

A11-1475

**State of Minnesota  
In Court of Appeals**

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Katherine Fashant Leifur,

Respondent,

v.

Conrad William Leifur,

Appellant.

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**BRIEF AND APPENDIX OF RESPONDENT  
KATHERINE FASHANT LEIFUR**

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Edward L. Winer  
(I.D. No. 117948)  
Shannon M. Bixby-Pankratz  
(I.D. No. 033473X)  
MOSS & BARNETT,  
A Professional Association  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129  
(612) 877-5000

*Attorneys for Appellant  
Conrad William Leifur*

Kay Nord Hunt (I.D. No. 138289)  
LOMMEN, ABDO, COLE,  
KING & STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

Jennifer A. Jameson (I.D. No. 029486X)  
McGRANN SHEA CARNIVAL  
STRAUGHN & LAMB, Chtd.  
800 Nicollet Mall, Suite 2600  
Minneapolis, MN 55402  
(612) 338-2525

*Attorneys for Respondent  
Katherine Fashant Leifur*

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## STATEMENT OF THE ISSUES

DID THE TRIAL COURT ABUSE ITS DISCRETION IN HOLDING THAT SPOUSAL MAINTENANCE MODIFICATION WOULD BE RETROACTIVE TO OCTOBER 28, 2010 IN ACCORD WITH MINN. STAT. § 518A.39, SUBD. 2(E)?

This issue was raised and addressed by the parties pursuant to Respondent's motion to enforce spousal maintenance and child support and Appellant's responsive motion to terminate or suspend spousal maintenance. (A. 4). It was also addressed in Appellant's Motion for Amended Findings of Fact and Conclusions of Law and by Respondent's response. (A. 13).

Minn. Stat. § 518A.39, subd. 2(e).

Kielley v. Kielley, 674 N.W.2d 770 (Minn. Ct. App. 2004).

King v. Dalton Motors, Inc., 260 Minn. 124, 109 N.W.2d 51 (1961).

## STATEMENT OF THE CASE AND FACTS

The trial court, the Honorable Laurie J. Miller, granted Appellant Conrad Leifur's October 28, 2010 oral motion to modify his spousal maintenance obligation to Respondent Katherine Fashant Leifur, reducing his monthly spousal maintenance from the agreed-upon amount of \$6,600 per month contained in the November 2006 Judgment and Decree to \$3,000 per month effective January 1, 2011. (Appellant's Appendix [A.] 4, 11, 13, 51, 61). The trial court also suspended Appellant's spousal maintenance obligation for November and December 2010. The trial court refused Appellant's further request to make such modification retroactive to June 1, 2009, which argument of Appellant was premised on the May 28, 2009 document entitled "Mediation Agreements." (A. 4, 13, 79). The trial court entered judgment against Appellant in the amount of \$104,100, representing arrears accumulated from February 2009 through October 28, 2010. (A. 11).

The sole issue raised by Appellant on appeal is his contention the trial court committed error in setting the retroactive date in accord with Minn. Stat. § 518A.39, subd. 2(e) and thereby seeks reversal of the judgment for arrears entered. Respondent Katherine Fashant Leifur asserts the trial court did not commit error and respectfully requests the judgment be affirmed. (Id.)

**A. Under the Stipulated Dissolution Judgment and Decree, Husband Agreed to Pay Wife \$6,600 per Month in Spousal Maintenance Until 2021.**

Appellant Conrad Leifur (Husband) and Respondent Katherine Fashant Leifur (Wife) were married in August 1991 and divorced in November 2006 under a stipulated divorce decree approved by the trial court. (Appellant's Appendix [A.] 45; Finding of Fact VII; A. 47). The parties have three children, then ages 9, 7 and 5. The youngest child (Youngest Child) has special needs – Down Syndrome – and requires significant one-on-one care. (Finding of Fact VIII; A. 47; Finding 3; A. 5). The parties stipulated to joint legal and joint physical custody of the children. (Finding of Fact VIII; A. 47). Husband has parenting time with the children on Wednesday nights overnight and every other weekend. (Conclusion of Law 2c; A. 54).

As part of the Decree, Husband agreed to pay Wife \$6,600 per month in spousal maintenance, payable until April 10, 2021. (Conclusion of Law 4; A. 61). He agreed to pay \$1,500 per month in child support and to additionally deposit \$803 per month in a joint checking account to pay for the children's expenses such as school lunches, tuition, child care, clothing, etc. (Conclusion of Law 3a; A. 58-60). Husband was also responsible for continuing to keep the children's health and dental insurance in force and effect. (Conclusion of Law 6; A. 62).

The child support agreed upon was less than the applicable Minnesota Child Support Guidelines, which required Husband to provide support in the amount of \$2,441 per month. (Conclusion of Law 3a; A. 58). One of the stated reasons the parties deviated

downward from the Guidelines was the fact Husband and Wife each were awarded approximately \$1.6 million in assets, much of which was easily converted to cash. (Id.) Therefore, the parties agreed each parent had the ability to contribute toward the children's support, although Wife was unemployed and Husband had annual income of approximately \$250,000 per year. (Id.; Finding of Fact IX; A. 47).

The parties recognized that expenses for the children would increase and therefore they agreed to annually review the children's expense budget. Also, because the Youngest Child has special needs, the parties recognized there would need to be adjustments in the future due to his special costs. (Conclusion of Law 3a; A. 58).

**B. Husband Was Employed and Wife Was Not Employed Outside the Home.**

Husband has an MBA degree. He was employed by Cargill as a managing director, with a gross annual base salary of approximately \$175,000 and he received, in addition, annual bonuses estimated to be \$75,000 for 2006. (Finding of Fact XV; A. 47-48). Wife, who has a law degree, was not employed. (Id.) Her last job was as a law clerk for a Hennepin County District Court judge between 1992 and 1994. Her salary was approximately \$24,000 per year. (A. 164-65). This job ended three years before their first child was born. (Finding of Fact VIII; A. 47). Husband has stated he had no expectations at the time of the Dissolution Decree whether or not Wife would work outside the home in the future. (Husband Depo., pp. 17-18; Respondent's Appendix [R.A.] 18-19).

The parties estimated that the division of property would provide each with gross income from investments, up to \$25,000 annually. (Finding of Fact XV; A. 47-48). At the time of the Dissolution Decree, Wife's reasonable living expenses for herself and the minor children were \$8,238 per month. (Finding of Fact IX; A. 47). Husband's reasonable living expenses for himself and the minor children were \$7,923 per month. (Id. at A. 48).

**C. The Judgment and Decree Provides for Two Reviews of Spousal Maintenance.**

As previously stated, the parties agreed that Wife would receive spousal maintenance of \$6,600 per month until 2021. (Conclusion of Law 4; A. 61). This end date coincides with the time the Youngest Child reaches age 20. (Finding of Fact X; A. 48). The parties also agreed to two interim reviews of spousal maintenance, one on May 1, 2010 and the other on July 1, 2016. The reviews are to be based on a substantial change in circumstances applying the Minn. Stat. § 518.64 standard. (Finding of Fact X; A. 48).

