



CASE NO. A07-0110

State of Minnesota

In Supreme Court

ELAINE IRENE LEE,

Appellant,

and

RAYMOND MICHAEL LEE,

Respondent.

APPELLANT'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).

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STATEMENT OF LEGAL ISSUES

- 1. Does a trial court have the authority to prorate an obligor's monthly pension benefit payments between portions that are available as a payment source for spousal maintenance and those that are not?**

Reversing the trial court, the Court of Appeals held that it cannot. Rather it concluded that until the obligor receives the full present value of the portion of his pension benefits awarded to him by the original decree, any benefits he receives constitute marital property, and not income, for spousal maintenance purposes. Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988); Richards v. Richards, 472 N.W.2d 162 (Minn. Ct. App. 1991); Walker v. Walker, 553 N.W.2d 90 (Minn. Ct. App. 1996).

- 2. Should premarital pension benefits be considered income for spousal maintenance purposes?**

Reversing the trial court, the Court of Appeals held that they should not. The Court also stated in a footnote to its opinion that "in addition to the obligor's receipt of pension payments representing the value of the original marital award, the obligor also must have received pension payments representing the value of the premarital portion of his or her pension before further payments may be treated as income." Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988).

- 3. Whether a trial court has the equitable authority to consider all pension benefits received by a spousal maintenance obligor in determining his ability to pay maintenance.**

The Court of Appeals decided, in effect, that it could not and ruled, as a matter of law, that because such benefits must be excluded from consideration, the Respondent in this case did not have the ability to pay spousal maintenance and none should be awarded. Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988).

- 4. Whether a trial court's selection of a retroactive date for modification must be supported by findings of fact, and, if no such findings are provided, whether the Court of Appeals can replace such date with the service date of the underlying motion?**

The Court of Appeals answered both questions in the affirmative. Kemp v. Kemp, 608 N.W.2d 916 (Minn. Ct. App. 2000).

- 5. Whether the issue of needs-based attorney's fees should be remanded to the trial court if that court's award of spousal maintenance is modified on appeal?**

The Court of Appeals decided, implicitly, that it need not be remanded. Kahn v. Tronnier, 547 N.W.2d 425 (Minn. Ct. App. 1996).

STATEMENT OF THE CASE

This appeal arises from a post-decree motion to terminate spousal maintenance by Respondent Raymond Lee (hereinafter "Respondent") and a counter-motion by Appellant Elaine Lee ("Appellant"). The motions were brought in the District Court of Washington County and were heard by the Honorable Susan R. Miles.

Respondent's motion sought to terminate his permanent spousal maintenance obligation to Appellant because of his retirement and the allegedly changed financial circumstances of the parties. Appellant's counter-motion asked that Respondent's motion be denied and that Respondent be ordered to secure his continuing spousal maintenance obligation with life insurance and that he pay reasonable attorney's fees incurred both for enforcing a prior court order and in connection with both parties' motions.

The trial court, in its Order dated November 16, 2006, found adequate grounds to modify Respondent's spousal maintenance obligation and reduced the same from \$825.00 to \$700.00 per month. The trial court granted Appellant's counter-motion to secure Respondent's continuing spousal maintenance obligation with life insurance and also granted Appellant's motion for an award of attorney fees to enforce payment of a prior court order. The court denied Appellant's motion for attorney fees relating to the other parties' respective motions.

Respondent appealed from the district court's ruling, arguing inter alia that the trial court had misapplied the law of Kruschel in determining Respondent's income, had erred in determining Appellant's need for security for spousal maintenance and had erred in setting the date for retroactive reduction of Respondent's spousal maintenance obligation. Appellant also appealed from the trial court's denial of her request for needs-based attorney's fees.

The Court of Appeals, in its opinion, as amended April 7, 2008, ruled that the trial court's decision violated the principles of Kruschel and its progeny in determining Respondent's income for spousal maintenance purposes. Based on its own interpretation of this law, the Court found that Respondent lacked the ability to pay spousal maintenance and reduced the amount of his obligation to zero. It also ruled that because the trial court gave no express rationale for its choice of a retroactive modification date, the date should be set, as a matter of law, to the date on which the motion was originally filed. Finally, the Court of Appeals affirmed the trial court's denial of needs-based attorney's fees to Appellant but failed to address the fact that the Court of Appeals' own decision, in its elimination of Appellant's spousal maintenance award and its modification of the retroactive date, had radically altered Appellant's financial condition.

Appellant filed a petition for review of the Court of Appeals' decision and the Minnesota chapter of the American Academy of Matrimonial Lawyers filed a petition for leave to appear as amicus curiae to the Court. This Court granted both petitions. No petition for review was filed by Respondent.

