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CASE NO. A07-0110

State of Minnesota
In Supreme Court

ELAINE IRENE LEE,

Appellant,

vs.

RAYMOND MICHAEL LEE,

Respondent.

RESPONDENT'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 THE CASE

This appeal is a permitted discretionary review of the published Court of Appeal's decision in this post-decree dissolution action dated April 7, 2008 (See Appendix pp. 1-13). The Appellant claimed in her Petition for discretionary review petition that the Appellate Court misapplied case law and that this Court should exercise its "...supervisory power and role.." to have the Court of Appeals "...apply the principles of that case [Kruschel vs. Kruschel, 419 N.W. 2nd 119 (Minn. Ct App. 1988)] in a very fundamental way...".

This case's initial appeal to the Court of Appeals is an appeal of a November 16, 2006 Washington County District Court Order from the Respondent's Motion that allowed a reduction in spousal maintenance but not a termination of the same as requested by Respondent. The District Court found that there was a substantial change in circumstances that required a reduction in the payment of spousal maintenance. However, the calculation of the Respondent's earned income was questioned on appeal by Respondent because the Court subtracted the amount of divided pension benefits that the Respondent received as a property settlement in the Decree from the amount of divided pension benefits that the Appellant received as property settlement to determine what pension benefit was to be included in Respondent's "earned income". The Respondent also questioned the district Court using a "balancing of the parties surpluses and shortages" methodology to determine an amount of spousal maintenance.

The district Court ordered that the spousal maintenance be reduced to $700.00 per

month retroactive to May 1, 2006, a date that had no significance to any event or service of any Motion, instead of terminating the spousal maintenance as requested as of the date of the service of the Motion.

The Court of Appeals, based upon the precedence set forth in Kruschel vs. Kruschel, 419 N.W. 2nd 119 (Minn. App. 1988), Richards vs. Richards, 472 N.W. 2nd 162 (Minn App. 1991) and Walker vs. Walker, 553 N.W. 2nd 90 (Minn. App. 1996) cases, reversed the district Court's ruling. The Court of Appeals ruled: 1.) that the district Court erred in considering as "future income" of the [Respondent's] pension benefits accumulated before the marriage and during the marriage, before [Respondent] has received pension payments equal to the value of the original property award and payments representing the value of the premarital portion. 2.) The district Court did not err in its findings regarding the parties' expenses, but did err in modifying the maintenance award to $700.00 per month and making it retroactive to a date that bears no relation to any event in the record. 3.) Because the [Respondent] did not have the current ability to pay maintenance, the Court of Appeals ordered Appellant's maintenance payment awarded be reduced to zero retroactive to July 13, 2005, however, it modified the dissolution decree to permit the district Court to retain jurisdiction over the issue of maintenance. 4.) That the district Court also abused its discretion in ordering [Respondent] to obtain life insurance to secure the maintenance payments without first ascertaining [Respondent's] insurability or the cost of such insurance. 5.) The district Court acted within its discretion by awarding attorney fees for the collection of previous

judgments and by considering [Appellant's] responsive motion even though she failed to timely file supporting documents and affirmed the denial of Appellant's request for need-based attorney's fees.

The Appellant in this appeal is asking this Court to reverse the Court of Appeals ruling because: 1.) the Court of Appeals erred in not considering as "future income" [Respondent's] pension benefits accumulated before the marriage and during the marriage, before [Respondent] received pension payments equal to the value of the original property award and payments representing the value of the premarital portion and requests this Court to "reinstate" the District Court's findings concerning income and its "balancing surplus" methodology to determine an amount of maintenance. Thus effectively "rewriting" Kruschel vs. Kruschel, 419 N.W. 2nd 119 (Minn. Ct App. 1988). 2.) Reverse the Court of Appeals fixing the retroactive date of the effective date of the modification of spoual maintenance to zero at the date of the bring of the motion and reinstate the original date used by the district Court. 3.) Or, if any other changes be made that this Court remand those changes to the district Court for determination.

The Respondent requests that this Court affirm, in all respects, the Court of Appeals decision.

