

No. A07-1226

State of Minnesota
In Court Of Appeals

In Re the Marriage of:

Randall M. Grachek,

Appellant,

and

Pamela Dawn Grachek,

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).

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS.....	1
ARGUMENT	3
I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN GRANTING RESPONDENT’S MOTION FOR A COLA TO HER SPOUSAL MAINTENANCE AWARD FROM THE APPELLANT.	3
A. Standard of Review.....	3
II. THE DISTRICT COURT PROPERLY ORDERED THE COST-OF-LIVING INCREASE TO RESPONDENT’S SPOUSAL MAINTENANCE AWARD, BECAUSE MINNESOTA LAW DIFFERENTIATES BETWEEN COST-OF-LIVING ADJUSTMENTS AND MODIFICATIONS OF MAINTENANCE AWARDS.	4
III. THE DISTRICT COURT PROPERLY INTERPRETED THE <u>KARON</u> WAIVER LANGUAGE TO EXCLUDE COST-OF-LIVING INCREASES BECAUSE THERE WAS NO EXPRESS WAIVER OF THE STATUTORY RIGHT TO A COLA.	5
A. The incorporation of Appendix A to the Judgment and Decree permits either party to seek COLAs.	5
B. The parties did not expressly or implicitly waive their statutorily conferred right to cost-of-living adjustments.	7
CONCLUSION	9
APPENDIX	11

TABLE OF AUTHORITIES

Minnesota Statutes:

Minn. Stat. §518A.75, subd. 1(b) (2007)	4
Minn. Stat. §518.641 (2005)	4-5
Minn. Stat. §518A.39, subd. 2 (2007).....	5

Minnesota Cases:

<u>Beck v. Kaplan</u> , 566 N.W.2d 723 (Minn. 1997)	7
<u>Berens v. Berens</u> , 443 N.W.2d 558 (Minn. Ct. App. 1989)	8-9
<u>Gessner v. Gessner</u> , 487 N.W.2d 291 (Minn. Ct. App. 1992)	3, 8
<u>Karon v. Karon</u> , 435 N.W.2d 501 (Minn. 1989)	1, 2, 5-7, 9
<u>Keating v. Keating</u> , 444 N.W.2d 605 (Minn. Ct. App. 1989) <i>review denied</i> (Oct. 25, 1989)	2, 6-8
<u>Li-Kuehne v. Kuehne</u> , 2006 WL 2677809 (Minn.App.)	8
<u>Loo v. Loo</u> , 520 N.W.2d 740 (Minn. 1994)	7-8
<u>McClenahan v. Warner</u> , 461 N.W.2d 509 (Minn. Ct. App. 1990)	5
<u>Santillan v. Martine</u> , 560 N.W.2d 749 (Minn. Ct. App. 1997)	3

STATEMENT OF THE FACTS

The Judgment and Decree in this marriage dissolution proceeding was entered in July of 1995, and established an award of spousal maintenance payable by Appellant to the Respondent. Appellant was ordered to pay the Respondent \$2,500 per month until the death of Respondent or October 1, 2021, whichever occurred first.

In their Judgment and Decree the parties stipulated to divest the Court from jurisdiction to modify the spousal maintenance award, pursuant to Karon v. Karon, 435 N.W.2d 501, 503 (Minn. 1989) (a “Karon waiver”). Paragraph 9 of the Conclusions of Law provides:

9. Except for the maintenance provisions set forth in Paragraph 9, each party waives and is forever barred from receiving any additional spousal maintenance whatsoever from one another, and the Court is divested from having any jurisdiction whatsoever to award temporary or permanent spousal maintenance to either of the parties. Each party also waives the right to seek a change in either the amount or the duration of the spousal maintenance set forth in Paragraph 9. The limitation of maintenance as set forth in this paragraph is supported by consideration, namely each party’s agreement to the terms of this Stipulation, and the maintenance and property settlement terms set forth herein.

