie alleged that his refusal to engage in contact with her was the basis for harassment when the opposite is true since harassment contemplates the initiation of wrongful conduct, not refraining from it.

Harassment is defined to include, "*repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect \* \* \* on the safety, security, or privacy of another.*" Minn.Stat. §609.748, subd. 1(a)(1) (2005). However, not even inappropriate or argumentative statements can be considered harassment. *Beach v. Jeschke*, 649 N.W.2d 502, 503 (Minn.App.2002)(holding that the statements related to a pending child-support matter made on one occasion that, "*You two had better come up with the \$80,000, or you're both going to jail. This is going to be fun,*" did not constitute harassment). Even if there is a preliminary showing of harassment, there must be a showing that there is an intent to have a substantial adverse effect on the safety, security, or privacy of another. Minn.Stat. §609.748, subd. 1(a)(1). In sum, Ken did not engage in harassment.

Under paragraph 4 of her petition for an extension, Marjorie alleged (in response to a request that she identify acts engaged in by Ken that explain the reasons an extension is needed) that she had called her son, and Ken “*answered and raged at [her] to “repent” and almost denied [her] talking to [her] son.*”<sup>20</sup> (Emp. added). At no time did she claim that Ken had threatened her with abuse. In conjunction with this single solitary *detailed* claim for her reason for the need for an extension, Marjorie checked the box on the form that she was, “*reasonably in fear of physical harm from [Ken].*” However, the form does not control whether or not the trial court should grant an extension, the law and the facts adduced at the hearing do.

Even though Marjorie has a lengthy history of calling the police for alleged violations of the order for protection, she did not call the police and complain that the 12/28/05 phone call was a violation of the order. Her explanation of the call was even not believable. According to her testimony, when Ken picked up she stated that she didn’t recognize his voice; however, she also testified that she first asked him if she could talk to, “*one of the kids.*” She obviously lied. By her own account she knew it was Ken since she asked to talk to one of the kids. The only *fear* that she related to the court was her *fear* that Ken would not return their daughter at the end of vacation. In fact, the most that she could come up with

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<sup>20</sup> The parties’ children were present in the same small room with Ken when the conversation occurred. Some of the children are older and clearly could have been called by Marjorie to support her claim. The party seeking the order has the burden of proof. *Chosa ex rel Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn.App. 2005).

in response to her attorney's open-ended question of why she is in fear of harm was, "Wouldn't you be" and that she was very frustrated by his actions. None of those justifications support the extension of an order for protection.

In general, there is little in the way of precedent regarding requests for extensions of orders for protections other than unpublished decisions, which are, in the very least, instructive. It obviously takes more than a blind assertion of fear of harm to obtain an extension. In *Pelkey v. Malecha*, 2003 WL 21694431 (Minn.App. 2003), the Court of Appeals made it clear that there must be a *reasonable* fear of physical harm in order to obtain an extension of an OFP. [A 150] In *Pelkey*, there was no showing of any violations in the preceding year and there were no facts alleged to support the claim of *reasonable* fear. It was therefore appropriate to deny the request for the extension.

While under appropriate circumstances a verbal threat can constitute sufficient basis for a finding of fear of harm, there is not even an allegation of a threat in this case, verbal or otherwise. *See, i.e., Hall v. Hall*, 408 N.W.2d 626, 628 (Minn.App. 1987)(threats such as "I'm going to hunt you down," "If you don't stop f\*\*\*ing with me you'll end up in a box," and "If you're going to f\*\*\* with me you're going to get it" are sufficient when taken in conjunction with prior abuse).