The first review (May 2010) was to occur when the Youngest Child was nine years of age.<sup>1</sup> (Id.; Finding of Fact VIII; A. 47). The second review (July 2016) occurs when

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<sup>1</sup> The Decree says this review occurs when the Youngest Child begins attending school full time. (Finding of Fact X; A. 48). However, by 2010, the Youngest Child was nine years old. (Finding of Fact VIII; A. 47). The Conclusion of Law does not express any event that correlates with such review. (Conclusion of Law 4; A. 61).

the oldest child has completed school and is emancipated. (Finding of Fact VIII & X; A. 47, 48).

Under the Dissolution Decree, these reviews “shall first be attempted by direct negotiations between the parties.” If not successful, “they shall return to mediation for the reviews and negotiate the change to spousal maintenance.” If that also was not successful, “either shall have the right to bring the matter before the court for a review of spousal maintenance, based on a substantial change in circumstances at the time pursuant to statutory requirements of Minn. Stat. § 518.64.” (Finding of Fact X; A. 48; Conclusion of Law 4; A. 61).

**D. Beginning in January 2009, Husband Unilaterally Reduced the Amount of Spousal Maintenance He Paid to Wife.**

In November 2007, Husband was terminated from his position at Cargill. He received severance through May 2008. (Finding 19; A. 7). Husband’s W-2 income for the years 2006 through 2008 was as follows:

- 2006 – income \$473,641
- 2007 – income \$411,160
- 2008 – income \$345,458

(A. 174).

After being terminated, Husband decided to earn a living by day trading. Husband told wife he would earn \$10,000 per month from that work. (A. 172). Husband instead incurred more than \$400,000 in investment loss. (Finding 20; A. 8). In 2009, Husband formed Superset Investment & Research, LLC. (A. 172; Husband Depo., p. 47; R.A. 26).

Superset Investments stalled because of an inability to raise money from institutional investors. (Finding 20; A. 8). Husband also embarked on a venture to develop an approach for analyzing stock with a Canadian-based software development company. The startup cost was \$30,000 with a highly uncertain revenue potential. (Id.)

Husband has not lived within his stated monthly budget of \$7,923. (A. 48). His average monthly spending (not including debt service, support or maintenance) in 2007 was \$18,405; in 2008 it was \$13,740 and in 2009 it was \$10,810. (A. 175). Wife submitted the Affidavit of Carol Devitt from Baker Tilly Virchow Krause, a financial expert, to analyze the information submitted by Husband. As set out in Carol Devitt's affidavit, Husband continued to spend over \$10,000 per month on living expenses in 2009 when he claimed he had zero income. (A. 188-89; R.A. 49).

In January 2009, Husband stopped paying the mandated spousal maintenance of \$6,600 per month. (Finding 9; A. 6). In February 2009, Husband paid \$1,500 for his child support obligation and \$1,100 in spousal maintenance. (Id.) Both parties stopped contributing \$803 per month to the children's account. (Id.) Husband was in arrears to Wife of \$5,500 for February 2009. Thereafter, Husband paid Wife \$3,170<sup>2</sup> per month for child support and spousal maintenance and was accordingly in arrears to Wife in the amount of \$4,930 per month. (A. 161).

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<sup>2</sup> Husband states on page 3 of his Appellant's brief that the arbitrary amount he paid "proved to be overstated by the District Court later at hearing." That is not accurate. Husband was ultimately ordered to pay \$3,000 per month in spousal maintenance and \$1,500 in child support. (A. 11).

Wife's 2009 income was \$71,961. (A. 162). Of that amount, \$60,000 came from a conversion to a Roth IRA which generated income for tax purposes. In 2009, her assets generated roughly \$7,800 in income. (A. 162). The trial court concluded that in 2009 Husband had income from investments and interest of \$72,155. (Finding 23; A. 8).

Because of the limited support Wife received from Husband, she reduced as many expenses as possible, resulting in a significantly reduced standard of living for Wife and the children. (A. 165).

Wife has been spending down assets to meet her monthly living expenses and those of the children. (A. 166). Wife pays for their school lunches, clothes, sports gear, etc. The expenses were to be split pursuant to the Decree, but they were now falling completely on Wife. (A. 165-66). In an attempt to offset the costs associated with day-to-day care, Wife suggested Husband have more time with the children. (A. 165-66). He refused, stating he was too busy. (*Id.*; Husband Depo., pp. 5-6; R.A. 15-16).

Because of the Youngest Child's special needs, both during the marriage and during the divorce Husband had agreed it would be better for Wife to stay home with the children rather than work outside the home. (A. 166-71, 185; Husband Depo., pp. 17-18; R.A. 18-19). The children are with Wife most of the time. (A. 165-66, 185-86). And Husband admits that Wife is the primary caregiver of the children. (Husband Depo., p. 18; R.A. 19).

It is particularly important for Wife to be home to care for Youngest Child. (A. 166-71). At school, the Youngest Child has a one-on-one care professional with him

throughout the school day. (A. 184-85). When the parties' Youngest Child is home from school, Wife is not able to do anything that takes her away from him for more than a minute. (A. 167-69). To take him to the grocery store or on errands is a challenge. (Id.) Therefore, Wife does everything to keep the household running while Youngest Child is at school. (Id.) Youngest Child can open doors and will run if not watched. If he gets away, he does not have the ability to communicate with others to let them know who he is, that he is lost, or how to find his home. More than that, he does not have the fear of being lost. (A. 168-69). Also, given Wife's earning capacity, it does not make financial sense for her to work outside the home, which would then require the parties to hire outside help. (A. 166-71, 184-86).

Wife also has had to expend money for necessary home improvements. Such expenditures include replacing single paned windows that were drafty. (A. 188).

**E. The Parties Attempted Mediation, But Reached No Agreement to Modify Husband's Obligations Under the Judgment and Decree.**

As previously stated, Husband stopped paying the court-ordered and agreed-upon spousal maintenance in January 2009, unilaterally picking a number he chose to pay. (A. 161). The parties then began talking about how to resolve the issue. The parties, unable to resolve the issues on their own, attempted mediation. (A. 34, 178).<sup>3</sup>

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<sup>3</sup> The record does not support Husband's statement on page 25 of his brief that he "finally sought relief in February 2009 when he requested the parties attend mediation . . . ."

In May 2009, the parties, in anticipation of the scheduled mediation session for June 5, 2009, signed a one-page document which is the subject of this appeal. (A. 44).

The document, while entitled “Mediation Agreements,” only states:

[Wife] and [Husband] met in a mediation session with their attorneys present for the purpose of discussing modifications to the Judgment and Decree of Dissolution entered by the Court November 21, 2006. They have scheduled a second mediation session for June 5, 2009 to continue the discussions.

They wish to make the following agreement binding upon them.