STATEMENT OF LEGAL ISSUES

1. **Did the trial Court in this case err in determining Respondent's earned income, under the facts of this case, the statutory law, and the case law to determine what amount of earned income was available to Respondent after retirement to continue an award of spousal maintenance after the trial Court had determined that there was a material change in circumstances because of Respondent's retirement that made the existing award of spousal maintenance unfair?**

   Answer: Yes

   The Court of Appeals reversed the trial court and held that the trial Court erred in determining Respondent's earned income. The Court of Appeals concluded that until the Respondent receives the full present value of the portion of his pension benefits awarded to him by the original decree as a property award can the pension be considered earned income available to be considered 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 any of the Respondent's pension benefits awarded to him in the Decree as a property award be considered as earned income available for spousal maintenance purposes?**

   Answer: No

   The Court of Appeals reversed the trial court and held that the Respondent must have received pension payments representing the value of his pension awarded to him as property in the Decree before further payments may be treated as income. Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988).

3. **Did the Court of Appeals err in determining that Respondent's reasonable expenses exceeded his earned income and thus Respondent did not have the ability to pay spousal maintenance and ordered the amount to zero reserving the issue of spousal maintenance to the trial Court?**

   Answer: No.

   The Court of Appeals decided that Respondent, under the facts of this case, did not have the ability to pay spousal maintenance and none should have been awarded by the trial Court. Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988) and Minn. Stat. §518 A.39, subd. 2 (2006).

4. **Did the Court of Appeals err in fixing the date of retroactivity of the reduction of**

spoual maintenance to the statutory date of the service of Respondent's reduction Motion when the Court of Appeals found that the retroactive date used by the trial Court bears no relation to any event in the record?

Answer: No.

The Court of Appeals reversed the trial Court and ordered the statutory date of the service of the reduction Motion for the date of retroactivity. Kemp v. Kemp, 608 N.W.2d 916 (Minn. Ct. App. 2000) and Minn. Stat.§ 518A.39, subd. 2(e).

5. **Did the Court of Appeals err in affirming the decision of the district Court to deny the Appellant's request for need based attorney's fees award? Was the Appellate Court required to remand this issue to the district Court under theses circumstances?**

Answer: No. No.

The Court of Appeals affirmed the district Court's decision on the issue of denial of need based attorney's fees. Crosby v. Crosby, 587 N.W. 2d 292 (Minn. App. 1998) and Minn. Stat.§ 518.14, subd. 1 (2006).

STATEMENT OF FACT

Preface

The reason that the Appellant and the Amicus party gave to this Court to encourage this Court to take this discretionary review of the Court of Appeals decision in this case was that the Court of Appeals misapplied Kruschel vs. Kruschel, 419 N.W. 2nd 119 (Minn. App. 1988), Richards vs. Richards, 472 N.W. 2nd 162 (Minn App. 1991) and Walker vs. Walker, 553 N.W. 2nd 90 (Minn. App. 1996). It is often said that in legal analysis that legal precedence and case law are applied, distinguished, or separated from a case at hand by the facts of that individual case. The facts as established by the record are:

FACTS

The Appellant and Respondent were married to each other on September 4, 1968 and were divorced on June 7, 1993. The Judgment and Decree that was entered in this matter divided the parties' property, which included the Respondent's St. Paul Electrical Construction Pension Plan, a defined benefit pension benefits, a part of which was earned during the marriage (nine years of this pension was accumulated nine years before the marriage and a number of years after the dissolution), and a Deferred Compensation Plan on a 50%-50% basis. There was no Finding contained in the Judgment and Decree, no pension expert witness that testified at trial nor any stipulation of the parties at the time of the dissolution that evaluated the pension or pension benefits on a "present dollar value". The district Court divided the Respondent's St. Paul Electrical Construction Pension Plan pension earned during the marriage equally between the parties as personal property, both the defined benefit and the Supplement Pension.(See Appendix pp. 14 - 29).

In the original Judgment and Decree the Court found that the Respondent had net earned income of $1,967.20 per month as an electrician and that the Appellant had net earned income of $450.00 per month from part time employment (See Finding 26 of the Judgment and Decree- despite the Appellant's indication in her brief that the Appellant was not employed since 1969 - See p. 4 Appellant's brief). The Court also found in the original Decree that the Respondent had reasonable monthly living expenses at the time of the dissolution of $1,410.00 and the Appellant's reasonable monthly living expenses were $1,500.00. The Court ordered the Respondent to pay to the Appellant $650.00 per month as permanent spousal maintenance.