In summary, even assuming arguendo that Minn.Stat. §518B.01, Subd. 6(a) applies here, there is no evidence that supports an extension of the existing order. The four categories under the statute are not present:

*(1) the respondent has violated a prior or existing order for protection;*

**There were no violations determined. All alleged violations were dismissed as part of a plea that was not accepted, or were simply not prosecuted. In fact, the trial court restricted the present hearing to the two most recent alleged violations, both of which were conceded to not have been pursued by the police.<sup>21</sup>**

*(2) the petitioner is reasonably in fear of physical harm from the respondent;*

**Marjorie did not identify any basis for fear. For one, there has never been a finding of physical abuse. Secondly, the only “fear” she testified to was the “fear” that she would not be able to talk to the children during the December 28, 2005, phone call. She did not identify one single incident in the prior two years that caused her to “fear” physical abuse from Ken.**

*(3) the respondent has engaged in acts of harassment or stalking within the meaning of section 609.749, subdivision 2; or*

**Marjorie did not identify any basis for harassment.**

*(4) the respondent is incarcerated and about to be released, or has recently been released from incarceration.*

**It is undisputed that Ken was not incarcerated.**

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<sup>21</sup> Judge Muehlberg previously held in this case that it takes a conviction to constitute a violation.

## STATEMENT OF FACTS REGARDING CASE FILE NO. AO6-1444 (DISSOLUTION OF MARRIAGE)

Ken and Marjorie were married on March 5, 1983. Ken is currently 67 years of age and Marjorie is currently 52 years of age. The parties have eight children, five of whom are still in their minority. Marjorie filed for dissolution of the parties' marriage in May 2003. Their marriage was dissolved on September 12, 2005.

As part of a stipulated order for protection in January 2003, Ken agreed to pay to Marjorie \$5,000 a month in what was deemed "family support." That requirement continued throughout the dissolution of marriage proceedings.

The parties are the owners of homestead real property located in Forest Lake, Minnesota. They also own a commercial building and real estate in St. Paul, Minnesota. Ken is the owner of an insurance agency known as *Unidale Insurance Agency* (hereinafter "*Unidale*."). It is undisputed that Ken owned and operated *Unidale* for approximately twenty years before the parties' marriage in 1983.<sup>22</sup> *Unidale* was described during trial as a "substandard" agency that dealt with risk insurance products for people or companies otherwise unable to obtain insurance elsewhere. Ken is the only licensed agent at the agency and is the only person at the agency who writes policies and performs consulting services. *Unidale* has three cash flows: (1) premiums on policies; (2) one-time policy fees; and (3) one-time consulting fees.

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<sup>22</sup> The Court did not treat any of the value of *Unidale* as non-marital despite the length of time that Ken owned and operated it prior to the marriage.

At the time of trial, Marjorie was unemployed; however, expert testimony determined that she could earn at least \$12.65 an hour, as well as the social security she was receiving by virtue of her marriage to Ken. Ken's sole employment was with *Unidale*. He earned salary of \$30,000 a year while the balance of his compensation was in the form of distributions from the Sub S Corporation (*Unidale*). Ken also received \$1,229 a month in social security benefits, rental income from the commercial property and interest income from his investments. The rental income for 2002 was \$33,127; for 2003 was \$34,392; and, \$34,810 for 2004.

The Court determined that Ken's average monthly net income was \$10,696 per month. [A 15, 16] In making that determination, the trial court made an elaborate computation. The trial court found that Ken had a salary of \$30,000 a year from *Unidale* and received the balance of his income from *Unidale* in the form of Subchapter S distributions. The trial court found that Ken had \$1,229 a month in social security benefits, that he received investment income and rental income. The trial court further noted that Ken had rental income in the prior three years of:

- ▶ 2002: \$33,127;
- ▶ 2003: \$34,392; and
- ▶ 2004: \$34,810.

The trial court concluded that it would calculate Ken's income based upon *Unidale's* corporate income taxes, which was consistent with the amounts Ken claimed as income on his personal taxes. The Court concluded that it was appropriate to total the following:

- ▶ Ordinary income (i.e., \$30,000 annual salary);
- ▶ Rent paid by *Unidale*;
- ▶ Officer compensation;<sup>23</sup>
- ▶ Rent from other tenants; and
- ▶ Medical Expenses.

In arriving at a number for current income, the Court averaged the above for three years. The three-year average was \$213,164.<sup>24</sup> The Court added to that amount the yearly social security and divided the total by twelve to arrive at “average gross monthly income.” [A 15] From that monthly amount the Court took appropriate Minn.Stat. §518.551 deductions, including state and federal taxes, social security and medicare, and medical. The result was the net monthly income for Ken of approximately \$10,696.