1. The parties agree that any modification of child support and spousal support be retroactive to June 1, 2009.

(A. 44) (hereinafter referred to as Mediation Agreements).

Husband states as fact on page 2 of his Appellant’s brief that “[t]o avoid the unnecessary expense of filing a motion to preserve retroactivity under Minn. Stat. § 518A.39, the parties reached a partial agreement at the May 28, 2009 mediation session to preserve retroactivity . . .,” citing A. 34 and A. 79. Neither Husband’s affidavit at A. 34 nor the Mediation Agreements at A. 79 supports Husband’s statement. That statement is not fact. Husband also repeats that statement in the argument section of his brief. (See Appellant’s Brief, p. 11).

Mediation broke down in June 2009. (A. 34, 189). There is no record support for Husband’s statement at page 3 of his Appellant’s brief that “[a]dditional negotiations took place through April 2010.” Husband’s citation is to his Legal Memorandum in Support of Husband’s Motion for Amended Findings at A. 151 and is not evidence. Husband

repeats this unsupported statement throughout the argument section of his brief. (See Appellant's Brief, pp. 11, 17, 21, 23, 26 and 27). The statement has no record support. The fact is when mediation broke down in June 2009, Husband did not seek reduced spousal maintenance from the court.<sup>4</sup> He just continued paying Wife the reduced amount he had unilaterally chosen to pay. (A. 189).

**F. In May 2010, Wife Sought Enforcement of the Judgment and Decree.**

In May 2010, Wife brought a motion to enforce the spousal maintenance and child support provisions of the parties' Judgment and Decree. (R.A. 1). She sought judgment against Husband for \$79,450 in unpaid maintenance and to establish a payment plan for arrears. (Id.; A. 161).<sup>5</sup> Wife explained that the parties had "attempted mediation for several months without success in 2009," but now "need the assistance of the Court to obtain resolution on this issue." (A. 162).

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<sup>4</sup> Husband's counsel stated at the October 28, 2010 hearing that in his judgment Husband "should have been in this court . . . earlier than June of 2009." (T. 10/28/10, p. 26).

<sup>5</sup> Throughout Husband's brief, as he argued to the trial court, he suggests there was some affirmative burden on Wife to notify him prior to the memorandum she filed on October 22, 2010 that she did not think the purported mediation agreement was binding. His argument has no factual or legal support. Wife, in her motion served on May 11, 2010, asked to enforce the Decree back to the date Husband started reducing his payments in January 2009 (R.A. 1), and she did not introduce the "Mediation Agreements" as part of her motion papers (A. 160). Clearly, Wife was asserting there was no agreement. Husband, however, did not assert to the contrary until October 18, 2010. (A. 34). Furthermore, it is Husband who sought to enforce the Mediation Agreements, so it was his burden to provide evidence to support his argument and to make his argument in accord with the rules. (R.A. 9). Wife's duty was to respond to his motion, which she did.

Discovery was conducted and Wife filed amended motions in August 2010 and October 2010. (A. 162; R.A. 3, 5). The amount in arrears was now \$104,100. (R.A. 5; A. 164). In the intervening time period, Husband filed no motion to modify his spousal maintenance or child support.

Wife learned that Husband in 2010 decided to open a pizzeria with his girlfriend. (Finding 20; A. 8; A. 28-29). Husband has invested over \$200,000 of his money into this venture. (Finding 20; A. 8). The pizzeria was scheduled to open in late 2010. (Husband Depo., pp. 86-87; R.A. 36).

Husband anticipates that his income will be back up to \$200,000 a year by 2012. (Husband Depo., pp. 75-77; R.A. 33). He projects in 2011 he would earn \$60,000 in salary and \$14,000 in dividends from the pizzeria. (Finding 20; A. 8). He projects by 2012 his annual salary will be \$100,000 and his dividend will increase to \$64,000 in year three. (Id.)

**G. On October 18, 2010, Husband Sought to Terminate or Suspend But Not Reduce His Spousal Maintenance Obligation.**

On October 18, 2010, Husband sought the court's permission to terminate or suspend (but not reduce) his spousal maintenance obligation. (R.A. 9). In this motion he sought termination of his "spousal maintenance obligation, retroactive to June 1, 2009 based on the parties' binding agreement." In the alternative, he sought suspension of his spousal maintenance obligation "retroactive to June 1, 2009 based on the parties' binding agreement. He also asked that any spousal maintenance or child support arrears accrued

between February 1, 2009 through May 31, 2009 be extinguished “as the parties were actively involved in the mediation process during this time.” (R.A. 9-10). Husband did not seek, as part of his motion, to modify spousal maintenance downward or to the amount he had been unilaterally paying since early 2009. (Id.) He asked that his child support obligation of \$1,500 continue under the terms of the Judgment and Decree “retroactive to June 1, 2009 based on the parties’ binding agreement.” (Id.)

In his affidavit accompanying his motion, Husband stated he and Wife began attending mediation sessions by themselves and eventually retained counsel to continue with mediation services from “March 2009 through June 2009.” (A. 34). It was with that affidavit that he first presents a copy of the Mediation Agreements. (A. 34, 79). Husband did not, until that point, file it with the court. In addition to presenting that document, Husband also represented that the parties had agreed he could reduce his spousal maintenance payments to \$1,670 per month. (Id.)

In response, Wife explained there were no enforceable mediation agreements and Husband’s statements were not an accurate representation of the discussions in mediation. (A. 189). Wife stated:

There was no meeting of the minds, no agreement. Mediation broke down in June 2009 and [Husband] did nothing to modify his support.

(A. 189).

As Wife explained, both parties made numerous proposals at the mediation, but could not reach an agreement. (A. 189-90). Ultimately, Husband just picked a number that he wanted to pay in early 2009 and kept paying that amount. Such amount “had nothing to do with [the parties’] discussions or . . . court order . . . .” (A. 190).

Wife also explained how the parties never anticipated her going back to work. (A. 185). The parties had made an equitable division of their assets. (A. 188). Wife has tried to conserve assets rather than spend and liquidate them to support an unsupportable lifestyle. (*Id.*) As to Wife’s travel expenses, Wife asserted they are in accord with the parties’ standard of living. While Husband complained of Wife’s travels, Husband traveled to “France, Spain, Hawaii, New York, Florida, California, Washington state, Nevada, Wyoming.” Those were only the trips Wife knew about because Husband asked to switch time with the children. (A. 189).

Contrary to Husband’s contention at page 25 of his brief, Husband did respond to Wife’s affidavit, submitting an affidavit before the October 28, 2010 hearing on October 22, 2010. (A. 96). Accordingly, Husband was given every opportunity to address his issue regarding retroactivity.

**H. The Trial Court Allowed Husband to Orally Modify His Spousal Maintenance Motion at the October 28, 2010 Hearing and Granted Husband a Reduction in Spousal Maintenance to \$3,000 per Month.**

At the October 28, 2010 hearing on the parties’ motions, the trial court accepted Husband’s oral motion to seek modification of his spousal maintenance downward.

