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NO. A07-0110

State of Minnesota
In Court of Appeals

In the Marriage of:

Elaine Irene Lee,

Petitioner-Respondent,

vs.

Raymond Michael Lee,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

I. Did the district court abused its discretion in allowing the Respondent's August 11, 2006 dilatory and late filing in violation of the requirements of the Rules of General Practice for Family Court and error in it discretion not to allow Appellant time for a written response?

Trial Court's Ruling: No.

Apposite Cases: Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971),
Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984)
Prahl v. Prahl 627 N.W. 2d 698 (Minn. App. 2001)
Rule 303.02 Gen. R. of Prac.

II. Did the district court error in the determination of the Appellant's earned income by including his pension amount that were already divided?

Trial Court's Ruling: NO

Apposite Cases: Kruschel v. Kruschel 419 N.W.2d 119 (Minn.App. 1988)
Richards v. Richards 472 N.W. 2d 162 (Minn. App. 1991)

III. Did the district court erred as a matter of fact and law in disregarding the Appellant's unrebutted affidavits and documentation to establish the parties' 2006 ("present") expenses and erred by adopting the parties' 2004 finding as to the parties' expenses as the parties' 2006 ("present') expenses?

Trial Court's Ruling: NO

Apposite Cases: Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971),
Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984)
Prahl v. Prahl 627 N.W. 2d 698 (Minn. App. 2001)
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IV. Did the district court error as a matter of fact and law and was it arbitrary, in "balancing" the parties surpluses and shortages in determining the "reduced" amount of spousal maintenance?

Trial Court's Ruling: NO

Apposite Cases: Lyon vs. Lyon, 439 N.W. 2d 18 (Minn. 1989)
Claybaugh v. Claybaugh, 312 N.W. 2d 447 (Minn. 1981)

V. Did the district court error as a matter of fact and law (or abused discretion) in determining that the Respondent was in need of security for the payment of the reduced amount of spousal maintenance by requiring a new requirement on Appellant to obtain a life insurance policy.

Trial Court's Ruling: No.

Apposite Cases: Claybaugh v. Claybaugh, 312 N.W. 2d 447 (Minn. 1981)
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42 U.S.C 402 Sec. 202 (b)(1)

VI. Did the district court error as a matter of law in its determination of the date for the retroactive reduction of the Appellant's spousal maintenance and not using the date of the original Motion to reduced.

Trial Court's Ruling: No.

Apposite Cases: Kemp v.s Kemp , 608 N.W. 2d 916 (Minn. Ct. App. 2000)
Stat. § 518.64, subd, 2 (c) (2006)

VII. Did the trial court error as a matter of law and fact and abused its discretion in awarding conduct based attorney's fees to Respondent for collect of the three judgements already awarded in this matter?

Trial Court's Ruling: No

Apposite Cases: Geske v. Marcolina, 624 N.W.2d 813 (Minn. App. 2001).
Minn. Stat. §518.14

STATEMENT OF THE CASE

This is an appeal from a post-decree order dated November 16, 2006 which ordered a modification of spousal maintenance and had ordered other relief. The matter was heard before the Honorable Susan R. Miles, Judge the Washington County District Court - Family Court Division, Tenth Judicial District. The Appellant had brought a Motion to terminate his spousal maintenance obligation and to obtain an accounting from Respondent of the total funds that she had collected from judgments for arrears in spousal maintenance payments. The Respondent served a responsive motion, without any supporting documents asking the Court to deny the Appellant's motion and asked the Court for additional new relief. The Respondent in the responsive motion asked the Court to order that the Appellant secure the payment of his spousal maintenance obligation by obtaining a life insurance policy in the amount of $75,000.00, she asked for an award for conduct based attorney fees for having to defend the Appellant's Motion to terminate his spousal maintenance obligation, and she asked for an award of conduct based attorney's fees for having to collect three judgments. The Respondent served Respondent's Attorney's Affidavit, Memorandum of Law and Sealed Financial Documents to support Respondent's Responsive Motion previously filed motion on August 11, 2006 and filed the same with the Court on August 14, 2006.

The Court found that there was a substantial change in the income of both of the parties but not in the expenses of the parties and reduced the Appellant's spousal maintenance obligation from $825.00 per month to $700.00 per month retroactive to May 1, 2006. The Court awarded the Respondent the relief asked for in her late

filed motion by ordering the Appellant to secure his new spousal maintenance payment with a $75,000.00 life insurance policy on his life naming the Respondent as beneficiary and ordering the Appellant to pay $1,699 00 of the Respondent's attorney's fees that were incurred for the collection of the judgments for arrears in the spousal maintenance which were fully collected after the February 27, 2004 Order.

COURT CHRONOLOGY OF DOCUMENTS FILED AND SERVED

Document	Date of Service of Document	Date of Filing in Court of Document	Date of Hearing
Notice of Motion and Appellant's Affidavit to Terminate Spousal Maintenance	7-11-2005	7-12-2005	12-2-2005
Amended Notice of Motion and Appellant's Supplemental Affidavit to Terminate Spousal Maintenance together with Motion to Compel Discovery and Attorney's Affidavit	3-31-2006	4-03-2006	4-14-2006
Respondent's Responsive Notice of Motion and Motion ***without*** Affidavit to Support	8-08-2006	8-08-2006	8-18-2006
Respondent's Attorney's Affidavit, Memorandum of Law and Sealed Financial Documents	8-11-2006	8-14-2006	8-18-2006
Appellant's Objection to Late Filing of the Respondent's Attorney's Affidavit, Memorandum of Law and Sealed Financial Documents	8-11-2006	8-17-2006	8-18-2006

Order and Court's Memorandum	11-16-2006	11-18-2006	8-18-2006

STATEMENT OF FACT

The Appellant and Respondent were married to each other on September 4, 1968 and were divorced by a negotiated stipulated settlement on June 7, 1993. Both parties at the time of the dissolution was represented by counsel of their individual choice. The stipulated Judgment and Decree divided the parties' property and Respondent's defined benefit pension benefits earned during the marriage on a 50%-50% basis.[1] There was no Finding contained in the Judgment and Decree nor any stipulation that evaluate the pensions [2] or pension benefits other than to equally divide the same as personal property.

In the original Judgment and Decree the Court found that the Appellant had net earned income of $1,967.20 per month as an electrician and that the Respondent had net earned income of $450.00 per month from part time employment. The Court also found that the Appellant had reasonable monthly living expenses at the time of the dissolution of $1,410.00 and the Respondent's reasonable monthly living expenses were $1,500.00. The parties stipulated that the Respondent would pay to the Petitioner $650.00 per month as permanent spousal maintenance until "...[Respondent's] remarriage or cohabitation with an unrelated male for a period of 90 days, the death of either party, or further order of the Court." The parties did not

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[1] The Appellant had pension credits that were earned prior to the marriage that were excluded from this division.

[2] There are three separate pensions that were earned and divided

agree to any security for payment of the spousal maintenance payments nor was any demanded. Neither party had any life insurance at all.