During trial, Marjorie presented valuation testimony from her expert, Stephen G. Dennis, *Baune Dosen & Co.* Ken presented valuation testimony from his expert, Edward D. Bates, *Edward D. Bates & Associates* and expert testimony from Jeffrey Pletcher of *Muellerleile & Harrington, Ltd.*, regarding an accounting of the assets of *Unidale* regarding its cash accounts.

Both parties agreed that the value of *Unidale* had two components: (1) the value of

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<sup>23</sup> This is also referred to as “undistributed Sub S earnings.”

<sup>24</sup> This formula overstated Ken’s income since in 2002 he had capital gains from the sale of a home in the amount of \$52,000. [T 25, 55] The three year totals (including capital gains in 2002) were: \$175,742 (2003); \$252,238 (2002);and \$211,128 (2001).

the assets (name, reputation, good will, phones, phone number, furnishings, etc.); and, (2) the value of the cash on hand in the company. The experts agreed that in order to sell the company Ken would likely have to sign an agreement not to compete; the cash would not be sold with the company; and, that the sale of the company would be an asset sale as opposed to a cash sale.

Expert Dennis testified that the value of the company (excluding cash) was \$220,861. Expert Bates testified that the agency was worth between \$67,913 and \$78,330. After weighing the testimony, including the witnesses thoroughness, expertise and backgrounds, the trial court determined that Marjorie's expert had greatly overvalued the business and accepted Ken's fair market value of \$67,913. Since Ken was receiving the agency, that amount would be credited to his side of the asset division.

Regarding the cash in *Unidale*, it was undisputed that there was more than \$200,000 cash in the two *Unidale* accounts as of December 31, 2003, the valuation date utilized by the court for the business. Both parties agreed that the University Bank Account had \$101,673.26 in it. The parties disagreed about the Western Bank Account. The Court reconciled the differences and determined that there was \$103,942.12 in the Western Bank Account, the amount determined by Ken's expert.

Expert Pletcher reconciled *Unidale's* accounts payable and opined that the net value of the account was \$65,199.12, after deductions for the following:

Gross Amount: \$103,942.12

Deductions:

▶ Undistributed Sub S earnings.	(\$ 22,630.00)
▶ Rents collected by Unidale but owed to [Ken]	(\$ 14,443.00)
▶ Insurance Company Payables as of 12/31/03	(\$ 70,093.98)
▶ Regular Accounts Payable	(\$ 6,097.64)
▶ Commissions received in 2003 for 2004	(\$ 7,009.40)
▶ Policy Fees Received in 2003 for 2004	(\$ 7,009.40)
▶ Insurance Deposits Received in 2003 for policies To be issued in 2004	<u>(\$ 13,132.84)</u>
	\$ 65,199.12

Instead of deducting the entire amount in Pletcher's reconciliation, the Court disregarded the "undistributed Sub S earnings" and the "rents collected by Unidale but owed to [Marjorie]," holding that they would be "marital assets" and "not payable to a buyer." [A 8] Adding back in those two categories the Court found the value of the business to be \$102,272.12. In this appeal, Ken assigns the Court's decision not to deduct those two categories as error.

Evidence was undisputed that *Unidale* is a Sub S corporation. , From a tax standpoint, as a Sub S corporation *Unidale* would not have any cash at the beginning or ending of a calendar year, which was typical for such business structures. [T 18] As explained by Ken's CPA Paul Volstad, "*everything is cleaned out at the end of the year.*" [T 20, 170] Furthermore, there is no such thing as "retained earnings" in a Sub S corporation. [T 24, 49, 50] The problem in this case involved the fact that Ken had not distributed his Sub S earnings and rental income for 2003 at the end of 2003, even though as noted above those amounts were used by the trial court in calculating Ken's net monthly income of \$10,696.