(A.App. 10). The Judgment and Decree also included Appendix A, which allowed the parties to seek biennial adjustments to the child support and spousal maintenance awards Appellant was ordered to pay Respondent. Appendix A states, in pertinent part:

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 Index Mpls. St. Paul, for all urban consumers (CPI-U), unless otherwise specified in this order) when the conditions of Minnesota statutes, section 518.641, are met.

(A.App. 23) (emphasis added).

On December 27, 2006, Respondent served Appellant with Notice of Cost of Living Increase, which would increase Appellant's spousal maintenance obligation to \$3,341 per month effective January 19, 2007. (A.App. 2) Appellant objected to the Cost-of-Living Adjustment (COLA), arguing that a COLA is considered a modification for spousal maintenance purposes, and asserting that Respondent waived her right to have cost-of-living adjustments applied to her spousal maintenance via her Karon waiver.

On April 25, 2007, the district court issued an Order denying Appellant's motion that the cost-of-living increase not take effect, and granted Respondent's motion for a COLA in the amount requested, effective January 19, 2007. (A.App. 2) In its Order, the district court specifically referenced Keating v. Keating, 444 N.W.2d 605 (Minn. Ct. App. 1989) *review denied* (Oct. 25, 1989), stating "it is not appropriate to infer waiver in the absence of a clear intent to waive a statutorily conferred right. The Court finds no such clear intent to waive the statutorily conferred right to cost-of-living increase." (A.App. 2)

On May 25, 2007, counsel for Appellant filed correspondence with the district court requesting that the court issue amended Findings of Fact and Conclusions of Law with respect to the Order dated April 25, 2007, and in the alternative seeking permission to bring a motion to reconsider that same Order. (R.App. 1) On May 30, 2007, counsel for Respondent responded to that letter, urging the court to deny petitioner's requests, as the court's Order needed no clarification. (R.App. 1) On June 14, 2007, the court denied Appellant's requests for amended Findings and his request for permission to bring a

motion to reconsider. (R.App. 5) The court specifically stated in its letter that “[I]t [the April 25, 2007 Order] is clear and conveys my intent on the matter.” (Emphasis added)

There is no language in the parties’ Judgment and Decree that expressly waives Respondent’s right to a cost-of-living increase. Furthermore, the inclusion of Appendix A with the Judgment and Decree reinforces the fact that the parties never waived the statutorily conferred right to a COLA.

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN GRANTING RESPONDENT’S MOTION FOR A COLA TO HER SPOUSAL MAINTENANCE AWARD FROM THE APPELLANT.

A. Standard of Review.

Appellant challenges the district court’s award of the cost-of-living increase to Respondent’s spousal maintenance. The district court has broad discretion over spousal-maintenance issues and will not be reversed absent an abuse of discretion. Santillan v. Martine, 560 N.W.2d 749, 750 (Minn. Ct. App. 1997). A district court’s findings of fact will not be disturbed unless clearly erroneous. Gessner v. Gessner, 487 N.W.2d 921, 923 (Minn. Ct. App. 1992). However, subject-matter jurisdiction and the interpretation of statutes are legal issues, which the appellate court reviews de novo. Santillan, 560 N.W.2d at 750.

II. THE DISTRICT COURT PROPERLY ORDERED THE COST-OF-LIVING INCREASE TO RESPONDENT'S SPOUSAL MAINTENANCE AWARD, BECAUSE MINNESOTA LAW DIFFERENTIATES BETWEEN COST-OF-LIVING ADJUSTMENTS AND MODIFICATIONS OF MAINTENANCE AWARDS.

Minnesota statute and caselaw distinguish COLAs to maintenance and child support awards from modifications to spousal maintenance and child support by placing the burden of implementing the adjustment or modification on the obligor or the obligee, respectively.