On August 17, 1994 the Court issued an order, pursuant to the Appellant's Motion to reduce spousal maintenance, amending the Judgment and Decree to reduce the Appellant's spousal maintenance obligation from $650.00 per month to $341.08 per month based upon the Appellant's unemployment status.

The Court then issued an Order dated February 25, 2004, pursuant to Respondent's Motion to increase spousal maintenance, that increased the Appellant's spousal maintenance obligation to $825.00 per month retroactive to November 1, 2003. In that Order the Court found the financial circumstances of the parties as follows: Appellant was working as an electrician with net monthly income of $2,491.00 and had reasonable necessary living expenses of $2,100.00 per month, which expenses ***excluded*** the payment of his $825.00 monthly spousal maintenance payment to Respondent. In that same Order the Court found that the Respondent had net monthly social security income of $647.00 and her reasonable living expenses were $1,950.00 per month. That Order also, again without any evaluation, split equally, back to the date of the original Judgment and Decree, two of Appellant's three pensions that were omitted from the original Decree.[3]

The Appellant's former counsel served Respondent on July 11, 2005 with a Notice Motion and Motion requesting termination of the spousal maintenance together with Appellant's supporting Affidavit and Exhibits based upon his

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[3] The Court split the two omitted pensions as personal property rights in the same manner and way as the defined benefit pension in the original Judgment and Decree

retirement status at the age of 65. The Appellant's Motion also asked to obtain an accounting of the funds obtained by Respondent's counsel on three judgments for past delinquent spousal maintenance obligations that he had collected by account levies.

Appellant indicated in his affidavit filed at the time of his initial Motion that his income, excluding the pensions that were already divided as personal property, was $830.35 per month and his expenses were $2,921.00 per month ***excluding*** any expense for spousal maintenance. The Motion hearing date for this Motion was originally scheduled for a December 2, 2005 hearing date. The December 2, 2005 hearing date was continued by consent of the parties to January 20, 2006. The January 20, 2006 hearing date was thereafter continued by consent of the parties to April 14, 2006. Prior to the April 14, 2006 hearing and on March 31, 2006, the Appellant's new counsel filed an Amended Notice of Motion and Motion relative to discovery issues together with an Amended termination of spousal maintenance Motion. A hearing was held on April 14, 2006. At that hearing the Court wanted the parties to mediate and orally ordered that mediation be completed by August 1, 2006.

In the Appellant's Supplemental Affidavit served on March 31, 2006 he stated that it was his belief that there was a substantial change in circumstances since the February 27, 2004 order which makes that current maintenance Order unfair and inequitable. Appellant stated that since the Court's last order: 1.) he reached retirement age of 65 and he had retired. 2.) that the Respondent has retired and was collecting her portions of his pensions awarded to her and her income had

increased. 3.) that the Respondent's income of approximately $1,500.00 net per month in social security and pension payments adequately meets her necessary living expenses and that there is no longer any other need for spousal maintenance and asked that the same be terminated.

The Appellant indicated in that Supplemental Affidavit that the Respondent stated in her answers to the Appellant's Interrogatories that her monthly living expenses were $2,174.05 per month. The Appellant in that same Supplemental Affidavit carefully examines each of the Respondent's claimed monthly expenses. Appellant indicated that the Respondent's listed a $125.00 per month as restaurant expense, a $200.00 personal allowance and grooming expense, a $200.00 per month entertainment and travel expense, a $37.80 per month pre-paid burial plan expense, a $78.00 per month cost of Medicare insurance expense, and gift expenses of $150.00 per month. The Appellant claimed in his Supplemental Affidavit that these expenses were not reasonable, were inflated, not real and more importantly not supported by the Respondent's checking account. To support his analysis the Appellant attached four consecutive months of the Respondent's checking account bank statements obtained in discovery. He pointed out that the Respondent's claimed restaurant expense was not substantiated by the bank statements nor by her checking account. Appellant pointed out that there is not one month out of the four that there are restaurants expenses total $125.00. He indicated that the checking account bank statements substantiates a more reasonable amount of $40.00 per month for restaurant expenses. Appellant indicated that the monthly checking account statements do not support the claimed $200.00 per month for entertainment

, travel expenses, personal allowance and grooming expenses and stated that a reasonable and sustainable amount for these expenses would be $40.00 for ***each*** of these categories. The Appellant also questioned if a prepaid funeral expense is something that ought to be allowed by the Court as a new reasonable living expense because it was nothing more than a savings account for an anticipated expense for her estate.

The Appellant indicated to the Court in his Supplemental Affidavit that the claimed medicare insurance expense that the Respondent claimed has already been taken from the Petitioner's social security ***before*** it is deposited and, therefore, is not an actual cash flow expense and if the Court allowed this as an expense it would have to increase the income of the Petitioner by the same amount. The Appellant did not included the Medicare Insurance premium deducted from the Respondent's Social Security check into calculation of Respondent's income in his Supplemental Affidavit and thus indicated that this "expense" should be removed from the Respondent's list of expenses altogether. Lastly, the Appellant indicated in his Supplemental Affidavit that the $150.00 gift expense was not substantiated by the Respondent's checking account and should not be allowed as an expense. The Appellant indicated that maybe $200.00 of the disputed $790.80 inflated expenses are reasonable, real, and substantiated by the records. The Appellant urges that the Respondent's inflated expenses, should be reduced downward by the Court some $590.80 from $2,174.05 per month to $1,583.25 per month to better reflect actual living expenses.

The Appellant states in his Supplemental Affidavit that a downward shift in

the amount of the Petitioner's "expenses" to $1,583.25 gives the Respondent the benefit of the doubt because even the above downward shifted monthly expense totals ($1,583.25) are not even substantiated and shown as paid by the Respondent on a monthly basis as evidenced in her checking account and bank statements. To verify the Appellant's argument that the Respondent's should be paying ***all*** of her actual living expenses by use of her checking account he cited, in his Supplemental Affidavit, from the Respondent's deposition taken on January 20, 2006:

> "Q: Would it be a true statement that you pay your expenses out of the Wells Fargo?
> A: That would be true
> Q: Either in the form of a check or I see you have a debit card that you use also?
> A: That's right.
> Q: Okay.
> A. Except sometimes I get cash and will pay my bills with cash I get if I happen to be done there in that areas, if the bill is due the 20th and today is the 19th.
> Q: But would you take that out of the ATM through the use of your debit card?
> A: From the ATM or my oldest daughter owes me money. Sometimes she pays me money back that she owes me and I will turn around and pay a bill with it. (Citing pp. 35-36 of that deposition; Appendix p.13).

By her responses the Respondent clearly indicated that all of her expenses that are ***"actually"*** paid would be shown and verified by her Wells Fargo checking account statements.