The Respondent was laid off from work in June of 1994 and he moved to reduce his spousal maintenance obligation based upon the Respondent's unemployment status. On August 17, 1994 the district Court entered an order reducing the Respondent's spousal maintenance from $650.00 per month to $381.08 per month. The district Court then issued an Order dated February 25, 2004, pursuant to Appellant's Motion to increase spousal maintenance, that increased the Respondent'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: Respondent 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 obligation to Appellant. In that same Order the Court found that the Appellant had net monthly Social Security Disability benefits of $647.00 and her reasonable living expenses were $1,950.00 per month.(The Court in that

Order, despite what the Appellant says in her brief did ***not find*** on page A.3 of Appellant's Appendix, that "[i]n 2003, Appellant - who had taken two jobs to make ends meet- was forced by medical disabilities to retire". The Court at that time found: "[Appellant] has suffered from ill health ***before*** and ***after*** the dissolution and is now collecting Social Security Disability benefits in the amount of $679..." (Appellant's Appendix p. 4 - ***emphasis added***). At this time there was discovered two (2) additional pensions that the Respondent had that were omitted from the Decree that should have been divided (International Brotherhood of Electrical Workers Pension Benefit Fund and National Electrical Benefit Fund). The district Court, again without any evaluation of present dollar value, split equally, back to the date of the original Judgment and Decree, these two pensions that were omitted from the original Decree as additional property division.

Then on July 13, 2005, after the Respondent retired at age 65, the Respondent's former counsel served Appellant with a Notice Motion and Motion requesting termination of the spousal maintenance based upon his retirement status at the age of 65, his decrease in income and his ex-wife's increase in income. Respondent claimed that his "earned income", excluding the pension amounts that he receives, was $830.35 per month and his expenses were $2,921.00 per month ***excluding*** any expense for payment of spousal maintenance. The Appellant, on August 8, 2005, served and filed a Counter-Motion, without any supporting affidavits, seeking maintenance for the balance of her life, security for payment of the spousal maintenance (life insurance), and conduct based attorney's fees.

In considering the maintenance issue, the district Court included in its calculation

of Respondent's monthly income ***immediately*** available for maintenance all payments that he receives from his pension benefit plans, except $795.64, representing the amount Appellant receives from her award of pension benefits, for a net income of $3,227.14. The court found Appellant's net monthly income, excluding as one of his expenses payment of his spousal maintenance, was $1,674.14. The court also found that neither party submitted reliable evidence of changes in his or her respective expenses after the February 27, 2004 order and therefore used as current expenses that order's findings of $1,950 for Appellant and $2,100 for Respondent. The court determined that Respondent had suffered a substantial diminution in income, making the original maintenance award unreasonable and unfair. The court found that Appellant had a monthly shortfall of $275.14, based on deducting her $1,950 in monthly expenses from her $1,674.14 in net monthly income, while Respondent had a monthly surplus of $1,127.14, based on deducting his $2,100 in monthly expenses from his $3,227.14 in net monthly income. The court then "balanced ... the parties' surpluses and shortages" to reduce spousal maintenance to $700 per month, making the award retroactive to May 1, 2006. The court also ordered Respondent to secure his payment of spousal maintenance by obtaining a life insurance policy naming Appellant as the beneficiary and ordered him to pay attorney fees for the collection of previous maintenance arrears judgments, but the court denied both parties' motions for attorney fees for the Motion proceedings.

The Court of Appeals, based upon the precedence set forth in Kruschel vs. Kruschel, 419 N.W. 2nd 119 (Minn. App. 1988), Richards vs. Richards, 472 N.W. 2nd 162 (Minn App. 1991) and Walker vs. Walker, 553 N.W. 2nd 90 (Minn. App. 1996) cases, reversed the district Court's ruling. The Court of Appeals ruled: 1.) that the district Court

erred in considering as "future income" the [Respondent's] pension benefits accumulated before the marriage and during the marriage, before [Respondent] has received pension payments equal to the value of the original property award and payments representing the value of the premarital portion. 2.) The district Court did not err in its findings regarding the parties' expenses, but did err in modifying the maintenance award to $700.00 per month and making it retroactive to a date that bears no relation to any event in the record. 3.) Because the [Respondent] did not have the current ability to pay maintenance, the Court of Appeals ordered Appellant's maintenance payment awarded be reduced to zero retroactive to July 13, 2005, but modify the dissolution decree to permit the district Court to retain jurisdiction over the issue of maintenance. 4.) That the district Court also abused its discretion in ordering [Respondent] to obtain life insurance to secure the maintenance payments without first ascertaining [Respondent's] insurability or the cost of such insurance. 5.) The district Court acted within its discretion by awarding attorney fees for the collection of previous judgments and by considering [Appellant's] responsive motion even though she failed to timely file supporting documents and affirmed the denial of Appellant's request for need-based attorney's fees.