(Finding 14; A. 7).<sup>6</sup> Husband also asked the court to suspend his required \$803 monthly contribution to the children's expense account. (Finding 15; A. 7).

The trial court, by Order filed February 2, 2011, found no bad faith on Husband's part in failing to secure employment with comparable salary as that earned at the time of the Judgment and Decree. (Finding 25; A. 9). The trial court also declined to impute income to Wife "at this time," finding that "in the short term Wife most likely would not be able to find employment that could meet her expenses and still allow for the flexibility needed," especially "in light of the extra vigilance and attention needed for the special needs child." (Finding 28; A. 9).

The trial court modified Husband's spousal maintenance obligation, decreasing it from \$6,600 per month to \$3,000 per month. (Finding 31; A. 10). The trial court ruled this modification was "effective January 1, 2011, when Husband has the ability to pay the modified spousal maintenance along with the original child support amount of \$1,500 per month, which [Husband] specified he did not seek to modify." (Finding 32; A. 10; Finding 36; A. 10a). The trial court suspended Husband's spousal maintenance obligation for November and December 2010. (A. 11).

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<sup>6</sup> Husband states at page 29 of his Appellant's brief, with no citation to the record, that Wife informed the trial court at the October 28, 2010 hearing that she had to request public assistance. Wife cannot find that statement in the transcript of that hearing, which transcript is of record.

**I. The Trial Court Ordered Maintenance Was Retroactive to October 28, 2010 – the Date of Husband’s Oral Motion.**

The trial court ordered the maintenance modification was retroactive to October 28, 2010. It specifically denied Husband’s request that it be ordered retroactive to June 1, 2009. (Findings 33, 34, 35, 36; A. 10, 10a). The trial court looked to Minn. Stat. § 518A.39, subd. 2(e), which does not authorize the court to establish an earlier retroactive date, and concluded “the purported agreement in mediation does not provide a compelling basis for an earlier retroactive date.” (Finding 35; A. 10-10a). The trial court found:

- the parties never reached an agreement to modify Husband’s spousal maintenance obligation;
- any agreement as to retroactive date was most likely tied to the parties’ expectation they would be able to agree to modification through their ongoing mediation efforts;
- when mediation failed, so did the retroactive date;
- no independent consideration supports Wife’s supposed agreement that the June 2009 retroactive date would continue indefinitely in the future;
- Husband did not serve his motion to modify spousal maintenance until 16 months after the supposed retroactive date.

(Finding 35; A. 10-10a).

As to the amount in arrears, the trial court ordered judgment be entered against Husband in the amount of \$104,100 representing spousal maintenance arrears accrued prior to the October 28, 2010 hearing. (Order 5; A. 11).

**J. Husband Sought Amended Findings of Fact and Conclusions of Law as to the Retroactive Date.**

In response to the trial court's ruling, Husband requested amended findings of fact and conclusions of law. (A. 13). In so requesting, Husband challenged the trial court's finding and conclusion ordering Husband's spousal maintenance modification retroactive to October 28, 2010 instead of June 1, 2009, as requested by Husband. As to Husband's spousal maintenance arrearages, he asserted that they should be limited to amounts accrued from February 2009 through May 2009, which he now claimed totaled \$9,780. He reached this sum by claiming the amount owed was \$26,400 less \$12,000 (claiming a payment made in June 2010), less \$4,620 (claiming Wife's \$330 withdrawals made from the children's account from January 2010 through February 2011 as additional spousal maintenance), thereby reaching a total of \$9,780. (A. 145).

Husband also sought to amend Finding of Fact 9 to state that Husband continued to pay for the children's medical insurance premiums from March 2009 through the date of hearing in October 2010. (A. 142). He also asserted he made "a good faith effort to pay one half of his spousal maintenance arrears," asserting "[a] payment was made to Wife in June 2010 in the amount of \$12,000." (A. 143).

In response, Wife explained she never cashed Husband's \$12,000 check because she was given no explanation by Husband as to why he was presenting a check in that amount. Husband had admitted that the check was never cashed. (A. 216). Contrary evidence exists in the record related to withdrawal from the children's accounts. (Id.)

Wife sought to strike any new affidavits or evidence submitted by Husband as part of his motion for amended findings. (R.A. 13; A. 213-16).

At the April 7, 2011 hearing on Husband's motion for amended findings and conclusions of law, the trial court expressed its concern with Husband's argument that the "Mediation Agreements" document is equally enforceable whether mediation was ongoing or ended and whether enforcement was sought one month, one year or five years after the fact. (A. 17; T. 4/7/11, pp. 6, 8, 14, 17).

The trial court also expressed its concern that the retroactive date is only one piece of the spousal maintenance order. Here, the trial court had granted Husband a substantial modification of his spousal maintenance and in addition suspended his maintenance obligation for two months. Wife asserted that Husband got this great deal and that if the court was going to impose the retroactive date asserted by Husband, then the court must reconsider its whole order. (T. 4/7/11, p. 35). The court then stated to Husband's counsel:

THE COURT: I understand that is your [Husband's] position, but if I were to agree with you that this should be retroactive to May 1, or June 1 of 2009, that leaves wide open the question of what the modification should be from June 1, 2009 until October of 2010.

(Id. at pp. 37-38).

**K. The Trial Court Denied Husband's Motion for Amended Findings of Fact and Conclusions of Law as to Retroactive Date.**

By Order filed June 20, 2011, the trial court denied Husband's motion for amended findings of fact and conclusions of law regarding the retroactive date. (Findings 8-21; A. 14-18). The trial court agreed with Wife and struck Husband's affidavit and accompanying exhibits which had not been previously presented to the trial court. Minnesota law prohibits the admission of new evidence in a motion for amended findings. (Findings 2 & 3; A. 13-14). That ruling Husband has not challenged on appeal.

The trial court again, on the record presented, rejected Husband's argument that the trial court was bound to impose a June 1, 2009 retroactive date based on the one-page document dated May 28, 2009 and signed by the parties. (Findings 8-21; A. 14-18). The trial court explained:

- While the title of this one-page document is plural, "Mediation Agreements," it contains only one numbered paragraph following the introductory language that the parties "wish to make the following agreement binding upon them" as follows.
- The document contains no agreement as to the expected amount of any modification, as to the process by which a future modification might be determined, or as to when the potential modification might be made.

(Finding 8; A. 14-15).

In his motion for amended findings, Husband relied primarily on Kielley v. Kielley, 674 N.W.2d 770, 777 (Minn. Ct. App. 2004). (Findings 14-18; A. 16-17). The trial court explained in detail why Kielley did not support Husband's position. (Id.) Here, there was no comparable specificity of agreement as that in Kielley. The trial court

found no basis to conclude “that such a non-specific and open-ended agreement [as that of the May 28, 2009 agreement] meets the “fair and reasonable” requirement under Karon.”<sup>7</sup> (A. 17).