The Appellant then attached to his Supplemental Affidavit four consecutive months of the Respondent's checking account records from ***after*** the last Court Order to establish what Respondent has actually has been spending on a monthly basis since the last order. The total withdrawals for these four months were:

April 23 to May 23	$1,078.86
May 23 to June 23	$1,476.53

June 23 to July 23	$ 979.65
July 23 to August 23	$1,301.52

The average withdrawals for these four months is $1,209.14 per month, hardly, the amount claimed as her expenses in her Answers to Interrogatories. The Appellant cautioned the Court to note that there were no cash withdrawals in these four months so there could not be a claim that a bill or expenses was paid in cash in theses months either. The Appellant stated in his Supplemental Affidavit that if there were cash withdrawals from the ATM those withdrawals would be reported on the Respondent's checking account statement in the total of the monthly withdrawals section and none were stated. The Appellant then reviewed the Respondent's bank transactions, statements, and checking account register since the last Court's Order and found that the Respondent has had generally a surplus of funds each month in her checking account. Appellant came to the conclusion in his Affidavit that the Respondent adequately meets all of her monthly expenses without the need for spousal maintenance.

A further example of the lack of need for an award of spousal maintenance was pointed out in the Affidavit by Appellant. Appellant pointed out that his spousal maintenance checks are for some strange reason not being deposited by the respondent into the Respondent's Wells Fargo bank checking account. The Appellant speculates that this omission of a paper trail on these spousal maintenance checks would show that there is no need for spousal maintenance because the Respondent is saving these checks and not using them to pay her monthly expenses because her monthly expenses are being paid out of the Wells Fargo expenses and these checks are not being deposited therein.

The Respondent's Supplemental Affidavit also stated that the Respondent's check registers and bank statements show in addition to her payment of expenses some checks to Respondent's family members over the last two years for money she has loaned them. The Appellant indicated that when the Respondent was questioned about these amount in her deposition the Respondent stated that she in fact loaned money to these family members. The Appellant in his Supplemental Affidavit did not question the Respondent's right to loan these individual money but he did indicate that this fact shows that the Respondent is not only able to pay all her expenses but has the ability to loan family members money out of her surplus funds. The Appellant showed an example of such a loan by Respondent to her oldest daughter of $6,236.00 since the last Court Order.

To further support the Appellant's claim that the Respondent is adequately meeting her expenses and saving money the Appellant testified in his Affidavit that the Respondent testified in her deposition that she paid cash for an automobile (over $10,000.00+), she has a Wells Fargo Certificate of Deposit of $10,000.00 +; she has had a Wells Fargo savings account at various times with a balance over $9,000.00 + in it, and she collected back spousal maintenance of $43,313.89 in October 2004.

To further bolster the Appellant's argument that the Respondent is not in need of spousal maintenance he indicated in his Affidavit that in the Respondent's deposition the Respondent admitted that she accumulates checks in her drawer at home because she can't get to the bank to put them in:

> Q: Showing you your February 24 through March 22 statement, on March 16, there is a deposit of $1,696.69. Can you tell me the source of that

deposit?
A: That, once again, I have no clear recollection, but sometimes for some reason or the another, I'll keep a group of checks in my drawer at home and then when I get to the bank..." (Citing pp. 45-46 of that deposition Appendix p.16)

The Appellant pointed out in his Affidavit that this action indicates that the Respondent has funds available to her to pay her expense and does not have the absolute need to rush to the bank to cover checks already written because her expenses are greater than her income in any month as she has alleged in the past.

The last point that the Appellant made in his Affidavit is to caution the Court about the Respondent's truthfulness. Appellant indicated that in this case he has been categorized to the Court by Respondent and Respondent's counsel as the disgruntled ex-husband that has just refuses to pay spousal maintenance and does not tell the truth. But he shows that it was the Respondent, Elaine Irene Lee, that has not been honest with the Court about her circumstances and money and has out an out lied to the Court. As an example of this he pointed out that the Respondent's prior under oath Answers to Interrogatories dated ***December 10, 2003*** stated that she had "...a checking account with Norwest (now Wells Fargo); account no. 312-644-897; the current balance is about $400.00..." When in fact that checking account had a December 2003 balance of $9,739.57 some $9,339.57 ***more*** than what the Petitioner reported. Appellant attached a copy of the December 2003 statement marked as Exhibit B to his Affidavit (Appendix pp.36-37). In that same Answer to Interrogatories Respondent stated "...I have a savings account (028-1058123), also with Wells Fargo, which I opened at the branch in Woodbury, but I primarily use the branch in Oakdale; the current balance is about $60." The fact is

the December 2003 balance in this account was $8,240.42. Appellant attached a copy of the January 2004 statement as Exhibit C to his Affidavit (Appendix p. 38-39) which showed the December 2003 balance as $8,240.42. Appellant further indicated that in that same Interrogatory answer the Respondent ***did not*** report her $10,000.00 Putnam account as an asset when asked to report all her assets. In a further example of the Respondent past untruths the Appellant indicated that the Respondent in an Affidavit to the Court in July of 1994 stated that "...remaining from my property settlement [is] only $400.00..." When in fact she had $13,422.60 in available lump sum benefits in the St. Paul Electrical Construction Supplemental Pension Plan. The Appellant attached to his Affidavit as Exhibit D (Appendix pp. 40-41) a letter from the Plan stating that the Respondent had the amount of $13,422.60 available.

The Appellant's Affidavits and facts stated therein was never challenged or disputed by any Affidavit by the Respondent in this Motion process. The Appellant submits that the facts contained and the documentary evidence contained in Appellant's Supplemental and Responsive Affidavits are not rebutted and must be taken as the "Facts" of this case.

On August 8, 2006 the Respondent's Counsel served a Responsive Notice of Motion and Motion without any supporting documents, affidavits or memorandum. He filed that Motion with the court on August 8, 2006. On August 11, 2006, on a Friday, Respondent's counsel served a Memorandum of Law, Affidavit of Counsel, and Sealed Financial Documents and filed those documents with the Court on August 14, 2006. On August 15, 2006 Respondent's Counsel served and filed a

written Objection to the late and untimely service and filing of those documents. On August 18, 2006 the Court held a hearing. At that hearing the Court indicated that it read all of the parties documents,

> The Court: "...I have read all the pleading save Mr. Weiner's--"
> Mr. Weiner: "The one last night?"
> The Court: "The one last night way outside of the timelines will not be read"
>
> (Motion transcript p. 2 lines 13-17)

At the hearing Appellant's counsel orally objected again to the late filing of the Respondent's Motion and the late filing of the Respondent's Attorney's, Affidavit, Memorandum of Law and Sealed Financial Documents, and Exhibit A (Motion Transcript pp.21, 22) and, asked the court, if the Court was of the mind to consider these untimely served and filed documents, that it give the Appellant time to respond in writing (Motion Transcript p. 22, lines 2-5).

On November 16, 2006 the Court issued its Order, obviously reading, considering, and adopting the Respondent's late filed documents without giving the Appellant any time to respond in writing to those late filed documents. In that Order the Court found that the Appellant meet his burden to showed that there has been a substantial change in circumstances in the income of the parties but not the expenses that makes the original spousal maintenance Order unfair and inequitable. The Court also found that "Neither party submitted evidence of changes in their respective expenses or need since the February 27, 2004 Order and therefore the Court will decide the Respondent's Motion to Terminate Maintenance based on alleged changes in income."