Pursuant to Minnesota Statutes Section 518A.75, subd. 1(b) (2007), formerly Minn. Stat. § 518.641 (2005), the circumstances under which a court may waive the requirement of the cost-of-living clause are limited. If the court “expressly finds that the obligor’s occupation or income, or both, does not provide for cost-of-living adjustment or that the order for maintenance or child support has a provision such as a step increase that has the effect of a cost-of-living clause,” it may waive the requirement of the cost of living clause. *Id.* Additionally, the court “may waive a cost-of-living adjustment in a maintenance order if the parties so agree in writing.” *Id.*

Essentially, the court will automatically impose a COLA upon an obligee’s request, unless the obligor “establishes an insufficient cost of living or other increase in income that prevents fulfillment of the adjusted maintenance or support obligation.” Minn. Stat. § 518A.75, subd. 3. This standard is markedly different from the standard applied to a request for a child support or spousal maintenance modification, which places the burden on the party “seeking modification of a spousal-maintenance award...to show (1) that there has been a substantial change in circumstances since the

original or previous award; and (2) that change has made the existing award unreasonable and unfair.” Minn. Stat. § 518A.39, subd. 2 (2007) (emphasis added). The statutory verbiage is clear that Respondent’s request for a COLA should not be treated the same as if she had requested a spousal maintenance modification.

In McClenahan v. Warner, 461 N.W.2d 509 (Minn. Ct. App. 1990), this Court held that a proceeding for a cost-of-living increase to a child support order under what was then Minn. Stat. § 518.641 would not be considered a child-support modification proceeding. The Court held: “[c]ost-of-living adjustments occur automatically every two years so long as the conditions of section 518.641, subd. 2 are met and the obligor does not request a hearing.” Id. at 511. The Court went on to state that modification proceedings are “relate[d] to motions claiming that the support amount itself has become unreasonable and unfair...” Id. Here, Respondent has never claimed that her maintenance award is unreasonable or unfair, rather she has moved only to adjust the maintenance award so that the value of the award keeps pace with inflation, a statutory right she never waived and which is expressly provided in Appendix A of the parties’ Judgment and Decree.

III. THE DISTRICT COURT PROPERLY INTERPRETED THE KARON WAIVER LANGUAGE TO EXCLUDE COST-OF-LIVING INCREASES BECAUSE THERE WAS NO EXPRESS WAIVER OF THE STATUTORY RIGHT TO A COLA.

- A. The incorporation of Appendix A to the Judgment and Decree permits either party to seek COLAs.**

By incorporating and including Appendix A, paragraph VII, in their Judgment and Decree, the parties unambiguously agreed on certain post-decree rights to a spousal maintenance or child support adjustment; namely the COLA. Paragraph VII of Appendix A includes the required notice to the parties that they are permitted to pursue or contest their statutory rights to cost of living adjustments to the child support and spousal maintenance awards. The attachment and thereby incorporation of Appendix A to the Judgment and Decree has never been disputed by either party.

The district court relied on Keating, *supra*, for its decision that the Respondent did not waive her statutory right to cost-of-living increases. In Keating, the district court granted respondent a spousal maintenance modification. Appellant argued that this was in error because respondent had waived the right to a spousal maintenance modification in the parties' Judgment and Decree, which stated that "each party hereto has released the other of and from any and all claims, demands, actions, causes of action, or obligations of any and every nature whatsoever, past, present or future, growing out of or arising from the marital relationship between the parties..." Keating at 606. The Court of Appeals affirmed the district court's decision, stating that the waiver language contains "neither express divestiture language as in Karon nor is there an immediate waiver of the right to modify the maintenance as in Berens...[I]t is not appropriate to infer waiver in the absence of a clear intent to waive a statutorily conferred right." *Id.* at 607-608 (emphasis added).

Based on Keating, in the absence of an express waiver, the district court herein correctly refused to assume a waiver of respondent's statutorily conferred right to a COLA.

B. The parties did not expressly or implicitly waive their statutorily conferred rights to cost-of-living adjustments.

The Supreme Court in Loo v. Loo, 520 N.W.2d 740 (Minn.1994) held that the district court retained jurisdiction to consider a modification motion where the judgment and decree did not contain a contractual waiver of the statutory right to modify, and did not contain express language divesting the court of jurisdiction to consider such motions. “[T]he better approach [to determining whether a waiver of jurisdiction exists] is to require both a contractual waiver and express language divesting the court of jurisdiction.” Id at 745. Thus, courts should not assume parties specifically bargained to supplant the statutory modification procedure without a clear or express statement divesting the court of jurisdiction. Id.