The trial court, after reviewing its earlier findings, summarized its holding as follows:

The Court, having reviewed its findings, remains of the view that the “Mediation Agreements” document could only be binding, if at all, within the context of an ongoing mediation process. The parties met in mediation before signing the document on May 28, 2009, they had another mediation session scheduled for June 5, 2009, and they stated their agreement to a retroactive modification date of June 1, 2009 as part of their so-called “Mediation Agreements.” The plural title of that document indicates the parties’ expectation that their mediation would produce additional agreements, presumably as to an amount of a specific modification. Unfortunately, the mediation did not succeed. To continue to enforce one component of a failed mediation agreement long after the completion of the mediation process does not strike the Court as meeting the “fair and reasonable” test that a dissolution stipulation must meet in order to be enforceable.

(A. 17).

The parties had agreed to amend Finding of Fact 9 with regard to Husband’s payment of the minor children’s medical insurance premiums, and the trial court so ordered. (Findings 5-7; A. 14).

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<sup>7</sup> Karon v. Karon, 435 N.W.2d 501, 503 (Minn. 1989).

**L. Husband Challenges the Trial Court's Ruling on the Retroactive Date on Appeal.**

Husband has appealed, challenging the trial court's refusal to grant Husband's request that any orders modifying payment of child support and spousal maintenance are retroactive to June 1, 2009.

**ARGUMENT**

**THE TRIAL COURT, IN ACCORD WITH MINNESOTA LAW AS APPLIED TO THE FACTS OF RECORD, APPROPRIATELY HELD THAT ANY SPOUSAL MAINTENANCE MODIFICATION WOULD BE RETROACTIVE TO OCTOBER 28, 2010.**

**A. This Court Reviews the District Court's Decision Regarding the Effective Date of a Spousal Maintenance Modification for an Abuse of Discretion.**

A district court has broad discretion in modifying spousal maintenance. Kielley v. Kielley, 674 N.W.2d 770, 775 (Minn. Ct. App. 2004). Here, the trial court suspended Husband's spousal maintenance obligation for the months of November and December 2010 and ruled that commencing January 1, 2011, Husband shall pay Wife a reduced modified spousal maintenance of only \$3,000 per month, a \$3,600 a month decrease from that he agreed to pay in November 2006 and which was ordered in the Marital Dissolution Judgment. (A. 11). Husband was ordered to continue to pay \$1,500 per month in child support. (Id.) The parties agreed and the trial court ordered that both parties may draw from the children's college account to pay the children's necessary expenses and in the future to replenish the account. (A. 18). Husband's challenge on appeal is to the trial court's refusal to make its spousal maintenance modification retroactive to June 1, 2009.

The trial court's ruling that the maintenance modification is retroactive to October 28, 2010 is in accord with Minn. Stat. § 518A.39, subd. 2(e), which is the date of Husband's oral motion to modify spousal maintenance.

A modification of support or 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 and on the public authority if public assistance is being furnished or the county attorney is the attorney of record.

Minn. Stat. § 518A.39, subd. 2(e).

This Court reviews the trial court's decision regarding the effective date of a spousal maintenance modification for an abuse of discretion. Kemp v. Kemp, 608 N.W.2d 916, 920-21 (Minn. Ct. App. 2000).<sup>8</sup> A trial court abuses its discretion when its findings are unsupported by the record or based on a mistake of law. Braend ex rel. Minor Children v. Braend, 721 N.W.2d 924, 927 (Minn. Ct. App. 2006). This Court reviews the record in a light most favorable to the trial court's findings. Dailey v. Chermak, 709 N.W.2d 626, 629-30 (Minn. Ct. App. 2000), *rev. denied*.

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<sup>8</sup> Husband's counsel acknowledged at the motion for amended findings that the standard is abuse of discretion, asserting the trial court abused its discretion by making a mistake of law. (T. 4/7/11, p. 4).

**B. The Trial Court Properly Ruled That Husband Did Not Comply With Requirements for Retroactive Modification Set Out in Minn. Stat. § 518A.39, subd. 2(e).**

The record stands undisputed that Husband did not seek by motion to reduce his spousal maintenance until October 28, 2010. Therefore, under Minn. Stat. § 518A.39, subd. 2(e), the earliest possible date to which the trial court could have applied the modification is the date it chose – October 28, 2010.

Moreover, “[b]ecause forgiveness of arrearages is a retroactive modification of support, arrearages accruing prior to service of the modification motion may not be forgiven.” Allan v. Allan, 509 N.W.2d 593, 597 (Minn. Ct. App. 1993). The trial court, in accord with well-established Minnesota law, held judgment must be entered against Husband for his arrearages. The trial court properly entered judgment in the amount of \$104,100, representing the arrears accumulated from February 2009 through October 2010. (A. 11).

Husband, however, argues that the parties reached an enforceable agreement in mediation imposing on the trial court a retroactive date to June 1, 2009. (A. 79). Husband, in essence, argues he should be rewarded for unilaterally reducing his support obligations in January 2009 rather than seeking such modification through court order when mediation broke down in June 2009. Husband asserts that the trial court abused its discretion in following the dictates of Minn. Stat. § 518A.39, subd. 2(e), asserting the trial court’s decision is contrary to law. Wife disagrees.

Husband asserts that the May 28, 2009 document reflects “partial agreement resolving one issue related to their case.” And with no factual support in the record, Husband states “the parties continued in the mediation process and negotiations through counsel until April 2010.” (Appellant’s Brief, p. 11). In fact, as stated in the May 28, 2009 document, the parties had scheduled a second mediation session for June 5, 2009 to continue discussing modifications to the Judgment and Decree. It was in that context and on that premise that the parties stated

They wish to make the following agreement binding upon them.

1. The parties agree that any modification of child support and spousal support be retroactive to June 1, 2009.

(A. 79).

What the record reflects is that another mediation session took place June 5, 2009. There was, however, no agreement made during that session and settlement discussions broke down. (A. 34, 189). Husband then did not serve a motion to modify his spousal maintenance or child support obligation at any time at or near the signing of the “Mediation Agreements.” He failed to comply with Minn. Stat. § 518A.39, subd. 2(e) for establishing an earlier retroactivity date in conjunction with his modification request. The trial court properly applied the retroactive modification statute, determined Husband’s arrearages and entered judgment. The judgment should be affirmed.

**C. The Trial Court Did Not Abuse Its Discretion in Finding “Mediation Agreements” Was Not a Valid and Enforceable Contract.**

Dissolution-related stipulations are treated as contracts. Shirk v. Shirk, 561 N.W.2d 519, 521 (Minn. 1997). However, the trial court is a third party to dissolution actions. It has a duty to protect the interests of both parties and the parties’ children to ensure any stipulation is fair and reasonable to all. Gully v. Gully, 599 N.W.2d 814, 823 (Minn. 1999); Karon, 435 N.W.2d at 503; see also Moylan v. Moylan, 384 N.W.2d 859, 865 (Minn. 1986) (child’s welfare takes precedence in support modification proceeding even when case involves stipulation). Because dissolution-related stipulations are treated as contracts and because the trial court must ensure that dissolution-related stipulations are fair, a dissolution-related stipulation must be both (1) contractually sound and (2) otherwise fair and reasonable. Kielley v. Kielley, 674 N.W.2d 770, 777 (Minn. Ct. App. 2004). The trial court has the authority to refuse to accept the terms of the stipulation in part or in toto. Karon, 435 N.W.2d at 503; Toughill v. Toughill, 609 N.W.2d 634, 638 n.1 (Minn. Ct. App. 2000).