In the Court's Order of November 16, 2006 the Court found that the

Appellant's net monthly income, excluding his pension benefits awarded to him in the original Decree, was $3,227.14 per month (the amount claimed in the late filed documents. The district court included in Appellant's income calculation the ***monthly*** difference between the pensions that the Appellant was receiving at the time of the hearing and what the Respondent was receiving at the time of the hearing from the pensions awarded) and found that Petitioner's net monthly income was $1,674.14 per month. The Court, instead of considering Appellant's unrebutted Supplemental Affidavit and documents concerning the parties' present expenses, used the parties' expenses as found in the February 27, 2004 Order as the parties' "present [2006] expenses". The Court then found that the Respondent had a surplus of $1,127.14 per month and the Petitioner a shortage of $275.86 per month. The Court then used a "balancing of the parties surpluses and shortages" method to determine a spousal maintenance figure of $700.00 per month. The Court ordered that the spousal maintenance be reduced to $700.00 per month retroactive to May 1, 2006, a date that has no significance to any event or service of any Motion instead of terminating the spousal maintenance as requested.

The Court also in the November 18, 2006 Order granted the Respondent the relief asked for in her untimely filed new Motion by providing, a new provision that ordered the Appellant to secure the new spousal maintenance payments past his death by ordering him to take out a life insurance policy of $75,000.00. The Court based the amount upon its calculation of the Respondent's life expectance. The Court also ordered the Appellant to pay $1,699.00 of the Respondent's attorney's fees that were incurred for the collection of the judgments for arrears previously

ordered that were collected after the February 27, 2004 Order because of his conduct.

ARGUMENT

I. : The Court abused its discretion in allowing the Respondent's August 11, 2006 dilatory and late filing in violation of the requirements of the Rules of General Practice for Family Court and erred in it discretion not to allow Appellant time for a written response.

Standards of Review: Abuse of discretion, a clearly erroneous conclusion that is against logic and the facts of the record (Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971), Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984), Prahl v. Prahl 627 N.W. 2d 698 (Minn. App. 2001).

Argument

The Appellant's Motion to Terminate Spousal Maintenance was originally filed on July 11, 2005 and had been continued on the hopes of mediation until April 14, 2006. On March 31, 2006 the Appellant served his Amended Notice of Motion and Appellant's Supplemental Affidavit to Terminate Spousal Maintenance together with a Motion to Compel Discovery. At the April 14, 2006 hearing the court wanted mediation completed by August 1, 2006 and set a hearing for August 16, 2006. On August 8, 2006 the Respondent served a Responsive Notice of Motion and Motion without any supporting affidavits, memorandum or other documents which raised new issues. On August 11, 2006 (the Friday before the hearing) the Respondent served a Memorandum of Law, Affidavit of Robert L. Weiner, and Seal Financial Documents without Exhibit A. On that same day (August 11, 2006) the Appellant

served and filed an Objection to the Late Filing on the basis that the same were: 1) not served with the Petitioner's Motion as required under Rule 303.02 of the Rules of Family Court Procedures, 2) not served timely as required 303.03 of the Rules of Family Court Procedures, 3.) the affidavit relative to attorney's fees was not served and did not accompany the motion for fees in violation of Rule 119.02 of the General Rules of Practice for District Courts, 4.) and the Seal Financial Documents was not served and did not accompany the motion and was un-timely served and Appellant objected to the Court considering the same since it prejudices the Respondent from timely and proper response. The Respondent then served Exhibit A upon the Appellant's counsel at his personal resident at 8:00 p.m. on August 11, 2006 which under the rules was served after the close of the business day and thus the service date is the next day or August 12, 2006 (See: Minn. R. Civ. Proc. 6.05)

Counsel for Appellant orally objected on the date of the hearing on the record to this late filing again and asked the court for time to respond to the late filing (Transcript p. 21-22). The Court did not allow any time to the Appellant to respond and proceeded with the hearing and its decision. In so doing the Court erred in fundamental fairness and with the Rules of Civil Procedure for the District Court and the Family Court.

The Respondent's Responsive Motion raises new issues and asks for new relief other than those raised by the Appellant's Motion in the initial Motion and thus subject to the requirements of Rule 303.02 (a)(2) of the Minn. Gen. R. Prac. for family court which states:

> (2) *Motion Raising New Issues.* A responding party raising new issues other than those raised in the initial motion shall pay any required

motion fee, serve a copy of the following documents on opposing counsel, and file the original with the court administrator at least 10 days prior to the hearing:

(i) Notice of motion in form required by Minn. Gen. R. Prac. 303.01(a);
(ii) Motion
(iii) Any relevant affidavits and exhibits; and
(iv) Any memorandum of law the party intends to submit.

First of all, the Respondent's Motion was served on August 8, 2006 which is 10 days before the hearing, however, it was served ***without*** any Affidavits or Memorandum and it was not ***filed*** with the court administrator until August 14, 2006 (See: File stamp of district court) which violates the rule in a number of respects. Secondly, the Respondent's Attorney's Affidavit, Respondent's Memorandum and Sealed Financial Documents were not served until August 11, 2006 only 7 days before the hearing and without Exhibit A, again violating the rule in a number of respects. These documents were not ***filed*** until August 14, 2006 only 3 days before the hearing, again violating the rule in a number of respects.

Rule 119.01 of the Minn. Gen R. Prac. Requires application for attorney's fees to be made by motion. Rule 119.02 of the Minn. Gen R. Prac. states that "the motion ***shall*** be accompanied by an affidavit of any attorney of record.. "(Emphasis added). The Motion served on August 8, 2006 ***was not*** accompanied by an affidavit of an attorney and thus violated the rule and should not have been heard.

Rule 303.02 (b) of the Minn. Gen. R. Prac. for family court provides a variety of sanctions that the district court could have imposed upon the Respondent for violation of the rule. The district court applied no sanctions at all in this situation and heard the responsive motion. There was and is no justifiable excuse for the lateness of Respondent's filing since the Appellant's motion had been pending for

over a year and it was the Respondent that did not want to continue to hearing. What is more egregious and unfair is the fact that the Court failed to allow any time after the hearing for Appellant to respond to the late filing of the Attorney's Affidavit for fees and the Sealed Financial Documents in so doing the court really removed the Appellant's right to respond to Exhibit A, the Sealed Financial Documents, and the Motion for Fees under Rule 303.02 (a)(3) of the Minn. Gen. R. Prac. for family court. Lastly, there permeates an appearance of basic unfairness with the process employed by the Court especially when the court adopts the Respondent's analysis of the Appellant's income as contained in Exhibit A and grants the new relief requested by the Respondent in its Order.

II. :The Court erred as a matter of fact and law in the determination of the Appellant's earned income.

Standards of Review: Abuse of discretion, a clearly erroneous conclusion that is against logic and the facts of the record (Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971), Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984), Prahl v. Prahl 627 N.W. 2d 698 (Minn. App. 2001).