Ken testified (as did his CPA) that it has always been his practice to hold back much of the Sub S distributions until his taxes are done each March. The reasoning is that Ken (and his accountant) do not know the actual tax liability and do not know the amount that has to be paid to insurance companies for payments that have been received by Ken from clients but have not been billed by December 31<sup>st</sup> by the insurance companies. [T 14, 29, 79, 113] Put simply, Ken receives premium payments from clients, is paid a percentage as a commission or fee, and is required to pay the balance to the insurance companies he writes policies through. Therefore, while the trial court included the Sub S distributions in Ken's income determination, it also treated it as an asset to be divided. In effect, this resulted in a double pumping. Ken is required to pay child support based on the Sub S distributions; yet, by categorizing the amounts payable to Ken for 2003 as an asset, Marjorie got the benefit of the entire amount being used by the Court to calculate child support, as well as the benefit of receiving one-half of the amount in the account.

A similar problem exists with the 2003 rents. Ken explained that in May 2003 he began to deposit the commercial rents into his *Unidale* business account even though his prior practice had been to take them individually as Schedule 1040 -E- supplemental income. Ken further explained that his tenants would oftentimes improperly write the checks to *Unidale* when they should have been made out to him personally. When that would occur the bank would not allow Ken to cash the checks individually, which resulted in his having to run them through his business account. To be consistent Ken, Ken decided to run all of

the checks through the business account, and them reflect the rental income and expenses on Schedule 1040 -E-. [T 53,66, 107, 170] Ken was co-mingling his personal income with his business income which was perfectly acceptable since there is no requirement of a trust account. [T 171, 172] Either way, all of the income, either Sub S of rental, was individually taxable to him. [T 182, 183] Had Ken simply paid out the rental income from the *Unidale* account (where it did not belong) prior to the end of the year, it would not have been an issue. Unfortunately, the Court misconstrued it as an asset to be divided.

The net result of counting the “undistributed Sub S” and “rental” monies in the *Unidale* account at year end as an asset was Marjorie received one-half of the total of the two, to-wit: \$18,536.50 [ $\$22,630 + \$14,443 = \$37,073/2$ ].

The manner in which the Court treated the 2003 rents and “undistributed Sub S distributions” was also inconsistent with the parties’ prior agreement. When Ken appeared in Court for the initial order for protection in January 2003, it was agreed that he would pay \$5,000 a month in “family support.” Ken testified that the \$5,000 number was not pulled from thin air. On the contrary, it was the product of lengthy negotiations and calculations. Ken testified that his attorney and Marjorie’s attorney took a five year average of his net income. [T 66] That averaging included all Sub S distributions as well as commercial rents and the \$5,000 payment was one-half of Ken’s total net income. [T 60, 61, 95, 96] As of the trial dates in June 2005, Ken had been paying the \$5,000 a month each month without fail since January 2003. He continued to pay according to that agreement until September 2003

when the *Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree* were issued.

The Court also valued other account monies that the parties had as of the date of their separation on December 26, 2002 and divided those accounts, as well as their retirement accounts, vehicles, and the value of their homestead. Each was \$924,023 in assets according to those valuations.<sup>25</sup>

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<sup>25</sup> *See*, Exhibit 2 to Judgment and Decree.

## ISSUE REGARDING DISSOLUTION FILE

### 1. DID THE TRIAL COURT ERR BY TREATING THE RENTALS AND UNDISTRIBUTED SUB S DISTRIBUTIONS AS BOTH INCOME AND AS MARITAL PROPERTY?

#### Apposite Cases and Statutes:

**Minn.Stat.** §518.54, Subd. 5;

Minn.Stat. §518.54, Subd. 6;

*Gottsacker v. Gottsacker*, 664 N.W.2d 848 (Minn. 2003)

## ARGUMENT

### 1. THE TRIAL COURT ERRED BY TREATING THE RENTAL INCOME AND UNDISTRIBUTED SUB S DISTRIBUTIONS AS BOTH INCOME AND MARITAL PROPERTY. Minn.Stat. §518.54, Subd. 5 defines