Here, the parties had agreed and the trial court had found in the parties’ 2006 Dissolution Decree that Wife and the children had reasonable monthly expenses of \$8,238 per month. (Finding of Fact IX; A. 47). The parties had also agreed that Husband was to pay \$8,100 of this amount (\$6,100 in spousal maintenance and \$1,500 in child support) with each party “as and for additional child support . . . contribute equally to the ‘shared’ portion” by depositing \$803 into a joint checking account. (A. 58-62). Husband,

however, unilaterally reduced his contribution to his Wife and Children to \$3,170 per month in early 2009. (A. 161). The Mediation Agreements, which Husband asks this Court to enforce, by its terms and in its effect, affects both Wife and Children. Husband is wrong in his assertion at page 32 of his brief that what he seeks has no effect on his children.

Questions of contract formation and its terms are left to the factfinder. Bergstedt, Wahlberg, Berquist Assocs., Inc. v. Rothchild, 302 Minn. 476, 225 N.W.2d 261, 263 (1975). But this Court has also held whether a document constitutes an enforceable contract is a question of law. Mohrenweiser v. Blomer, 573 N.W.2d 704, 706 (Minn. Ct. App. 1998), *rev. denied*. Because it is Husband that asserts Mediation Agreements applies and is an enforceable contract, he bore the burden of proof. Alpha Systems Integration, Inc. v. Silicon Graphics, Inc., 646 N.W.2d 904, 907-08 (Minn. Ct. App. 2002). Husband, on this record, did not meet his burden of proof, and the trial court did not commit error. It should be affirmed.

**1. “Mediation Agreements” is not contractually sound and is not an enforceable contract.**

Although there is a strong policy in favor of encouraging compromises and settlements, a compromise and settlement, like other alleged contractual arrangements, may be invalidated or be unenforceable on various grounds such as failure to establish essential elements for an enforceable contract. See, e.g., Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 117 N.W.2d 213, 220 (1962) (“the fact that a promise was

given does not necessarily mean that a contract was made”). “[T]he existence of a written agreement does not necessarily equate to the formation of a contract.” 20 Minn. Prac., Business Law Deskbook § 7:1 (2011 ed.), citing Cooke v. Belzer, 413 N.W.2d 623, 627 (Minn. Ct. App. 1987).

Contract law principles do not differentiate between a purported mediated agreement and an unassisted agreement. Minn. Stat. § 572.35, subd. 1 (“The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract.”); see, e.g., Lindsay v. Lewandowski, 43 Cal.Rptr.3d 846, 849 (Cal. Ct. App. 2006), *reh’g denied* (mediated settlement agreement silent regarding a material term is unenforceable); Meyer v. Alpine Lake Property Owners’ Ass’n, Inc., 2007 WL 709304 (N.D. W. Va. 2007) (R.A. 67) (refusing to enforce an alleged mediated settlement agreement after the parties reported that an agreement had been reached because a subsequent disagreement over terms led the court to conclude that there was no meeting of the minds). It is not the policy of the law to enforce that which does not meet the requisite elements of an enforceable contract. Here, the May 28, 2009 Mediation Agreements is not contractually sound and is not enforceable.

***a. The Mediation Agreements is too indefinite to be enforced.***

Under Minnesota law, “[t]he formation of a contract requires communication of a specific and definite offer, acceptance and consideration.” Commercial Assocs., Inc. v. Work Connection, Inc., 712 N.W.2d 772, 782 (Minn. Ct. App. 2006). Parties to a contract must “agree with reasonable certainty about the same thing and on the same

terms.” Peters v. Mutual Ben. Life Ins. Co., 420 N.W.2d 908, 914 (Minn. Ct. App. 1988); see also Minneapolis Cablesystems v. City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980) (there must be a “meeting of the minds concerning [the alleged agreement’s] essential elements”). The terms of a contract must be definite and certain. “[A]n alleged contract which is so vague, indefinite and uncertain as to place the meaning and intent of the parties in the realm of speculation is void and unenforceable.” King v. Dalton Motors, Inc., 260 Minn. 124, 109 N.W.2d 51, 52 (1961). Consequently, when substantial and necessary terms are left open for future negotiations, the purported contract is void.

Id.

If a purported contract is vague or omits important terms, such cannot be supplied by the court. The agreement is too indefinite to be enforced. And when there are omissions, there is a possibility of doing an injustice to one or both of the parties by the courts forcing any assumption about the supposed content or consideration for the agreement. This a court cannot do. As one court explained:

Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence of contract law. Impenetrable vagueness and uncertainty will not do.

Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 417 N.E.2d 541, 543 (1981).

There must be a reasonable standard for determining the parties’ obligations, whether a breach occurred and a certain basis for determining a remedy. Restatement

(Second) of Contracts § 33. It is especially important that a mediated agreement meet, on its face, all the essential elements of an enforceable contract because the court cannot invade the mediation process. Minn. R. Gen. Prac. 114.08(a) and (b); see, e.g., Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1, 6 (Minn. Ct. App. 1985).

Here we have a situation of impenetrable vagueness and uncertainty. As the trial court properly concluded, there is no comparable specificity of agreement here as that before this Court in Kielley. 674 N.W.2d at 774. In Kielley, the parties made an agreement on October 3, 2001 to modify the husband's spousal maintenance obligation from \$1,861.55 to \$1,361.55 and included reasons for their agreement in the findings of that document. Id. at 774-75. Their agreement was very detailed and specific. Id.

The agreement must include sufficient information so future court proceedings are not unnecessarily complicated. Id. at 779. This Court in Kielley noted the agreement was favored because it contained the necessary elements of a contract and concluded there was adequate consideration because the agreement eliminated "the uncertainty of the result inherent in litigating modification of maintenance as well as the certainty of incurring the considerable attorney fees and other costs associated with doing so." Id.

Here, the parties did not agree on spousal maintenance modification or child support modification, let alone a specific amount to be paid. They did not specify an end date for any potential future use of the June 1, 2009 retroactive modification date. And there is no way to tell from the face of the document how the parties intended to establish

any of those essential terms.<sup>9</sup> All we know is there was a scheduled mediation for June 5, 2009. (A. 79). There is no basis for Husband's statement at pages 14 and 31 of his brief that "here, both parties have performed extensively under the contract." Wife does not know what Husband could be referring to as to performance, let alone extensive performance.

As the record reflects, there were no resolutions, in fact, at mediation as to what Husband's obligation should be when his employment changed. The trial court had to make that determination and impose it on the parties.