STATEMENT OF THE FACTS

The parties dissolved their twenty-five year marriage by a partially stipulated¹ decree of dissolution (“Decree”) filed in Washington County on June 7, 1993. Appellant’s Appendix (“A”).1. The parties had five children together and Appellant stayed at home for most of the marriage to raise and care for the children. Decree at 10. As noted by the original trial court in the Decree – in partial explanation of its award of permanent spousal maintenance to Appellant – Appellant “remained in the home throughout the marriage of the parties so as to meet the needs of the family as a wife, mother and homemaker.” Decree at 10. The court further noted that “with the exception of providing housecleaning and babysitting services, [Appellant had] not been employed outside the home since 1969.” Decree at 9-10. In the Decree, the court awarded Appellant permanent spousal maintenance from Respondent in the amount of \$650.00 per month.

Approximately one year later, in June of 1994, Respondent—who was a journeyman electrician and member of the International Brotherhood of Electrical Worker, local #110—was laid off from his job and brought a motion to reduce his spousal maintenance obligation. A.2. The motion was filed on June 24, 1994 and the hearing was held on July 11, 1994. A.2.

Three days after the hearing, and over a month before the decision was issued, Respondent returned to work. A.2. Because he did not advise the trial court of his new employment, the Court issued an order based on the assumption that Respondent was still unemployed and receiving only unemployment compensation. A.2. On that basis, the Court reduced Respondent’s spousal maintenance obligation to \$341.08 per month. A.2.

¹ The issue of spousal maintenance was not stipulated, but was tried to the court.

The reduced rate of spousal maintenance continued for the next 10 years despite the fact that Respondent's annual income stayed at a level substantially and continuously higher than it had been at the time of the parties' dissolution. A.3-6.

In 1999, Respondent stopped paying his spousal maintenance obligation to Appellant altogether. This action was taken without any justification and was neither related to Respondent's income nor sanctioned by the court. A.2-6.

In 2003, Appellant—who had taken on two jobs to make ends meet—was forced by medical disabilities to retire. A.3. At this point, because her expenses exceeded her income, she filed a motion with the court to reinstate her spousal maintenance payments and collect arrearages.² A.3. In the course of doing discovery for this motion, she discovered that two pensions had been omitted from the original dissolution decree. A.3. She also discovered that Respondent had returned to work almost immediately after the hearing on his 1994 motion to reduce spousal maintenance and that the resulting reduction had not been justified. A.3. Because of these discoveries, her motion was expanded to include these additional issues. A.3-6.

On February 25, 2004, the trial court issued an order reinstating the full spousal maintenance amount that had been previously reduced as a result of Respondent's 1994 motion, increased the amount of prospective maintenance to \$825.00 per month, quantified the arrearages resulting from Respondent's failure to pay spousal maintenance, divided equally the two omitted pensions and awarded Appellant partial reimbursement of her attorney's fees and expenses.³

A.1.

² She had not returned to court earlier as she was afraid that doing so would cause a return of epileptic-type seizures that she had suffered throughout the final years of her marriage.

³ Respondent appealed certain aspects of this order to the Court of Appeals. The trial court's order was affirmed in an unreported decision by the Court of Appeals dated April 26, 2005. File No. A-04-1070. A.7.

In 2005, Respondent brought a new motion to terminate his spousal maintenance obligation claiming that his recent retirement and other changed circumstances of the parties justified such relief. A.11. Discovery proceedings were then conducted by both sides.

The only significant changes to Appellant's income related to receiving the income from the various pension accounts that had been divided in the dissolution. A.18. Appellant also had received certain back spousal maintenance that had been ordered paid by Respondent in the court's February 25, 2004 order.

The changes to Respondent's financial circumstances were more complex. He had retired but also had started receiving social security and monthly benefits from three pension plans. Although the marital portion of the pension accounts had been divided equally in the parties' dissolution, the benefits received by Respondent included amounts that related to periods of both pre and post-marital employment. These nonmarital periods substantially increased the benefits received by Respondent as compared to the strictly marital portions that were received by Appellant. A.27.

Respondent also had accumulated substantial assets, both liquid and not, after the parties' divorce. A. 28-29. In part, these resulted from a windfall profit on the sale of his homestead and a large inheritance. A.20, 28-29.

Respondent also had remarried since the last court order and, as a result, had substantially reduced his expenses by selling his own home and moving into his wife's and sharing expenses with her. A.30-31.

The trial court, in its November 16, 2006 order, found that a substantial change of circumstances had occurred by virtue of Respondent's retirement and Appellant beginning to receive her share of the marital pension benefits. It also found, *inter alia*, that Appellant was still

in need of spousal maintenance, that Respondent had the ability to pay such maintenance from his social security and nonmarital pension income and that it was appropriate to order life insurance security for the payment of Respondent's spousal maintenance obligation. The trial court, presumably taking into account its continuing award of spousal maintenance to Appellant, also denied Appellant's motion for needs-based attorney's fees.