ISSUES

1. Did the trial Court in this case err in determining Respondent's earned income, under the facts of this case, the statutory law, and the case law to determine what amount of earned income was available to Respondent after retirement to continue an award of spousal maintenance after the trial Court had determined that there was a material change in circumstances because of Respondent's retirement that made the existing award of spousal maintenance unfair?

Answer: Yes

2. Should any of the Respondent's pension benefits awarded to him in the Decree as a property award be considered as earned income available for spousal

maintenance purposes?

Answer: No.

ARGUMENT

In Minnesota we have been given legal principles and directions regarding the division and treatment of pensions in a dissolution. Minn. Stat. § 518.58, subd. 3(a) (2006) and Minn. Stat. § 518.581, subd. 1 (2006) tell us that pensions may be divided as property or as a source of income but not both. The case of Kruschel v. Kruschel 419 N.W.2d 119, 123 (Minn. App. 1988) tells us that when the pension is awarded as a property award it remains a property award ***until*** the recipient receives an amount equivalent to its value as determined in the original property distribution. (See: Kruschel vs. Kruschel, 419 N.W.2d at 123)). The Court in Richards v. Richards 472 N.W. 2d 162,165,166 (Minn. App. 1991) gives us the legal principle and direction that:

> 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 district Court acknowledged and followed the legal principle that pensions may be divided as property or as a source of income but not both but failed to follow the legal directions that until the recipient receives the equivalent of the value of the total property award in pension benefits, can the Court ***immediately*** consider the pension benefits as income. The Court of Appeals correctly recognized that the district Court erred and reversed the district Court's calculation of income.

In the original dissolution decree, the district court awarded Appellant one-half of

the pension Respondent had "accumulated during the marriage." As such, that award was a division of marital property under Minn. Stat. § 518.58, subd. 3(a) (2006). Alternatively, the district court could have ordered payments from the pension funds as maintenance, in either a periodic payments or a fixed dollar amount but not both. It is clear and undisputed that the District Court awarded the pension division in this case as a property award.

On the modification motion, the district Court correctly recognized that pension benefits awarded as property are not also available for payment of maintenance (See District Court Memorandum to the November 16, 2006 Order). But the district court erroneously found that the benefits Respondent received in excess of the benefits received by Respondent were available for the ***immediate payment of spousal maintenance even while the Respondent was still collecting his pension***. By so doing the district court failed to apply the legal principles set forth in Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. App. 1988), and Richards and Richards, 472 N.W.2d 162 (Minn.App.1991), instead it mistakenly relied on Walker v. Walker, 553 N.W.2d 90 (Minn.App.1996).

A problem that exists in this case is that neither party, ***at any time***, provided any evidence to establish the value of the pension benefits awarded at the time of the original decree, there is no starting point. But bad lawyering does not make a long standing legal principle and precedence bad in its application.

Walker clearly acknowledges *Kruschel's* handling of pension benefits as the rule of law but applies the parties' ***stipulation*** to uphold a different valuation of pension benefits. Walker v. Walker , 553 N.W.2d at 94, (Minn. App.1996)) . In *Walker*, the parties had stipulated to a specific value of the marital portion of a pension based on anticipated annual benefits payments. In *Walker* the Court of Appeals affirmed the district Court's decision that applied the parties stipulation to conclude that any receipts in excess of the stipulated amount could be considered income for determining maintenance. *Walker* was thus premised on the existence of the stipulation and is not

authoritative here and should not have been relied upon by the district Court. The facts of this case ***clearly*** is distinguished from Walker.

The Amicus Brief relies upon Judge Woznaik's dissent in Kruschel for its direction and authority to review Kruschel and to obtain the result that it forwards. Respondent reminds the this Court that dissents are not authority and do not control the application of Kruschel. Kruschel has been applied since its inception and should continue to so applied.