***b. The Mediation Agreements is an unenforceable agreement to agree.***

The fundamental requirement for a valid contract is that there shall be an actual meeting of the minds on all the material elements of the agreement, without the reservation of any such element for future negotiations. If a material element of a contemplated contract is left open, there is no enforceable contract.

The language in the May 28, 2009 document clearly anticipates future actions and agreements between the parties that were yet to be determined. (A. 79). This is similar to letters of intent and agreements to negotiate in the future. Under Minnesota law, if the agreement is merely an understanding that negotiations shall occur in good faith in the future, then it is deemed unenforceable because it does not represent the parties' complete

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<sup>9</sup> Before the trial court, Husband attempted to introduce purported settlement discussions, which Wife disputed. (A. 34, 189). Minn. Rule of Evidence 408, as well as Minn. R. Gen. Prac. 114.08(a) and (b), prohibits inclusion of settlement discussions. C.J. Duffey Paper Co. v. Reger, 588 N.W.2d 519, 524 (Minn. Ct. App. 1999).

and final agreement, whether as an agreement to negotiate or as an agreement to agree. Shepard v. Carpenter, 54 Minn. 153, 55 N.W. 906, 906 (1893); see also Ohio Calculating, Inc. v. CPT Corp., 846 F.2d 497, 501 (8th Cir. 1988) (agreement to negotiate unenforceable under Minnesota law); First Trust Co. of St. Paul v. Holt, 361 N.W.2d 476, 479 (Minn. Ct. App. 1985) (agreement to agree unenforceable because of indefiniteness); Hansen v. Phillips Beverage Co., 487 N.W.2d 925, 927 (Minn. Ct. App. 1992).

An agreement to agree or an agreement to negotiate is not enforceable. To be enforceable there must be reasonably objective controlling standards provided. Agreements, such as that before this Court, are deemed unenforceable “because they provide neither a basis for determining the existence of a breach nor for giving an appropriate remedy.” Ohio Calculating, Inc., 846 F.2d at 501. Clearly, the Mediation Agreements is premised on the parties resolving scores of additional details before either party would have definable binding obligations to each other.

The Mediation Agreements includes no end date for the potential future use of the June 1, 2009 retroactive date. Looking at the four corners of the Mediation Agreements, the trial court concluded it was most likely tied to the expectation the parties would be able to agree on modification in the upcoming mediation. (A. 10a). The document states that the parties have met in mediation “for the purpose of discussing modifications to the Judgment and Decree . . .” and “[t]hey have scheduled a second mediation session for June 5, 2009 to continue the discussion.” (A. 79). The legal effect of the Mediation Agreements is the same as if the parties had left blanks in the writing, to be filled in later

when their minds should meet. The agreement was too vague to be enforced. Here, because of the vagueness and indefiniteness of the Mediation Agreements, the court is left with only assuming what the supposed context was for this agreement, which is why it is unenforceable.

*c. The Mediation Agreements is unenforceable because it lacks consideration.*

The issue of whether a stipulation is supported by consideration is a legal question which is reviewed de novo. Kielley, 674 N.W.2d at 777. A contract must be supported by “consideration,” which is something of value given in return for a performance or a bargained-for promise of performance. Deli v. Hasselmo, 542 N.W.2d 649, 655 (Minn. Ct. App. 1996), *rev. denied*. To form a binding contract, the parties must agree on the consideration. Cooke, 413 N.W.2d at 627. Here, the document omits a recitation of consideration and the record contains no evidence that consideration was exchanged. It is not evident upon examination of the Mediation Agreements. Diedrich v. Diedrich, 424 N.W.2d 580, 582 (Minn. Ct. App. 1988). Under those circumstances, there is no contract. Navickas v. Quilling, 2010 WL 5290552 at \*6 (Minn. Ct. App. 2010) (R.A. 63-64). Lacking consideration, a valid contract was not formed.

It is true that consideration may be in the form of a benefit to one party or a detriment to another. Kielley, 674 N.W.2d at 777. In Kielley, this Court held that at least a reasonable case for modifying appellant’s maintenance obligation existed at the time of the stipulation signing. The stipulation regarding maintenance eliminated the uncertainty

of litigation and certainty of attorney fees and costs associated with any such litigation. Id. The stipulation also addressed the parenting issues and potentially significant interstate transportation-associated costs. Id. This Court in Kielley held that where the promises are mutual, made concurrently and incorporated into a bilateral contract, such promises are sufficient consideration for each other. Consideration is adequate as long as some value has passed between the parties. Id.

Procedurally, where no consideration is evident in an agreement, the party charging its sufficiency bears the burden of proving the consideration. Bartl v. Kenyon, 549 N.W.2d 381, 383 (Minn. Ct. App. 1996), *rev'd on other grounds* 552 N.W.2d 730 (Minn. 1996). Husband did not meet his burden.

In this instance, Husband argues that the “Mediation Agreements” document by its terms constitutes a separate, freestanding and binding contract between the parties, with no expiration date and no connection to the completion, success or lack thereof of the mediation process in which the parties were engaged when they signed the document. But, as the trial court held, no independent consideration supports Wife’s supposed agreement for a retroactive date that would continue indefinitely into the future. (A. 10a). The trial court’s ruling is correct.

Consideration must be the result of a bargain. Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 104 N.W.2d 661, 665 (1960). As the Minnesota Supreme Court explained in Baehr:

It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other. Consideration thus insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but had been uttered intentionally as a result of some deliberation, manifested by reciprocal bargaining or negotiation.

Id. at 665.

In Baehr, the Supreme Court explained that “an agreement of forbearance to sue may be sufficient consideration for a contract,” but the mere fact plaintiff failed to institute suit did not establish forbearance. The Supreme Court continued:

This court has held that circumstantial evidence may support the inference of such an agreement to forbear. However, such an inference must rest upon something more than the mere failure to institute immediate suit. The difficulty with plaintiff’s case is that there is no more than this.

Id. at 666.

The Supreme Court ultimately concluded that there was “no consideration” and “the promises did not amount to a contract.” Id.

Here, there is no stated consideration in the May 2009 document. No rights were exchanged for benefits. Neither party saved attorney’s fees on litigation. Moreover, there is no way to tell if either party fulfilled their end of the bargain or what their bargain was. There is no consideration. The Mediation Agreements is not contractually sound and the trial court’s ruling should be affirmed.

It should be noted that Husband’s arguments, especially with regard to consideration, rest fundamentally on a purported fact that the record does not support.

Husband continually asserts that “[t]he parties did in fact continue negotiations through April 2010.” (See Appellant’s Brief, pp. 21 & 23). This assertion is not in accord with the facts of record. And as the trial court expressed at the October 28, 2010 hearing, the concern here is one cannot recreate what happened in mediation. It is confidential. (T. 10/28/10, p. 40).