In determining of the amount of Respondent's pension benefits available for the payment of spousal maintenance, the trial court excluded the monthly amounts that were attributable to the marital interest that had been divided equally in the parties' dissolution. In this way, it assured that only nonmarital pension benefits were included in Respondent's income for spousal maintenance purposes. A.34.

Respondent appealed from the trial court's order and the Court of Appeals ruled as a matter of law that the trial court had erred in calculating Respondent's income for spousal maintenance purposes. Specifically it found that it was error to include in Respondent's income that portion of his pension benefits attributable to premarital employment. It also ruled as a matter of law that pension payments could not be prorated between portions includable in income and those which were not until the obligor had received payments that equaled the full value of the marital portion of the pension received by the obligor in the dissolution plus the value of any pension interest received by the obligor that related to his premarital employment. Lee v. Lee, 749 N.W.2d 51 (Minn. Ct. App. 2008).

In applying these rulings, the Court of Appeals found that the Respondent did not have sufficient "income" from which to pay spousal maintenance and reduced his obligation, as a matter of law, to zero. Id. at 60. This appeal follows from that and related rulings.

INTRODUCTION AND STANDARD OF REVIEW

This case asks the Court to examine the proper relationship between pension benefits and a spousal maintenance obligor's ability to pay such support. This issue most frequently arises upon retirement of an obligor when his earned income diminishes or ends and his pension benefits begin.

In making this study, it is helpful to have in mind the policies underlying the spousal maintenance law of this State. The right to such spousal maintenance is premised on the notion that a marriage is an "economic partnership in which the spouses equally share the burdens and responsibilities of both the marriage and dissolution." Erlandson v. Erlandson, 318 N.W.2d 36, 39 (Minn. 1982). Because of this "economic partnership" during the marriage, the maintenance obligor has a duty, to the extent that it is equitable, to support the obligee at the marital standard of living. Peterka v. Peterka, 675 N.W.2d 353, 358-9 (Minn. Ct. App. 2004). Thus, "the purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living." Id. at 358. This is done by balancing the needs of the obligee and her ability to meet those needs against the financial condition of the obligor. See Erlandson, 318 N.W.2d at 39-40.

The main issues in this case ask whether premarital pension benefits should be excluded as a payment source for spousal maintenance and whether courts should be allowed to apportion pension benefits between those that are available as a payment source for maintenance and those that are not. Appellant maintains that logic, related law and the policies involved all strongly support both allowing the apportionment of individual payments and including premarital pension benefits as a maintenance source. This case has been brought to examine the Court of Appeals' contrary result.

Because all of the primary issues involved in this case are questions of law, this Court reviews them de novo. See Baker v. Baker, 733 N.W.2d 815 (Minn. Ct. App. 2007).

ARGUMENT

I. IT WAS ERROR TO RULE THAT A TRIAL COURT DOES NOT HAVE DISCRETION TO PRORATE AN OBLIGOR'S MONTHLY PENSION BENEFIT PAYMENTS BETWEEN PORTIONS THAT ARE AVAILABLE AS A PAYMENT SOURCE FOR SPOUSAL MAINTENANCE AND THOSE THAT ARE NOT.

The Court of Appeals found that the trial court's apportionment of Respondent's monthly pension benefits between its marital and nonmarital components was improper as a matter of law. Citing Kruschel and Richards the Court of Appeals ruled that "until [Respondent] receives the full value of the portion of his pension benefits awarded to him by the original decree, any benefits he receives constitute marital property previously awarded to him." Lee, 749 N.W.2d at 57 (citing Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988); Richards v. Richards, 472 N.W.2d 162 (Minn. Ct. App. 1991)).

The Court's reliance on Kruschel does not appear justified. The issue in Kruschel was whether a shift from earned income to pension benefits upon retirement of the obligor constituted a substantial change of circumstances justifying a modification of the maintenance obligation. 419 N.W.2d at 120-122. The Court determined that the shift did constitute such a change because the pension had been divided as marital property in the parties' dissolution, and consequently, could not be used as income until the obligor had recouped his portion of the marital value from the pension payments. Id. at 122-123. The rationale being that to allow otherwise would subject the obligor's property award to a secondary distribution to the obligee. Richards v. Richards, 472 N.W.2d 162 (Minn. Ct. App. 1991).

Kruschel, however, does not support the Court of Appeals no-apportionment rule because the apportionment issue was never addressed in that case. It appears from the Kruschels' long marriage – 34 years – that the great majority of the pension there was earned during the marriage. Kruschel, 419 N.W.2d at 120. Moreover, neither of the parties nor the court raised the issue of apportioning any part of the obligor's pension to use as income.⁴ Consequently, the pension benefits were regarded, in effect, as having been wholly divided as marital property in the divorce. Id. at 122. Based on that treatment, there was simply no reason or opportunity to address the apportionment question at all. In other words, without a nonmarital component there is no possibility of apportionment.