Argument

The district court erred as a matter of law in the determination of the Appellant's income. The district court wrongly adopted the Respondent's income analysis contained in the Sealed Financial Documents (Exhibit A) (Appendix p. 88). The case law is quite clear in Minnesota that the Appellant's pensions are to be treated either as personal property and divided in the property division or as income but not ***both.***(See: *Kruschel* v. *Kruschel* 419 N.W.2d 119 (Minn.App. 1988) and

Walker v. Walker 553 N.W. 2d 90 (Minn. Ct. App. 1996)). The district court had already divided ***all*** of the Appellant's three pensions as personal property. Therefore, it must ***not, and can not,*** included as Appellant's earned income for the sake of determining spousal maintenance the amount that he receives in pension payments "***until*** he has received from the pension[s] an amount equivalent to [their] value[s] as determined in the original property distribution." (Emphasis added, *Kruschel* v. *Kruschel* 419 N.W.2d 119, 123 (Minn.App. 1988)).

In addition the district erred, as a matter of law, in determining that it could subtract what Respondent receives on a monthly basis from the pensions (her ½ awarded by the Judgment and Decree and the Amended Judgment and Decree) from the amount that Appellant currently receives on a monthly basis ***beginning*** at his retirement and call that Appellant's "non-marital" share of his monthly pension "income" not "property"and ***include*** the difference into his earned income for the purposes of spousal maintenance. (See the Court's Memorandum- Appendix p.8). First of all, the value of the pensions in this case were never determined in the initial dissolution on a monthly, yearly, total cash, or on any other basis nor was there any stipulations between the parties regarding any valuation of the three pensions. Neither the district court nor the Respondent nor Respondent's counsel can ***now*** arbitrarily, without any expert testimony, place a monthly value on the pensions just because they are ***received*** on a monthly basis. The Court is directed to *Richards v. Richards* 472 N.W. 2d 162,165,166 (Minn. App. 1991) which says:

> The purpose of *Kruschel* was to avoid a redistribution of property after the divorce became final. The court held that a pension awarded as property could not be invaded for maintenance until the owner received pension payments equal to the value of the asset at the time of the divorce. The court

did not hold that income representing the appreciation of the pension after the divorce was ***immediately available for maintenance***. (Emphasis added).

The *Richards* case tells us that because the three pensions were not evaluated on a ***monthly*** basis at the time of the dissolution nor was there a stipulation at the time of the dissolution to a value of the pensions on a ***monthly*** basis the ***monthly*** payments between the parties can not be subtracted from one another to ***determine*** the non-marital portion (income) of that portion of the pension payments to Appellant. The Appellant has just turned 65 years of age and has just now started to draw upon his pensions that he earned for 25+ years. The Court erred in determining that Appellant has received ***all*** the value of the three pensions subjecting a portion of the Appellant's monthly three pension payments to payment of spousal maintenance. Appellant takes the position that, as a matter of law, ***all*** of his monthly amount currently received is a return of his personal property awarded to him because he has yet received from the pensions an amount equivalent to the values of these three pensions.

The Appellant's submits that as a matter of law his earned income at the time of his Motion to Terminate Spousal Maintenance was only his Social Security of $1,555.00 per month. If the district court had used this income figure in its analysis of the Appellant's motion instead of twice that amount it would come to the conclusion that the Appellant's earned income of $1,555.00 did not meet his necessary needs and produced a storage of -$555.00 (See the Court's analysis in Finding 9-Appendix p. 3) and the Court should have terminated the spousal maintenance payment.

III.: The Court erred as a matter of fact and law in disregarding the

Appellant's unrebutted affidavits and documentation to establish the parties' 2006 ("present") expenses and erred by adopting the parties' 2004 finding as to the parties' expenses as the parties' 2006 ("present') expenses.

Standards of Review: When modifying maintenance the district must make adequate findings to allow the Appellate Court meaningful review *Rapacke v. Rapacke*, 442 N.W. 2d 340 (Minn. App. 1989). In considering a motion to modify, the district court shall apply those factors for an award of maintenance that exist "at the time of the motion." Minn. Stat. § 518.64, subd. 2 (c) (2006)

Argument

The case law is clear that once an obligor (Appellant) of permanent spousal maintenance establishes a substantial change in circumstances by showing a decrease in income that demonstrates little ability to pay maintenance, the trial court ***must*** make findings on the recipient spouse's ***present*** needs and income so that her present needs, available present resources, and present income may be balanced against the obligor's ability to pay from his earned income. (See: *Kemp v. Kemp* 608 N.W. 2d 916 (Minn. Ct. App. 2000)). The Minnesota Supreme Court has held that an award of maintenance is based on a showing of ***need*** and that even if one of the two statutory factors contained in Minn. Stat. § 518.552, subd. 1 (2006) is met, an award is ***improper*** if there is no showing of need for the award of spousal maintenance (See: *Lyon vs. Lyon,* 439 N.W. 2d 18 (Minn. 1989)).

The district court in this matter erred in not making sufficient findings of Respondent's and Appellant's ***present*** expenses and made a finding that is clearly an erroneous conclusion that is against logic and the facts of the record and which is

arbitrary and capricious. In Finding number 7 the Court found: "Neither party submitted reliable evidence of changes in their respective expenses or needs since the February 27, 2004 Order." (Appendix p. 3). The Court footnote for that finding the Appellant submits is not supported by the facts in this case and is therefore erroneous. The footnote says: "While Respondent's pleading contains excerpts from Petitioner's Answers to Interrogatories, the court does not deem Respondent's selective submissions to be reliable evidence of Petitioner's overall monthly expenses. Moreover, Respondent assertion that his monthly living expenses are now $3,594.12 makes no allowance for the presence of his new wife and her children." (Appendix p. 3). The Appellant submits that he presented to the district court more than "selective submissions" from "excerpts from Petitioner's Answers to Interrogatories" to establish the Respondent's and his individual living expenses and it is error for the court not to find so. The Appellant's March 30, 2006 Supplemental Affidavit (See: Appendix pp. 11-41) and Respondent's August 2006 Responsive Affidavit (See: Appendix pp.74-87) set forth that the Respondent claimed that her present monthly living expenses ("needs") were $2,177.80 per month. The Appellant's affidavit shows this amount was claimed by the Respondent in her Answers to Interrogatories (See Appendix p. 14). In that same affidavit Appellant sets forth the actual sworn deposition testimony of the Respondent stating that she pays all her monthly expenses ("needs") out of her Wells Fargo checking account. (Copies of the pages of the Respondent's actual deposition pages were attached to the March 30, 2006 Affidavit of Timothy W.J. Dunn as Exhibit C (See Appendix pp.69-71) which Appellant supplied to the district court. In addition the Appellant

attached to the Supplemental Affidavit, as Exhibit A, (Appendix pp. 19-35) copies of the Respondent's actual bank statements for four consecutive months. The Supplemental Affidavit reviewed the Respondent's bank statements looking at the total amounts withdrawal made by check, debit card or cash (ATM) for these four consecutive months. The results showed that the total amount of the Respondent's expenses actually spent were far less that those claimed by the Respondent. The Appellant submits that if the Respondent's monthly living expenses were in deed $2,174.05 per month as she claimed there should be withdrawals shown in her bank statements for each month of at least or close to $2,174.05. The withdrawals for these four months were actually:

April 23 to May 23	$1,078.86
May 23 to June 23	$1,476.53
June 23 to July 23	$ 979.65
July 23 to August 23	$1,301.52

The average expenses for these four months is $1,209.14. The Appellant submits that these bank statements do not support the amount that the Respondent claims as her "actual" present monthly living expenses. The Appellant then attempted in his Supplemental Affidavit to reconcile Respondent's claimed living expenses against the bank statements and the amounts actually shown to have been expended. The Appellant in his Supplemental Affidavit challenged the Respondent's individual category amounts as being too high and not supported by the bank statement. For example, Appellant compared the claimed monthly expense of $125.00 per month for "restaurant expenses", the $200.00 "personal allowance and grooming expense", the $200.00 a month "entertainment and travel expense", a $37.80 per month "pre-paid burial plan expense", a $78.00 per month cost of Medicare insurance expense,

and a $150.00 per month "gift expense" to four consecutive checking account statements and finds that none of these amounts are supported by the Respondent's bank statements. The Appellant urges that the Respondent's inflated expenses, should be reduced downward by the Court some $590.80 from $2,174.05 per month to $1,583.25 per month.

The Appellant further analyzed the bank statements and found that ***none*** of his spousal maintenance checks were deposited into the checking account. The Appellant submits that would further show that there is no need for spousal maintenance because the Petitioner is saving these checks and not paying her monthly expenses with them because her monthly expenses are being paid out of the Wells Fargo without the spousal maintenance checks being deposited into the Wells Fargo checking account. The Appellant submits that this failure of a paper trail of the spousal maintenance checks indicates that either the Respondent does not want to show the use of these funds, or does not want to show a paper trail for the spousal maintenance checks, or they are put into some unknown savings account. Further, in the Appellant's affidavits he points out the Respondent's admission in her deposition that she accumulates checks in her drawer at home because she can't get to the bank to put them in:

> Q: Showing you your February 24 through March 22 statement, on March 16, there is a deposit of $1,696.69. Can you tell me the source of that deposit?
>
> A: That, once again, I have no clear recollection, but sometimes for some reason or the another, I'll keep a group of checks in my drawer at home and then when I get to the bank..." (Deposition pp. 45-46; Appendix p.16)

Appellant submits that this proves the lack of need and another indication that the

Respondent is not in need of spousal maintenance because the Respondent has available monies to her to pay her expense and does not have the absolute need to rush to the bank to cover checks already written.

The Appellant, in his affidavits, also pointed out to the district court that the Respondent's bank statement show some checks to various family members over the last two years, for varying amounts, one for $6,236.00. When questioned about these checks in her deposition the Respondent stated that she loaned money to these individuals. It is submitted that the Appellant proved yet another indication that the Respondent has adequate surplus each month to pay her expenses ***and*** to have money to loan out without again using the spousal maintenance payment because the spousal maintenance checks were not deposited into Respondent's Wells Fargo checking account from which she pays all of her bills (expenses). The Appellant's affidavits further indicated that since January 2004 the Respondent has had available to her a total of $152,286.20 and if the Respondent claims $2,177.80 in monthly expenses over the last 30 months than would amount to $65,334.00 in total expenses. The difference between the amount received of $152,286.20 and the 30 months of claimed (but not documented) expenses of $65,334.00 is $ 86,952.20. The Appellant's affidavits point out that there had been no accounting or paper trail for this $86, 952.20 or any indication by the Respondent as to where this surplus has gone or where and how it was spent.

The Respondent choose not to dispute, rebut, or challenged Appellant's Affidavits, evidence and documents with any of her own affidavits or documents. The Respondent had plenty of time to prepare, serve and file (some five months

before the August 18, 2006 hearing), any responsive affidavits or documents that she wanted to submit to dispute, rebut or challenge the Appellant's evidence but again choose not to do so. Appellant submits that the Court was bound to adopt the unrebutted evidence presented by the Appellant as reliable. The type of evidence submitted by Appellant for the August 18, 2006 hearing was similar, if not identical, to the type of evidence submitted for the February 27, 2004 Order that established the prior Order.

It was error for the Court to disregard this detailed and documented evidence of the Respondent's monthly expenses and lack of need of spousal maintenance. It is error and contrary to statute for the Court to arbitrary and without any basis adopt as the parties' 2006 ("present") expenses the expenses that the court found for the parties back two years earlier in 2004. It is not logical or factual that the parties' expenses stayed the same. ***If***, the district court had problems with the presentation of the evidence or the reliability of the evidence or needed more detailed evidence of the "present" expenses it should have requested or required the parties to supply the same after the hearing instead of just arbitrarily adopting the 2004 expenses as the "present" expenses to do so is clearly erroneous.

In addition, the Appellant submits that his expenses that he submitted to the district court in his affidavits are solely his obligations and expenses and not his ***and*** his wife's expenses, and furthermore, submits that no document, affidavit, nor argument presented to the Court in this matter has ***ever*** referred to Appellant's new wife's ***"children"*** living with him or he paying expenses for his new wife's ***"children"*** because the fact is he does not. No other person resides with the

Appellant and his new wife. Where the trial Court got the "fact" that the Appellant "makes no allowance for the presence of his new wife ***and her children***"(Emphasis added) is a mystery and that conclusion and "fact" is against logic and the facts of the record and is in error.

It is submitted that the Appellant adequately submitted to the district court evidence that the Respondent's present reasonable living expenses were $1,583.25 per month and that Respondent did not have a need for an award of spousal maintenance because she was paying her expenses from her income without using the spousal maintenance payments that are not run through any account by the Respondent. It is also submitted that the Appellant presented unrebutted living expenses of $3,594.92 per month and that the district court should have found these facts.

IV.: The Court erred as a matter of fact and law and was arbitrary, in "balancing" the parties surpluses and shortages in determining the "reduced" amount of spousal maintenance.

Standards of Review: Abuse of discretion, a clearly erroneous conclusion that is against logic and the facts of the record (Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971), Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984), Prahl v. Prahl 627 N.W. 2d 698 (Minn. App. 2001)

Argument

The district court erred as a matter of fact and law in Finding number 9 by "balancing" the Respondent's shortfall (income minus expenses) from meeting her 2004 expense amount against the Appellant's surplus (income minus expenses) from

meeting his 2004 expenses. Setting aside for now, but in no way agreeing with, the errors of fact in the district's court determination of the parties income and expenses to arrive at the "surplus" and the "shortfall" the district court erred as a matter of law in its basic principal in determining the amount of spousal maintenance by a "balancing of the shortfall and surplus" approach.

The case law is very clear that an award of spousal maintenance is given in principle to have the needs of the spouse in need of the award met. If there is no need shown there should be no award of spousal maintenance despite any "surplus" of income that the other spouse's may have. (See: *Lyon vs. Lyon,* 439 N.W. 2d 18 (Minn. 1989). If there is a need for an award of spousal maintenance there is a counter-part to be determined and that is to determine if the obligor has the present ability to pay any spousal maintenance. If there is a need and no ability to pay by the obligor out of earned income there should be no award of spousal maintenance.