While parties to a dissolution action may waive statutory rights, any stipulation to do so must specifically incorporate an express waiver. Beck v. Kaplan, 566 N.W.2d 723, 726 (Minn. 1997) (waiver of statutory right to modify maintenance under Minn. Stat. §518.64 is valid only if contractually and expressly made); Geiger v. Geiger, 470 N.W.2d 704, 707 (Minn. Ct. App. 1991) (requiring that a waiver “express the parties’ clear intent” on its face), *review denied* (Minn. 1991).

An agreement in which the parties do not expressly waive their statutory rights cannot be construed to contain such a waiver. *See* Karon v. Karon, supra, at 503 (a

contractual waiver of the statutory right to seek modification of an award of spousal maintenance must be express); Loo, supra, at 745; Gessner, supra (waiver of statutory right will not be inferred where the stipulation or decree does not clearly indicate the parties' intention to supplant the statutory scheme); Keating, supra, at 607-08 (appellate court may not "infer waiver in the absence of a clear intent to waive a statutorily conferred right").

This Court's most on-point analysis of a nearly identical set of circumstances is found in the unpublished opinion in Li-Kuehne v. Kuehne, 2006 WL 2677802 (Minn. Ct. App.) (R.App. 6). In that case, Petitioner moved the court for a cost-of-living adjustment to her spousal maintenance, in addition to other relief. The trial court denied the COLA, finding that since the parties' Decree contained no explicit waiver of the cost-of-living adjustment, it was ambiguous regarding whether spousal maintenance was subject to a cost-of-living adjustment, and concluded that the parties did not intend to subject the spousal maintenance award to cost-of-living adjustments. The Court of Appeals reversed and remanded, stating that the "judgment and decree was...not silent regarding a cost-of-living adjustment, but rather included the required cost-of-living adjustment notice. Although Appendix A was not expressly addressed in the spousal-maintenance portion of the judgment and decree, it was incorporated by reference in the section addressing child support." Id. at *2 (emphasis added).

Appellant's reliance on Berens v. Berens, 443 N.W.2d 558 (Minn. Ct. App. 1989), *review denied* (September 27, 1989) is misplaced. In Berens, the former wife attempted to amend the Judgment and Decree to include Appendix A with the COLA language, and

argued that the lower court erroneously omitted Appendix A from the final Judgment and Decree. The trial court had refused to include Appendix A because Petitioner failed to show a necessity for ordering its inclusion. This Court affirmed, finding that the former wife expressly waived her right to the attachment of Appendix A, because the language of the parties' stipulation divested the court of jurisdiction to modify a maintenance award, and the Judgment and Decree adopted the parties' express waiver of their rights to modification. The Court considered the exclusion of Appendix A from the Berens Judgment and Decree as a substantiation of the parties' intent to include Cost-of-Living Adjustments in their waiver of their right to modify spousal maintenance.

Unlike the parties in Berens, the parties herein never expressly waived their rights provided in Appendix A, as demonstrated by the attachment and thus incorporation of Appendix A into the Judgment and Decree, and the failure to otherwise expressly provide that COLAs were not applicable to the award of maintenance. Even though the lower court is clearly divested of jurisdiction to entertain requests to modify the spousal maintenance award, Appendix A authorizes the court to review requests for COLAs to child support and spousal maintenance. Since Respondent is seeking a statutory cost-of-living increase only, which is not considered to be the same as a modification of the award, she is not precluded by the Karon waiver from making her request, or from receiving such relief.

CONCLUSION

Because the Judgment and Decree did not contain an express waiver of the statutory right to seek a COLA to the spousal maintenance award, but only divested the district court of jurisdiction to entertain a request to modify or award "additional" maintenance, the district court retained its authority to consider Respondent's request for such an adjustment. The district court acted well within its authority to apply a cost-of-living adjustment to Respondent's spousal maintenance award, and this Court should affirm the district court's April 25, 2007 Order.

Respectfully submitted,

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Dated: August 27, 2007

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