The Richards case, by contrast, does appear on its facts to apply a no-apportionment rule. 472 N.W.2d at 165-166. There the Court found that the value of the pension had increased significantly following the divorce “due to generous restructuring of the plan” by the employer. Id. at 163-164. The obligee's request to have the increased value immediately applied towards spousal maintenance was denied. Id. at 165-166. Citing Kruschel, the Court of Appeals held that until the obligor received pension benefits equal to his marital share of the pension, the obligee could not claim a share of increased pension income in excess of the original award. Id. at 165.

The Court in Richards gives no rationale for its decision other than to cite Kruschel and note that the intent of that case was “to avoid a redistribution of property after the divorce became final.” Id. at 165. However such intent seemingly provides no logical basis to bar a trial court from apportioning pension payments between portions that are properly considered as income and those that are not. Such apportionment does not cause any double dipping to occur, but rather fully protects the obligor's property interest in the pension. This seems particularly

⁴ This is understandable both because of the parties' long marriage and because this was apparently the first case in Minnesota to shield pension benefits from double distribution.

true given the fact that pension rights are not a right to a lump sum of money. Rather they are a contractual right to a stream of payments, generally payable from a pensioner's retirement until his death. The entitlement to each succeeding payment is conditioned on the pensioner remaining alive. Accordingly, allowing monthly payments to be apportioned simply recognizes the actual nature of the pension benefit. If the obligor is allowed to keep that portion of the payment that relates to a marital property interest divided in the dissolution, he is getting the exact benefit that he is entitled to retain at exactly the time when he would have normally received it. If, on the other hand, the court requires that the obligor recover the full present value of his marital pension benefit before any payment is treated even in part as income, the obligor receives an unnatural windfall, in the form of an accelerated return on his marital pension interest. The obligee, on the other hand, experiences unwarranted and inequitable disruption of spousal support. Because of the still widespread use of pensions as a retirement vehicle, the practical harm resulting from such a rule is potentially enormous.

Cases subsequent to Richards have applied the apportionment approach. See Walker v. Walker, 552 N.W.2d 90 (Minn. Ct. App. 1996); Nelson v. Nelson, No. A05-1027, 2006 WL 771888 (Minn. Ct. App. 2006). In Walker, the parties stipulated to the anticipated annual payment from the marital portion of a pension interest. 552 N.W.2d at 93. Based on that stipulated value, the trial court allocated an appropriate portion of the benefit to the obligor's property interest and allowed the balance to be considered as income for purposes of determining spousal maintenance. Id. at 94.

The Court of Appeals below attempts to distinguish Walker claiming that the parties' stipulation of value at the time of the divorce undermines its application here. Lee, 749 N.W.2d at 57. However, there does not appear to be any logical basis to distinguish a case where pension

interests are valued by stipulation from one in which the value is set by the court, for purposes of determining whether the trial court should thereafter be allowed to apportion payments.

In the 2006 Nelson case, the Court of Appeals approved a pro rata apportionment of pension benefits finding that such an approach was within the discretion of trial court. No. A05-1027, 2006 WL 771888, at 2 (“The district court did not clearly err in its finding of the portion of [the obligor’s] pension that was attributable to his property award in the dissolution judgment....” Id.)

Similarly, the Court of Appeals has approved a pro rata apportionment of monthly disability annuity benefits between marital property and income for child support purposes. Walswick-Boutwell v. Boutwell, 663 N.W. 2d 20 (Minn. Ct. App. 2003). In Walswick-Boutwell, the Court of Appeals points out that the apportionment approach is consistent with the statutory overlap of the definitions of marital property and income, both of which include pension plan benefits. Id. at 23. (“We conclude that the district court did not abuse its discretion by treating a portion of the monthly benefit as marital property and the remaining portion as income for purposes of child support.” Id. at 24.)

In sum, there is seemingly no persuasive rationale for denying trial courts the discretion to apportion pension benefits in appropriate cases. Allowing that option also gives the trial court the ability to avoid unnecessary and potentially wrenching gaps in spousal maintenance support to persons who are critically dependant on such assistance.

II. PREMARITAL PENSION BENEFITS SHOULD BE CONSIDERED INCOME FOR SPOUSAL MAINTENANCE PURPOSES.

The Court of Appeals ruled that pension benefits relating to a premarital period of employment are not to be construed as income for spousal maintenance purposes. Lee, 749 N.W.2d at 59. In doing so, the Court created an entirely new rule of law with broad application

and great impact that significantly reduces the funds available for use as a payment source for spousal maintenance. Appellant maintains that this rule is contrary to established law, that it undermines the policy supporting spousal maintenance and that it will cause great financial harm and disruption to individuals dependent on spousal maintenance.