The purpose of spousal maintenance is to care for the recipient spouse's ***needs*** after dissolution not to provide her with a lifetime profit-sharing plan.(See: *Crampton v. Crampton* 356 N. W. 2d 768 (Minn. Ct App. 1984). The Appellant submits that the district court erred in taking this "balancing of surplus and shortage" approach to determine the amount of spousal maintenance in Finding number 9 because it provided in the court's calculation ***more*** than what it took to meet the Respondent's needs (shortage) as determined by the court. The district court did not make particularized findings as to why the Respondent needed the "extra" funds of $424.13 each month over and above her basic needs, based even on the skewed high figures that the court found was needed. Again, if there is no need

shown or found there should be no award of spousal maintenance. (See: *Lyon vs. Lyon,* 439 N.W. 2d 18 (Minn. 1989). The result and conclusion reached by the district court is against logic, the facts of the record, and the case law.

V.: The Court erred as a matter of fact and law (or abused discretion) in determining that the Respondent was in need of security for the payment of the reduced amount of spousal maintenance by requiring a new requirement on Appellant to obtain a life insurance policy.

Standards of Review:

Setting aside the fact that the Respondent's Motion to have her spousal maintenance secured by life insurance was untimely served and not properly before the Court and the fact that the Court did not allow the Appellant time to respond in writing to the late Motion the Court erred as a matter of law in modifying the terms of the original Judgment and Decree by requiring the Appellant to secure the spousal maintenance payment with a life insurance policy. Because there is no language in the Judgment and Decree relative to termination of spousal maintenance

The Appellant does not challenge a trial Court's discretion and right in the ***initial*** judicial determination to award a party spousal maintenance ***and*** requiring the same to be secured by a life insurance policy. In this case there was a stipulated settlement reached between the parties some thirteen years ago that required no security or life insurance to secure the agreed upon spousal maintenance, the Judgment and Decree had absolutely no language in it that would require or come close to requiring the spoual maintenance to be secured, and the parties had and have no life insurance presently.

The decree in this matter was entered pursuant to a stipulated settlement back in 1993. The case law tells us that the courts should give due deference to that stipulation between the parties because it represents the parties' voluntary settlement of their financial rights and obligation and the maintenance provision may be only one important factor in the overall settlement agreement and to modify the same the district courts have been cautioned to exercise their discretion carefully and reluctantly. (See: *Claybaugh v. Claybaugh*, 312 N.W. 2d 447 (Minn. 1981), *Kaiser v. Kaiser*, 290 Minn. 173, 186 N.W. 2d 678 (1971)). The parties did not stipulate to any security for the payment of spousal maintenance at any time. The Respondent did not ask for any security for the spousal maintenance at the hearing that resulted in the February 27, 2004 order and nothing has changed for the worst since that hearing, as a matter of fact, they have improved. All of the arrears in spousal maintenance have been paid and the payment of the spousal maintenance has been current for years since 2004. There was and is no reason for security for payment of the spoual maintenance that existed at the August 18, 2006 hearing and none should have been ordered.

Minn. Stat. § 518.64 Subd. 3 states that "Unless otherwise agreed in writing or expressly provided for in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." There is no agreement in writing in this matter nor any express or implied provision in the decree that continue the spousal maintenance payments past the death of the Appellant. It is, therefore, clear in this matter that any spousal maintenance terminates at the Appellant's death and there is no practical reason to

insure any obligation to pay the same ***after*** the death of the Appellant. With that said, the Respondent's request to have the spousal maintenance secured is nothing more than a relitigation of the maintenance initial award. "One may not, under the guise of a modification of a dissolution of marriage decree, ask for or obtain the advantage of a new trial in the original suit" in asking for a new provision in the decree. (See *Anich v. Anich* 217 Minn. 259, 14 N.W 2d 289 (1944)).

The theory that was advanced by the Respondent to the district court, and accepted by the district court, in order to obtain the order for securing the payment to Respondent of her spousal maintenance payments for the rest of ***her*** life was that this case is an "exceptional circumstances". Although Appellant disagrees with the acceptance by the court of that theory and the theory itself, he submits that the Respondent has security ***already*** provided by federal law, eg. Social Security (42 U.S.C 402 Sec. 202 (b)(1)). Upon the death of the Appellant, and because the parties were married for more than 10 years and the Appellant is 60 years or older, and the Respondent is over 62 years of age Respondent can ***immediately*** start drawing Appellant's amount of Social Security instead of her amount which amounts to a difference of $815.00 per month ($1,555.00 - $740.00; Appendix p.88) This is $115.00 ***more*** a month than the amount of the monthly spousal maintenance awarded in the November 16, 2006 Order. This information was given to the district court in the Responsive Affidavit (Appendix p. 85) and orally at the hearing (Transcript p. 22, lines 8-15). The district court erred in requiring and imposing a requirement that Appellant go out and purchase a $75,000.00 life insurance policy to secure the payment of spousal maintenance for the rest of the

Respondent's life after his death.

a. The Court erred, and abused its discretion, in not obtaining information on cost of insurance and insurability of Appellant's life before requiring the Appellant to obtain $75,000.00 of coverage.

The district court abused its discretion in ordering the Appellant to go out an obtain a $75,000.00 life insurance policy without first obtaining information on the cost of such policy and the insurability of the Appellant's life. The insurance my not be available to a 65 year old with health problem and may be available at a prohibited price. The Appellant is a 65 year old man and been diagnosis with adult on-set diabetes which requires oral medication and has had major dental surgery and has been fitted for dentures (Appendix p. 86). The district court had no information on the insurability or the cost of such policy provided by either party during the pendency of this matter. To order that the Appellant obtain a $75,000.00 insurance policy is an abuse of discretion or at minimum a blatantly unfair.

b. The Court erred as a matter of fact and law in not taking into consideration the cost of the ordered insurance into Appellant's living expenses.

The Court by its order imposed an additional expense upon the Appellant in the cost of obtaining and maintaining the $75,000.00 insurance. The court did not take the cost of obtaining that insurance into consideration when it fixed the Appellant's expenses by adopting the Appellant's 2004 expenses as his current expenses. In so doing the court casts doubt on the 2004 expenses being the Appellant's actual expenses and throws off the "logic" of balancing the parties "surplus and shortfall" because the court did not reduce the Appellant's "surplus" by the cost of the insurance. The court makes these two "fact" and factors suspect

and erroneous. The court also places an additional burden upon the Appellant which is unfair and unjust. The Court erred in first not obtaining the cost of this insurance but also erred in its failure to take that cost into consideration when fixing the Appellant's expenses, his "surplus" and in its balances of the "shortage and surplus".

VI. : The Court erred as a matter of law in its determination of the date for the retroactive reduction of the Appellant's spousal maintenance and not using the date of the original Motion to reduced.