**2. “Mediation Agreements” is not “fair and reasonable.”**

Even if an agreement is found to be contractually sound, a trial court must also address whether the extrajudicial modification of maintenance is fair and reasonable and make findings addressing all relevant factors. Kielley, 674 N.W.2d at 778. The trial court must take an active role in determining whether the agreement is fair and equitable. Loo v. Loo, 520 N.W.2d 740, 745 (Minn. 1994). As stated earlier, in a dissolution proceeding, a district court has “a duty to protect the interests of both parties and all the citizens of the state to ensure that the stipulation is fair and reasonable to all.” Karon, 435 N.W.2d at 503. Thus, in deciding whether to approve a stipulation agreed to by the parties, a trial court must exercise its independent judgment to determine whether a stipulation is, on the facts of the case in question, appropriate. In doing so, the trial court “ha[s] the authority to refuse to accept the terms of the stipulation in part or *in toto*.” Id. For this reason, a private settlement agreement is not “self-executing.” Rettke v. Rettke, 696 N.W.2d 846, 850-851 (Minn. Ct. App. 2005).

It should be noted that the Mediation Agreements involved both spousal maintenance and child support. (A. 79). Stipulations are given considerably less weight

when the agreement involves children. Kielley, 674 N.W.2d at 776; see Frauenschuh v. Giese, 599 N.W.2d 153, 158-59 (Minn. 1999) (holding that district court is not bound by stipulations involving child custody); Tammen v. Tammen, 289 Minn. 28, 182 N.W.2d 840, 842 (1970) (noting that child support stipulations are given less weight to protect “the welfare of the child[ren] as the paramount consideration”).

The trial court here exercised its independent judgment and twice found that the “Mediation Agreements” was not fair and reasonable. The trial court stated it was unable to put the one isolated issue agreed upon by the parties, in the mediation that ultimately failed, in context with any overall resolution of the maintenance modification. When asked to reconsider its initial decision on the reasonableness and fairness of enforcing the “Mediation Agreements,” the trial court again found that it lacked the necessary detail which would allow the trial court to evaluate not only whether the contract was legally sound, but also whether or not the circumstances of the stipulation were fair. (A. 16). The trial court compared the stipulations in Kielley and the one at issue in this case and found that “no comparable level of detail is present in the “Mediation Agreements” in this matter.” Id.

As stated previously, here the parties did not agree on a specific amount of reduction; nor did they specify an end date for application of the purported retroactive modification date. They did not even agree on the process for reaching an agreement on those issues. Yet Husband argues this one term could be enforced years after the fact; without any relation to the amounts due or the length of time the modification would

apply. (A. 17). It could also be applied to his child support as well. (A. 79). The trial court found that this non-specific, open-ended agreement did not meet the “fair and reasonable” requirement set forth in Karon. (A. 17). The trial court found that it was not fair and reasonable to bind Wife to a June 2009 retroactive date “for any modification that may be sought by Husband at any point in the future, in any amount, in any context, for any reason at all.” (Id.)

The trial court found that the plural title of the document, “Mediation Agreements” indicated that the parties’ expected that their mediation would produce additional agreements, presumably as to an amount of a specific modification. (Id.) This initial agreement contained only one numbered paragraph. (A. 79). The next mediation session was set for the week following the signing of this one initial document, as specifically noted in the “Mediation Agreements” itself. (Id.) The mediation did not ultimately succeed and the trial court found that to enforce the one component of a failed mediation long after the completion of the mediation process did not meet the “fair and reasonable” standard. (Id.)

Husband asserts that “[w]here a contract is silent as to the time of performance, the law implies that it is to be performed within a reasonable time” and such is to be determined by the factfinder. (Appellant’s Brief, pp. 16-17). The trial court, as the factfinder, did address this issue in the context of determining whether the agreement was fair and reasonable. The trial court concluded it was not, and such determination was not an abuse of discretion.

As this Court has stated, when reviewing a settlement, relevant factors include whether the stipulated maintenance obligation is unfair and unreasonable to the children, to one of the parties, to the state and

to the court because the stipulation will unnecessarily complicate future court proceedings because the parties' incomes and expenses are not adequately addressed, their rights and duties under the stipulation are not reasonably clear, or other reasons.

Kielley, 674 N.W.2d at 779.

The "Mediation Agreements" here is clearly unreasonable because it does not adequately address any of the important issues identified by the court – the amount of the modification, the end date of the modification or even the process for reaching these decisions. The agreement is so vague in its sole term that it provides no basis for the court to evaluate whether or not the circumstances of this agreement are fair and reasonable to the parties, any minor children, the state and the court. This protracted litigation over the non-specific, open-ended term has itself proved that it has unnecessarily complicated the proceedings. Unlike the detailed stipulation in Kielley, which allowed the trial court to evaluate whether the circumstances of the stipulation were fair, no comparable level of detail was present in the "Mediation Agreements."

The trial court here carefully and repeatedly considered whether the enforcement of the "Mediation Agreements" was fair and reasonable under the tests enunciated under Minnesota law. The trial court did not abuse its discretion in finding that it was not and the findings of the trial court should be affirmed.

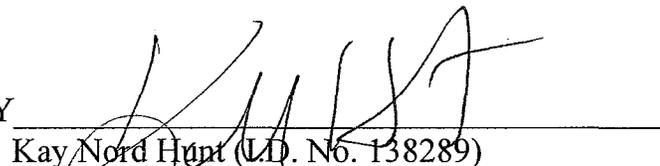
**CONCLUSION**

Respondent respectfully requests that the judgment be affirmed. If this Court should reverse, then the Court must remand this case for the trial court's reconsideration of its entire decision concerning modification of spousal maintenance as reflected in its February 11 and June 20, 2011 orders and resulting judgment. As the trial court recognized, any change to the retroactive piece of its determination has an impact on its entire order on modification and requires wholesale reconsideration.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: April 16, 2012

BY

  
\_\_\_\_\_  
Kay Nord Hunt (I.D. No. 138289)  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

McGRANN SHEA CARNIVAL  
STRAUGHN & LAMB, CHTD.

Jennifer A. Jameson (I.D. No. 029486X)  
800 Nicollet Mall, Suite 2600  
Minneapolis, MN 55402  
(612) 338-2525

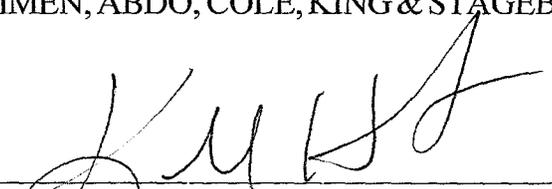
*Attorneys for Respondent Katherine Fashant Leifur*

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,504 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: April 16, 2012

BY 

Kay Nord Hunt (I.D. No. 138289)  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

McGRANN SHEA CARNIVAL  
STRAUGHN & LAMB, CHTD.

Jennifer A. Jameson (I.D. No. 029486X)  
800 Nicollet Mall, Suite 2600  
Minneapolis, MN 55402  
(612) 338-2525

*Attorneys for Respondent Katherine Fashant Leifur*