In considering the Court of Appeals' ruling, it is helpful to have in mind related statutory law. Maintenance is defined by Minn. Stat. § 518.003 subdiv. 3(a) as "an award made in a dissolution or legal separation proceeding of payments from the future income or earnings of one spouse for the support and maintenance of the other." (emphasis added). Income, in turn, was, at the time when Respondent's motion was first filed in 2005, defined by Minn. Stat. § 518.54 subdiv. 6 as "any form of periodic payment to an individual including, but not limited to, wages, salaries, payments to an independent contractor, worker's compensation, unemployment benefits, annuity, military and naval retirement, pension and disability payments." (emphasis added). This statute, which had applied to both child support and spousal maintenance, was repealed in 2006 when the new child support law was established in this State. The law was repealed so that a separate statute applying only to child support could be established in its place. See Minn. Stat. § 518A.29(a). That statute largely duplicates its predecessor. However, no separate statute has yet been established solely for spousal maintenance.

The Court of Appeals supports its ruling with various technical arguments but none appear to explain why premarital pension payments should be treated differently than post-marital pension payments which are well-established as a proper income source for maintenance purposes under Kruschel and its progeny. Moreover, none of the Court's arguments explain why the policies that allegedly support such a rule outweigh those serious and broad based policies that underlie the provision of spousal maintenance support.

In addressing the question of why premarital pension benefits should be treated differently than post-marital, the Court essentially agrees that there are no conceptual differences.⁵ Lee, 749 N.W. at 59. Nonetheless, the Court chose to follow the precedent of Kruschel for post-marital benefits but to exclude premarital. Id. This choice seems somewhat arbitrary and also appears to ignore the conceptual and practical inconsistencies and difficulties that it creates.

Those difficulties will include the need to value retroactively portions of pensions that include premarital periods. This, in turn, will add unwelcome expense and complexity to the dissolution process. The rule will also prejudice obligee spouses who marry later in life. This is so because the Court's rule includes the corollary that "the obligor also must have received pension payments representing the value of the premarital portion of his or her pension before further payments may be treated as income." Id. at 59 n.1. Thus, if a person marries later in life, after his or her spouse has already built up a substantial pension entitlement, upon divorce and retirement the excess pension benefits will not be available for maintenance purposes until all marital and premarital value has been recouped by the obligor.

The Court of Appeals attempts to justify its ruling with a variety of seemingly technical arguments, none of which seem compelling. It first characterizes premarital pension benefits as not satisfying the "future income" requirement because it is actually a distribution of an investment consisting of employer-employee investments and related appreciation. Id. at 58. However, pension plans more frequently involve a contractual right to a future stream of payments with payments generally set by the contract and not by investment results. In the abstract, such plans would seem to fall more in line with definitions of "income" that are given

⁵ The Court states that "[w]ere this a case of first impression, we might be inclined to agree with [Respondent] that post-marital pension benefits are no different than premarital." Lee, 749 N.W.2d at 59.

by Minn. Stat. §§ 518.54 subdiv. 6 (repealed in 2006) and 518A.29(a); that is “any form of periodic payment including...pension...payments.”

The Court of Appeals also attempts to justify its ruling by enlisting the law regarding division of nonmarital property in dissolution cases. Lee, 749 N.W.2d at 58. This law provides that only up to one-half of such property may be awarded and then only on a finding of “unfair hardship.” The Court notes that “by construing accrued premarital pension benefits as ‘future income’ instead of nonmarital property, the full amount of the premarital pension benefits may be awarded as ‘future income’ for maintenances purposes in the absence of hardship,....” Id. 58. However, the Court’s argument ignores the superseding policy of spousal maintenance law and the requirements of need and ability to pay which supply their form of “unfair hardship” analysis. Certainly, here, under either form of review there is inequitable hardship when the obligor can afford to live in relative luxury with large excesses of income and resources while the obligee, who was married to the obligor for almost twenty-five years, stayed at home to raise their five children and now is medically disabled and unable to work, and is forced to live on subsistence income.

Finally, the Court of Appeals attempts to shore up its new rule of law by pointing to the changes to the statute defining “income” that were enacted in 2006. Id. at 58-59. As noted above, the statute that had applied for many years to both maintenance and child support was repealed and reenacted as part of the new, exclusively child support statute. In making this change, the legislature has thus far neglected to reenact a new definitional section solely for purposes of spousal maintenance. From this fact, the Court of Appeals concluded that the legislature intends the definition of income to apply only to child support and not to spousal maintenance. Lee, 749 N.W.2d at 58-59.

This conclusion seems extremely strained and unrealistic. If the legislature had truly intended any change in the definition of “income” for spousal maintenance purposes it seems far more likely that it would have enacted a new and different law. On the other hand, a far more plausible explanation of the change that has occurred seems to be that it was effected solely as part of the major transformation of child support and that it demonstrated no intent whatsoever to altered established law regarding the definition of income for spousal maintenance purposes.