Standards of Review: Abuse of discretion, a clearly erroneous conclusion that is against logic and the facts of the record (Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971), Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984), Prahl v. Prahl 627 N.W. 2d 698 (Minn. App. 2001).

Argument

The Court in this matter determined that there was sufficient material change in the circumstances and income of the parties to necessitate a reduction in the amount of the spousal maintenance ordered to be paid by the Appellant to the Respondent. The Court reduced that amount from $825.00 per month to $700.00 per month retroactive to May 1, 2006. The date of May 1, 2006 has no significance to any event or procedures in the pending case and is arbitrary and capricious. Court's have generally used the date of the service of the motion for modification or the date of filing of the motion for modification as the date for an Order's retroactivity. The law in effect concerning retroactivity of an Order to modify spousal maintenance at the time of the hearing in this matter and the Court's

November 18, 2006 Order was Minn. Stat. § 518.64, subd, 2 (c) (2006). Minn. Stat. § 518.64, subd, 2 (c) (2006) permits a Court to make an Order for modification of spousal maintenance retroactive to the date of the service of the motion for reduction on the other party. The case law indicates that it is not error for a Court to use the date that the Motion for reduction was filed with the Court as the date of retroactivity (See: *Kemp v.s Kemp* , 608 N.W. 2d 916 (Minn. Ct. App. 2000). The initial Motion for reduction in this matter was served upon the Respondent on July 11, 2005. The Appellant submit that the date of the retroactivity of the reduction should be July 11, 2005. The circumstances warranting the reduction existed back on this date and this is the date that should have been used by the Court for the date of the commencement of the new amount of spousal maintenance and not May 1, 2006. The Court made no findings relative to its use of the May 1, 2006 date but this date, although during the pendency of the Appellant's Motion, has no significance to the parties, to any event in this matter, to the service of the motion or the filing of the motion. The facts are clear that the Appellant retired and served his Motion back on July 11, 2005 and Appellant submits that any order in this matter for reduction or termination should be retroactive to July 11, 2005.

VII.: The Court erred as a matter of law and fact and abused its discretion in awarding conduct based attorney's fees to Respondent for collect of the three judgements already awarded in this matter.

Standards of Review: Abuse of discretion, a clearly erroneous conclusion that is against logic and the facts of the record (Kaiser v. Kaiser, 290 Minn. 173, 186 N.W 2d 678 (1971), Rutten v. Rutten, 347 N.W. 2d 47 (Minn. 1984), Prahl v. Prahl 627

N.W. 2d 698 (Minn. App. 2001)

Argument

Awards of attorneys' fees in dissolution proceedings are governed by Minn. Stat. §518.14, Minn. Stat. §549.211, and Rule 11 of the Minn. Rules of Civil Procedure. Because there are different requirements depending on the authority upon which the award is based, the trial court must identify the authority for any award and apportion any fee award between need based and conduct based attorney's fees. (*Geske v. Marcolina*, 624 N.W.2d 813 (Minn. App. 2001).

It appears from Finding number 13 that the court awarded the Respondent $1,699.00 in ***conduct based*** attorney's fees. Conduct based attorneys fees can only be awarded only if the elements contained in Minnesota Statute §518.14 are satisfied (*Geske v. Marcolinia*, supra.)

Minn. Stat. §518.14 provides as follows:

The elements of need-based fees are as follows:

> ...the 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, disbursements are awarded does not have the means to pay them.

The Appellant submits that the district court could not have awarded these attorney's fees because in Finding number 12 the district court finds that the parties

can afford to pay their own attorney's fees and thus by so doing found that the party to whom fees, costs, disbursements are awarded has the means to pay her own fees. Secondly, the attorney's fees awarded are designated as attorney's fees incurred for the collection of the three judgments awarded to Respondent earlier. To "collect" theses fees is not an action "...necessary to enable a party to carry on or contest the proceeding..." as required by Minn. Stat. §518.14. Appellant submits that as a matter of law the court could not have awarded attorney's fees for the collection of attorney's fees

CONCLUSION

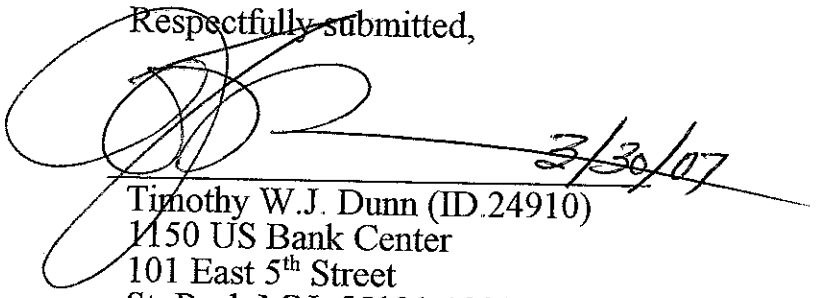
In conclusion it is submitted that: the district court abused its discretion in allowing the Respondent's August 11, 2006 dilatory and late filing in violation of the requirements of the Rules of General Practice for Family Court and erred in it discretion not to allow Appellant time for a written response; the district court erred as a matter of fact and law in the determination of the Appellant's earned income in including the Appellant's pensions as income before the Appellant has received all of the pension that was awarded to him as property; the Court erred as a matter of fact and law in disregarding the Appellant's unrebutted affidavits and documentation to establish the parties' 2006 ("present") expenses and erred by adopting the parties' 2004 finding as to the parties' expenses as the parties' 2006 ("present') expenses; the Court erred as a matter of fact and law and was arbitrary, in "balancing" the parties surpluses and shortages in determining the "reduced" amount of spousal maintenance; the Court erred as a matter of fact and law (or abused discretion) in determining that the Respondent was in need of security for

the payment of the reduced amount of spousal maintenance by requiring a new requirement on Appellant to obtain a life insurance policy; the Court erred, and abused its discretion, in not obtaining information on cost of insurance and insurability of Appellant's life before requiring the Appellant to obtain $75,000.00 of coverage; The Court erred as a matter of fact and law in not taking into consideration the cost of the ordered insurance into Appellant's living expenses; the Court erred as a matter of law in its determination of the date for the retroactive reduction of the Appellant's spousal maintenance and not using the date of the original Motion to reduced; The Court erred as a matter of law and fact and abused its discretion in awarding conduct based attorney's fees to Respondent for collect of the three judgements already awarded in this matter.

The Appellant requests that this Court determine, that as a matter of law, all of Appellant's pensions currently received by Appellant are previously awarded property settlement and not income, and, as such, the Appellant's spousal maintenance obligation should be terminated by this Court. The Appellant also requests that this Court reverses the district court's order that orders the Appellant to obtain a $75,000.00 life insurance policy and to reverse the district court's award of the conduct based attorney's fees.

Alternatively, the Appellant requests this Court to remand to the district court with instructions the determine of the parties actual 2006 expenses and 2006 incomes without the inclusion of the Appellant's previously awarded personal property and from which apply the law and modify the award of spousal maintenance to terminate the spousal maintenance obligation.

Respectfully submitted,



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