

NO. A07-1226

State of Minnesota
In Court of Appeals

In Re the Marriage of:

Randall M. Grachek,

Appellant,

and

Pamela Dawn Grachek,

Respondent.

REPLY BRIEF OF APPELLANT RANDALL M. GRACHEK

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INTRODUCTION

By focusing on the term of modification, Respondent entirely misses the mark and ignores the *unambiguous* meaning of the stipulated terms of the marital dissolution agreement, incorporated in the subsequent Judgment and Decree. The issue in this case is not *modification* of the spousal maintenance order, but rather whether the parties unambiguously agreed to waive “any” additional spousal maintenance “whatsoever.” While the plain meaning of the waiver language certainly contemplated a modification for increased spousal maintenance (i.e., “no additional increase *whatsoever*”), it also included a COLA increase. This is evident upon closer examination of the applicable statute and the Judgment and Decree.

ARGUMENT

- I. **Minn. Stat. §518A.75 requires that *if* a court provides for COLA increases for maintenance or child support, the terms of calculating the adjustment shall be specified in the order.**

Respondent mistakenly concludes that “the court will automatically impose a COLA upon an obligee’s request, unless the obligor establishes insufficient cost of living or other increase in income that prevents fulfillment of the adjusted maintenance or support obligation.”¹ This conclusion is unsupported. The applicable statute requires that if the court order provides for a COLA increase,

¹ See Page 4 of Respondent’s Brief.

then the order must include terms for calculating the adjustment. Indeed, this is achieved by not only attaching the notice provision referred to as Appendix A, but the statute requires inclusion of the calculation terms within the order itself. In the case at hand, the intent to waive COLA becomes evident, as the court *did not* specifically reference Appendix A with respect to the spousal maintenance provisions. In contrast, Appendix A was specifically referenced with respect to ordering COLA increases for child support payments. This fact is significant in light of the plain unambiguous language utilized by the parties and incorporated into Paragraph 9 of the Judgment and Decree. There is no reference to a COLA increase or calculation of the terms because the parties agreed to waive COLA with regard to spousal maintenance.

The statutory requirement of including a reference to COLA increases was analyzed in the context of an issue related to child support payments. In the case of Novak v. Novak, 406 N.W. 2d 64 (Minn. Ct. App. 1987), this court found that the statute “specifically requires cost-of-living language be included in child support orders.” *Id.* While the requirement was discussed within the context of child support, the statutory language imposes a similar burden on the court with respect to COLA issues for spousal maintenance.

Minn. Stat. 518A.75 provides in pertinent part:

Subdivision 1. Requirement. (a) An order establishing, modifying, or enforcing maintenance or child support shall provide for a biennial adjustment in the amount to be paid based on a change in the cost of living.

Careful examination of the Judgment and Decree at issue in this case reveals that the trial court complied with the statutory requirements with respect to the child support provision (Paragraph 5- Support- 1 Child) by specifically providing for an adjustment pursuant to child support guidelines and referencing Appendix A. **(A-10 and A-11)** To the contrary, the trial court did not make the same statutorily required references to an adjustment for the spousal maintenance provision (Paragraphs 8 and 9). **(A-12 and A-13)**

Respondent argues that by including Appendix A in the Judgment and Decree the parties “agreed on certain post-decree rights to a spousal maintenance or child support adjustment; namely the COLA.”² This argument is without merit. Appendix A specifically provides that the information is for *notice* purposes only. With regard to this case, Appendix A provides in pertinent part:

NOTICE IS HEREBY GIVEN TO THE PARTIES:

* * * * *

VII. COST OF LIVING INCREASE OF SUPPORT AND MAINTENANCE. Child support and/or spousal maintenance *may* be adjusted every two years based upon a change in the cost of living, (using the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price

² See Page 6 of Respondent’s Brief.

Index Mpls. St. Paul, for all urban consumers (CPI-U), unless otherwise specified in this order) *when the conditions of the Minnesota Statutes, section 518.641 are met.* (emphasis added). (A-22 and A-23)

Contrary to Respondent's position, the inclusion of Appendix A does not result in the creation of a substantive right to COLA increases. The language in the provision notifies the parties that such child support or spousal maintenance "may" be adjusted if conditions of the applicable statute are met. As previously discussed, at a minimum, the court that orders the child support or maintenance must reference COLA increases. This is statutorily required.

The Judgment and Decree specifically referenced adjustments to child support payments and Appendix A. (A-11) Nevertheless, no reference to adjustments or Appendix A are included in the spousal maintenance provision (Paragraph 8) of the Judgment and Decree. (A-12 and A-13) The omission accurately reflects the intent of the unambiguous language. Furthermore, the lack of a COLA reference in Paragraph 8 of the Judgment and Decree also supports Appellant's interpretation that the parties waived "any additional spousal maintenance whatsoever" with respect to future spousal maintenance, through modification or COLA.

II. There is a recognizable distinction between modification of an order for spousal maintenance and a COLA increase.

Respondent argues that the trial court properly granted a COLA increase because it is not a modification. Nevertheless, Respondent's focus on the term of modification in the context of examining the propriety of a COLA increase is misguided. The unambiguous waiver language in the parties settlement agreement encompassed *any additional* spousal maintenance whatsoever. In other words, if the additional spousal maintenance was ordered in the form of a modification or through a COLA increase it was effectively waived through the stipulation and subsequent Judgment and Decree.

In granting Respondent's motion for a COLA increase the trial court rendered the stipulated dissolution agreement meaningless with respect to the waiver provisions concerning additional spousal maintenance. At a minimum, the parties must be held accountable to honor their written agreement made over twelve years ago. As such, a reversal is warranted.

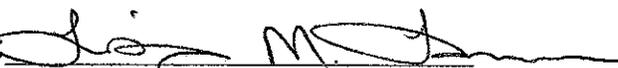
CONCLUSION

Appellant Randall M. Grachek respectfully requests that this Court reverse the trial court's order granting a COLA increase and remand with instructions to find the COLA waiver enforceable and deny Respondent Pamela Grachek's request for any COLA increase and order a credit for any and all COLA payments made towards future spousal maintenance.

Respectfully submitted,

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Dated: September 7, 2007

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