These arguments by the Court of Appeals provide no compelling reason to not consider all nonmarital pension benefits as income for maintenance purposes. The rationale of Kruschel to avoid the double distribution of marital assets has discernable merit. The shielding of nonmarital pension benefits from use as a maintenance payment source does not.

The basic concept of spousal maintenance looks to the needs of one party, the resources of the other and directs the court to consider numerous factors in reaching an equitable determination of any entitlement to such support. Minn. Stat. § 518.552 (2006). The Kruschel court expressly holds that all resources of both parties should be considered in this process. 419 N.W.2d at 122-123. The statute that defined “income” expressly included pension income and the Kruschel line of cases established that post-marital pension benefits are to be included as income. All of these facts suggest the propriety of overruling the Court of Appeals’ premarital pension ruling. Leaving it in place will work an unjustified hardship on numerous individuals and will likely cause additional stress on the public assistance resources of our State.

III. A TRIAL COURT SHOULD BE DEEMED TO HAVE THE DISCRETION TO CONSIDER ALL PENSION BENEFITS RECEIVED BY A SPOUSAL MAINTENANCE OBLIGOR IN DETERMINING HIS ABILITY TO PAY MAINTENANCE.

The Court of Appeals, in applying its no-apportionment and premarital pension benefit rulings, concluded that Respondent did not have “the current ability to pay maintenance.”⁶ Lee, 749 N.W.2d at 60. Based on that finding, the Court ordered that Appellant’s spousal maintenance award be reduced to zero as a matter of law. Id.

By making this ruling, and not remanding the case for further consideration by the trial court, the Court of Appeals seemingly violates the principles of Kruschel itself and more recent cases that have recognized the trial court’s ability to take an obligor’s full resources, including his retirement funds, into consideration in determining his ability to meet his own needs and, relatedly, his ability to pay spousal maintenance. See Kruschel, 419 N.W.2d 119; Hattstrom v. Hattstrom, No. C4-98-1249, 1998 WL 865752 (Minn. Ct. App. 1998); Roggeman v. Roggeman, No. A06-329, 2006 WL 3409843 (Minn. Ct. App. 2006).

In Kruschel, the Court of Appeals expressly recognized that although pension benefits that constituted an obligor’s marital property cannot be used as a payment source for spousal maintenance, they could be considered in determining the obligor’s ability to meet his own needs. Kruschel, 419 N.W.2d at 122-123. The following discussion of this point from the case is clear and instructive:

In determining the propriety and amount of continued maintenance, the trial court must consider [the obligee’s] total financial resources, including any income from her own marital property award. Minn. Stat. § 518.552, subs. 1(a) and 2(a). Conjointly, [the obligor’s] total financial resources must be considered in evaluating his ability to meet his own needs. Minn. Stat. § 518.552, subd. 2(g). If the court determines that [the obligor] has the financial resources to meet his own needs and [the obligee] does not, it may order continued maintenance out of [the

⁶ “Given that [Respondent’s] monthly income, excluding all pension benefits, is \$1555.00 and his monthly expenses are \$2100.00, [Respondent] does not have the ability to pay maintenance.” Lee, 749 N.W.2d at 60.

obligor's] non-pension income. However, maintenance may not be ordered to be paid from [the obligor's] pension payments until he has received from the pension an amount equivalent to its value as determined in the original property distribution.

On remand, [the obligor's] pension benefits should not be used as income for maintenance purposes; however, his property interest in the pension may, along with [the obligee's] own assets, be considered in determining the propriety or amount of future maintenance payable from non-pension income. Id. (emphasis added).

The remanding of the Kruschel case to the trial court is also significant. If the rulings of the Court of Appeals in this action were applied to the facts of Kruschel, the result would have been to eliminate all spousal maintenance as a matter of law as was done here.⁷ Instead, the court in Kruschel remanded the case for further consideration of the parties' total financial resources. Id. at 123. At a minimum, this same type of remand should have been made in this case.

Another example of the equitable discretion properly accorded trial courts to balance competing interests in spousal maintenance cases is found in the unreported decision of Roggeman v. Roggeman, No. A06-329, 2006 WL 3409843 (Minn. Ct. App. 2006). There the Court acknowledged that a trial court may order a maintenance obligor to pay maintenance that will require him to deplete his marital-property award if justified by the facts of a particular case. Id. The Court noted that the trial court's task is to balance the competing principles of trying to avoid such depletion while at the same time implementing the fundamental policy of spousal maintenance while taking into consideration all of the circumstances of the case. Id. at 3. The Court explained the second principle of such balancing as follows:

The second is the principle that the "purpose of a spousal maintenance award is to allow the recipient and the obligor to have a standard of living that approximates

⁷ The facts noted in Kruschel include findings that the obligor had after-retirement monthly income of \$2957.00, \$1900.00 of which came from pension benefits, and expenses of \$1680.00. Under the reasoning of the Lee court below, the obligor would not have had the ability to pay spousal maintenance.

the marital standard of living as closely as is equitable under the circumstances.” This principle dictates that the “maintenance obligor has a duty, to the extent equitable under the circumstances, to support the maintenance recipient at the marital standard of living. *Id.* (citations omitted).