Respondent acquired more than nine years of pension benefits before marrying Appellant. Those nine years was awarded to the Respondent in the Decree because the Appellant only was awarded ½ of the accrued benefits acquired during the marriage which did not include these nine years. Likewise these nine years lack any valuation.

The Court of Appeals states in its decision: "Maintenance is defined by statute as an award of payments from *future income or earnings.* Minn. Stat. § 518.003, subd. 3a (2006). To include pension benefits accrued *before* marriage, the receipt of which is delayed until a later date, as "future income," is to ignore the fact that payment of pension benefits is really a distribution of an investment comprising employer contributions for work performed during a certain period (before the marriage), employee contributions for that same period, and appreciation on that investment. If the word "future" in the definition of "future income and earnings" is to have any meaning, it refers to a time frame. See Minn. Stat. § 645.16 (2006) (requiring a statute to be construed to "give effect to all its provisions"). Because Respondent's receipt of accrued premarital pension benefits is not a receipt of "future income," but rather a receipt of property, it is not available for maintenance purposes.

Other references to pension benefits found in the marital dissolution statutes are also instructive on this question. Minnesota law provides that "vested public or private pension rights acquired by the parties ... during the existence of the marriage" are items of marital property subject to division. Minn. Stat. § 518.003, subd. 3b (2006). Conversely, "non-marital property" is acquired before and after the marriage relationship.

Id. Minnesota law provides for the award of one party's non-marital property to the other only after a finding of "unfair hardship," and when such hardship is found, a district court may award only up to one-half of the non-marital property to the other party. (Minn. Stat. § 518.58, subd. 2 (2006)). No hardship was found to exist by the district Court. By construing accrued premarital pension benefits as "future income" instead of non-marital property, the full amount of the premarital pension benefits may be awarded as "future income" for maintenance purposes in the absence of hardship, while upon the occurrence of a hardship, only one-half of the premarital pension benefits may be invaded. Such a construction lacks logic and common sense."

This additional analysis, although not needed to decide this issue, makes sound sense. The analysis argued and the result Appellant wants is one for the legislature to handle not the Courts. The Court of Appeals states that in it opinion that "the legislature made a statutory changes in the definition of "income," as it applies to child support and maintenance, suggests that the legislature intended to include premarital pension benefits as income for purposes of calculating child support, but not for awarding maintenance. Historically, the statute, entitled "Maintenance, Support, Property," included in its preliminary "definitions" section a definition of "income" that included "pension ... payments." Minn. Stat. § 518.54, subd. 6 (2004). This definition of income was repealed in 2006, however. 2006 Laws ch. 280, § 47. The current statute does not define "income" for purposes of maintenance and generally bases a maintenance award on one party's need for it and the other party's ability to pay it while satisfying his or her own needs Minn. Stat. § 518.552 (2006). By contrast, the current child support statute is more detailed and elaborate and provides a definition of "gross income" that includes "pension benefits," Minn. Stat. § 518A.29 (a) (2006), but refers to this definition only for setting a child support obligation. Minn. Stat. § 518A.35 (2006). To the extent that the earlier statute was rather imprecise in its treatment of income for purposes of awarding maintenance or child support, and to the extent that the current statute separately refers to the general provisions on maintenance and the detailed provisions on child support, we

conclude that the legislature intends the definition of income to apply to child support and not to maintenance. The Court of Appeals for the above stated reasons reversed the district Courts treatment of the pension."

Respondent continued to work and accrue pension benefits following the dissolution decree. This amount of pension benefits attributed to this work again has not been evaluated to present dollar value. Respondent argued that his post-marital pension benefits are also non-marital property rights and should not be deemed "future income," asserting that post-marital pension benefits are no different from premarital pension benefits. The Court of Appeals followed the rule in *Kruschel* and its progeny by recognizing that after pension payments equal to the value of the original property award are fully received, further payments ***may*** be treated as income for maintenance purposes. Kruschel, vs. Kruschel 419 N.W.2d at 123 (Minn. App. 1988) and Richards vs. Richards, 472 N.W.2d at 166. The problem that still exists in this case is the "post decree" pension benefits have not been evaluated. How does a Court separate this without expert evaluation?

ISSUE

3. **Did the Court of Appeals err in determining that Respondent's reasonable expenses exceeded his earned income and thus Respondent did not have the ability to pay spousal maintenance and ordered the amount to zero reserving the issue of spousal maintenance to the trial Court?**

Answer: No.