"marital property" as,

*“property, real or personal, including vested public or private pension plan benefits or rights, acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding at any time during the existence of the marriage relation between them, or at any time during which the parties were living together as husband and wife under a purported marriage relationship which is annulled in an annulment proceeding, but prior to the date of valuation under section 518.58, subdivision 1. All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to section 518.58. If a title interest in real property is held individually by only one spouse, the interest in the real property of the nontitled spouse is not subject to claims of creditors or judgment or tax liens until the time of entry of the decree awarding an interest to the nontitled spouse. The presumption of marital property is overcome by a showing that the property is nonmarital property.”*

Subd. 6 defines “income” as,

*“any form of periodic payment to an individual including, but not limited to, wages, salaries, payments to an independent contractor, workers' compensation, unemployment benefits, annuity, military and naval retirement, pension and disability payments. Benefits received under Title IV-A of the Social Security Act [FNI] and chapter 256J are not income under this section.”*

Clearly, based simply on definitions, “income” and “property” are not the same.

Ken does not deny that property derived from income received during a marriage *can* be deemed to be a marital asset. For example, interest earned from a non-marital asset is deemed to be marital property. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 854 (Minn. 2003). Earnings retained in a business do not constitute “income” under Minn.Stat. §518.54, Subd. 6. *Id.* at 855. However, the Court’s ruling deemed the money to be both.

Secondly, the valuation of marital property is subject to the provisions of Minn.Stat. §518.58, Subd. 1. As noted in *Gottsacker*, the definition of “income” in Minn.Stat. §518.54, applies to statutes governing support as well as the division of property. *Id.* at 855. Minn.Stat. §518.58, Subd 1, pertaining to the division of marital property, provides in relevant part,

*“The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable. If there is a substantial change in value of an asset between the date of valuation and the final distribution, the court may adjust the valuation of that asset as necessary to effect an equitable distribution.”*

In the present case the rental income, as well as earnings from the Sub S corporation, were by agreement treated (dating prior to the filing of the case by agreement of the parties accepted by the court) as “income” for child support purposes. This is not a case where Ken received the income and then purchased an asset prior to the valuation date. Ken *never* received the income. By agreement of the parties it belonged to him but had not been paid to him.

In ¶14b of the *Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree*, the Court held,

“\* \* \* the Court finds that the “Undistributed Sub S earnings” and “rents collected by Unidale but owed to [Ken] are a marital asset and would not be payable to a buyer. Therefore, the Court finds that if the company were to be sold the above amounts, excluding “Undistributed Sub S earnings” and “rents collected by Unidale but owed to [Ken]” would be payable from Unidale from the cash in the accounts as of December 31, 2003 and as such they are an offset to the cash available as of that date.” [A 8]

That finding is not consistent with the facts. Expert Pletcher testified that the rents and undistributed earnings had to be deducted from the value of the business since (1) the rents were not business related; and (2) the undistributed earnings were already factored into the taxes as income. But-for the need to ascertain the tax consequences prior to distribution, the monies would have been gone by December 31, 2003.<sup>26</sup> In effect, what the Court did was mix issues. It is unclear how the Court decided that *if* the business would be sold, those monies would suddenly become assets of *Unidale*. There is no factual basis for that position. Obviously, Ken would never agree to include those amounts as assets when they weren't assets. The final tax return for 2003 did not show those monies as they had been reconciled. Furthermore, the Court's finding ignored the Court's own finding that those monies were “income” for child support purposes. As noted above, it can't be both.

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<sup>26</sup> It was not disputed that Ken *could* have paid out the disputed amounts prior to 2003; however, he would be guessing as to the amount needed to pay the insurance companies and taxes. Ken was merely following past practice. In fact, prior to May 2003, the rents had *never* been paid into the company as they were not *Unidale* income.

## CONCLUSIONS

The absence of any prior finding of abuse (be it actual physical abuse or eminent threat of physical abuse) should in and of itself be enough to deny an extension of an OFP. If that is not the correct legal standard, Marjorie has nonetheless not presented a case for an extension. The decision of the trial court should therefore be reversed in the OFP file.

The Court erred by treating the undistributed corporate earnings and rental income as both income and property. The credit given Marjorie for the same should be deleted.

Respectfully submitted,

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