The Court further explained the overall task of the trial court as follows:

We acknowledge that these principles may conflict with one another if and when they are applied in this case. If indeed they conflict, the district court must balance those principles against one another and explain its reasoning. When the maintenance obligee urges that maintenance is insufficient and the maintenance obligor urges that it is excessive, the district court must discharge its duty equitably to balance the obligee’s need against the obligor’s ability to pay. We observe that the fact that an obligor’s income is less than his or her expenses, including maintenance, does not by itself require a modification of the obligor’s maintenance obligation. If on remand the district court finds that [the obligor] will have a shortfall, the district court must determine whether modification of spousal maintenance is warranted by balancing [the obligee’s] need against [the obligor’s] ability to pay and explain why the maintenance award is “appropriate, given all the circumstances of the case.” *Id.* at 4 (citations omitted).

In the instant case, the circumstances to be considered in balancing such competing interests are stark and compelling. The financial disparities between the parties are great. Appellant has a substantial shortfall and is trying to cover expenses with monthly payments of \$1,674.14 per month received from social security disability and her marital interest in three pension accounts. A.34. Appellant has been medically disabled from employment for several years. A.17. Respondent, by contrast, receives almost twice the amount of his expenses (with almost a \$2,000 per month surplus) also from social security and pension benefits. A.34. Moreover, while Appellant has only minimal assets, Respondent has a combination of liquid and non-liquid assets totaling \$1.3 million. A.28-29.

These facts suggest that a trial court, in its exercise of equitable jurisdiction and in the balancing of the parties’ competing interests, might well order Respondent to pay spousal maintenance even if this required him to use some his pension benefits to meet his own needs. This being the case, the Court of Appeals improperly terminated spousal maintenance as a matter

of law. The case should, at a minimum be remanded for further findings and decision by the trial court.

IV. IT WAS ERROR TO VACATE THE TRIAL COURT'S RETROACTIVE DATE FOR MODIFICATION OF THE SPOUSAL MAINTENANCE AWARD AND TO REPLACE IT WITH THE DATE ON WHICH THE MOTION WAS SERVED.

The trial court made its November 16, 2006 order modifying Respondent's spousal maintenance obligation retroactive to May 1, 2006. The underlying motion had been originally brought in July of 2005. No findings of fact were made in the trial court's order to explain its choice of retroactive date.

Respondent challenged the retroactive date in the Court of Appeals and that Court ruled that because no rationale had been given for the date chosen by trial court, it should be replaced with the date on which the motion was brought, July 13, 2005.

Appellant contends that it was error both to require findings of fact to support the trial court's retroactive date and, even if findings were required, to replace the trial court's date using the commencement date of the motion as a default date.

The trial court's discretion to select a retroactive date for modification is governed by Minn. Stat. § 518A.39 subdiv.2(e),⁸ which states in relevant part that a modification of spousal maintenance "may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party." (2006). In Kemp v. Kemp, 608 N.W. 2d 916 (Minn. Ct. App. 2000), the Court of Appeals held that the district court has discretion to determine the retroactive date of a maintenance modification, "[b]ecause the word 'may' [in the statute] is defined as 'permissive.'"

⁸ Formerly numbered Minn. Stat. 518.64 subdiv.2(d) (2004).

In a recent, unreported decision of the Court of Appeals, the Court undertook to further construe the language of the statute and Kemp. Lisser v. Lisser, No. A05-2574, 2006 WL 3775293 (Minn. Ct. App. 2006). There the obligor similarly argued that the district court had abused its discretion by not making the maintenance modification retroactive to the date of service of the motion without making findings justifying the use of a later date. Id. at 4. In affirming the trial court's action, the Court noted the following:

When used in a statute, "may" is permissive. Minn. Stat. § 645.44, subd. 15 (2004). Consequently, without making any findings regarding retroactive effect, a district court has discretion to make a maintenance modification retroactive to a day as early as the service date. Kemp v. Kemp, 608 N.W.2d 916, 920 (Minn. App. 2000). Id. at 4 (emphasis added).