ARGUMENT

The Court found in this case that the Respondent established entitlement to modification of a maintenance order. Once that has been done the court must then balance the needs of the Appellant against the Respondent's financial condition or ability to pay from his earned income to meet those needs and then determine the amount of maintenance award, if any. Kemp v. Kemp, 608 N.W.2d 916, 921 (Minn. App.2000). The district Court must look at the earned income of the Respondent. The Court of Appeals

found that, excluding all pension benefits, because he has not received all that part that was awarded as property, Respondent's monthly income was $1,555, and his monthly expenses were $2,100, and, found that the Respondent did not have the current ability to pay maintenance. (See: Minn. Stat. § 518A.39, subd. 2 (2006)). Instead of terminating Respondent's maintenance obligation, the Court of Appeals modify the award to zero and allowed the district court to retain jurisdiction over the issue of maintenance, because at some future date appellant's "future income" may again exceed his expenses and merit an award. In so doing the Court of Appeals ruled that the district Court use of a balancing of the parties' surpluses and shortages is without authority or precedent. Once an obligor establishes that he is entitled to modification, the court must then balance the ***needs*** of the spouse receiving maintenance (in this case $275.14 per month needs) must be compared to the obligor's ability to pay (zero). Kemp v. Kemp, 608 N.W 2d 916, 921 (Minn. App.2000).

ISSUE

Did the Court of Appeals err in fixing the date of retroactivity of the reduction of spousal maintenance to the statutory date of the service of Respondent's reduction Motion when the Court of Appeals found that the retroactive date used by the trial Court bears no relation to any event in the record?

Answer: No.

ARGUMENT

The Court of Appeals found that the district Court's retroactive date for the effective date of its order had no relationship to any event in the record and determined that the date of the reduction of spousal maintenance should be the date of the service and filing of the Motion. A modification of a maintenance obligation "may be made retroactive" to any date during which a modification motion is pending, but not before the date of service of the motion.(Minn. Stat. §518A.39, subd. 2(e)). The Court of Appeal reasoned that because the word "may" is defined as "permissive," a district court has discretion to set the effective date of a maintenance modification. Kemp v. Kemp, 608

N.W.2d at 920. The date used by the district Court had no significance to any event or action in this case. The Court of Appeals ruled that the date should be the date provided by statute (Minn. Stat. 518A.39, subd. 2(e)). Such a ruling is within the sound discretion of the Court of Appeals and supported by statute.

ISSUE

Did the Court of Appeals err in affirming the decision of the district Court to deny the Appellant's request for need based attorney's fees award? Was the Appellate Court required to remand this issue to the district Court under theses circumstances?

Answer: No. No.

ARGUMENT

Attorney's fees in a dissolution action can be awarded under 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 appeared 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. Marcolina, 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 Respondent argued in the appeal 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 and it did. In this matter the district Court refused to award the Appellant any need-base or any other attorney's fees except those related to collection a judgment for arrears.

The Court of Appeals ruled that an award of attorney fees rests almost entirely within the discretion of the trial courtand will not be disturbed absent a clear abuse of discretion." Crosby v. Crosby, 587 N.W.2d 292, 298 (Minn. App. 1998) review denied (Minn. Feb. 18, 1999). A district court shall award need-based attorney fees if it finds that the fees are necessary for the good-faith assertion of a party's rights, the party from whom fees are sought has the means to pay them, and the party to whom fees are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2006). The district court may also award conduct-based fees, regardless of need, "against a party who

unreasonably contributes to the length or expense of the proceeding." *Id.* The district court found that each party could afford to pay his or her own attorney fees for the current proceedings, and therefore denied need-based fees to respondent. But the court also found that respondent incurred $1,699 in attorney fees and costs in attempting to collect on previous judgments for maintenance arrears and that these fees and costs were reasonable. Respondent argues that the court abused its discretion in failing to award attorney fees relating to the present motions; appellant argues that the court abused its discretion in awarding conduct-based fees and the Court of Appeals ruled that the district court did not abuse its discretion in awarding conduct-based attorney fees, despite the delinquent filing of the attorney affidavit, and observe no error in the amount of fees awarded.

CONCLUSION

The Court of Appeals properly applied the long-standing case law and statutory law to this case in deciding this matter. Its decision on the appeal should be ***in all respects*** affirmed by this Court.

Respectfully Submitted,

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