The Court of Appeals also offered further instructive discussion of the basis for the trial court's discretion as follows:

[The obligor's] argument fails to recognize that even though the terms of a maintenance order have become unreasonable and unfair, modifying the order generally benefits one party at the expense of the other party. The statute allows the district court to modify the relative burdens of the parties, but it also grants the district court discretion to determine when the modification takes effect. Here, the district court did not make the modification retroactive, which reduced the benefit that [the obligor] will receive from the modification. The district court could have chosen a different balance for the parties' relative burdens, but the balance it chose was not an abuse of discretion. [The obligee's] income will drop, but the district court gave her additional time to deal with the reduction, and [the obligor's] maintenance obligation will be reduced, but only in the future. Id. at 5.

Based on this authority and the persuasive arguments of the Lisser court, Appellant maintains that no findings of fact were required to justify the trial court's choice of retroactive date. However, even if they were, the Court of Appeals' decision to simply replace that date with the service date of the motion was also error. There is nothing in the controlling statute that suggests that the service date should be used as a default date. Consequently, if the Court felt

that findings were required, it should have remanded the issue to the trial court to either justify its original date or select a new one based upon the actual facts and equities in the case.

V. IF THE TRIAL COURT'S SPOUSAL MAINTENANCE AWARD IS MODIFIED, THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF APPELLANT'S CLAIM FOR ATTORNEY'S FEES AND TO ADDRESS HER CLAIM FOR ATTORNEY'S FEES ON APPEAL.

In the Court of Appeals proceeding below, Appellant sought review of her claim for needs-based attorney's fees. The Court of Appeals affirmed the trial court's denial of such claim but at the same time eliminated her spousal maintenance award and extended the retroactive date by eleven months. This ruling dramatically altered Appellant's financial condition. It created a reimbursement liability, relating to overpaid spousal maintenance, of approximately \$25,000.00 and terminated any prospective spousal support. The loss of future spousal maintenance, in turn, left Appellant with a substantial shortfall each month in trying to cover her own modest living expenses. A.34.

In the event that the trial court's original spousal maintenance award is not fully reinstated, or if the issue is remanded to the trial court for the further proceedings, Appellant asks this Court to remand her attorney's fees claim as well. It seems highly probable that the trial court's original ruling on attorney's fees was influenced in large part by the spousal maintenance award that the trial court itself was concurrently ordering. Consequently, it is also likely that a different attorney's fees ruling would have been rendered had the court known that the spousal maintenance award was going to be significantly altered on appeal. Because of this, it is appropriate to remand the attorney's fees issue to the court to reconsider attorney's fees in light of any ultimate changes made to the spousal maintenance award. The propriety of such action is confirmed by the case of Kahn v. Tronnier, 547 N.W.2d 425 (Minn. Ct. App. 1996) ("Because we must remand the child support issue, we lack the information necessary to perform the

financial balancing required to determine the propriety of a need-based attorney fee award. Therefore, we also remand the issue of an award to mother of need-based attorney fees for any alteration necessary in light of any change occurring in father's child support obligation." *Id.* at 431.)

Appellant also asks that if her original claim for attorney's fees is remanded to the trial court or if the spousal maintenance issue is remanded, that this Court also refer her claim for attorney's fees on appeal to that court. Doing so would seem appropriate because the decision of the other issues by the trial court will impact any award of appellate attorney's fees as well. *See e.g. Merwin v. Merwin*, No. A07-1948, 2008 WL 2579151 (Minn. Ct. App. 2008) ("Because we remand for findings regarding attorney fees for the district court proceedings, and because those findings would impact any award of appellate attorneys fees on remand, the district court also shall address wife's request for attorney fees incurred in this appeal." *Id.* at 5.)

CONCLUSION

Appellant maintains that the two primary rulings of the Court of Appeals – barring the apportionment of pension benefits between portions that can be applied towards spousal maintenance and those that cannot, and finding that premarital pension benefits are not income for spousal maintenance purposes = are both unfortunate and misguided turns in the family law jurisprudence of this State. Both rulings have the effect of diminishing the spousal maintenance support available to divorced individuals. Both also increase the likelihood of an abrupt reduction or elimination of spousal maintenance upon retirement of the obligor, regardless of whether the obligor's resources actual diminish at that time. Neither ruling has strong support from either logic or policy but both undercut the important policies underlying the spousal maintenance law of this State. Because of this, Appellant asks this Court to reverse both rulings

of the Court of Appeals and to reinstate the income findings of the trial court and its original spousal maintenance award.

Appellant also asks that the Court of Appeals be reversed with respect to the retroactive date for spousal maintenance modification and that this Court reinstate the original date selected by the trial court. Finally, Appellant also requests that if there are any changes made to the original spousal maintenance order or if any related factual questions are remanded back to the trial court, that the issues of attorney's fees, both at the trial court level and on appeal, also be remanded.

Respectfully Submitted,

ROBERT L. WEINER & ASSOCIATES

A handwritten signature in black ink, appearing to read "Robert L. Weiner", written over a horizontal line.

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