

CASE NO. A08-1136

STATE OF MINNESOTA  
IN COURT OF APPEALS

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In re the Marriage of:  
Daniel E. Hemmingsen,

Petitioner-Appellant,

and

Claudia J. Hemmingsen,

Respondent-Respondent.

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***APPELLANT DANIEL E. HEMMINGEN'S REPLY BRIEF***

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New Lexicon Webster's Dictionary of the English Language 1989 Edition page 849.

## ARGUMENT

**A. A STIPULATION REGARDING MAINTENANCE DOES NOT PRECLUDE MODIFICATION UPON RETIREMENT, EVEN IF THE POSSIBILITY OF RETIREMENT IS NOT SPECIFICALLY MENTIONED IN THE STIPULATION, IF THE CIRCUMSTANCES OF THE PARTIES CHANGE AS A RESULT OF RETIREMENT AT THE CUSTOMARY AGE OF RETIREMENT.**

Respondent essentially asserts in her responsive brief that because the original decree in this matter was based upon a stipulated marriage termination agreement and that the agreement does not mention the possibility that one or both of the parties may retire in the future that the Court may not modify the maintenance obligation based upon either parties' decision to retire. Respondent relies upon a variety of quotes taken out of context from a number of Minnesota cases to attempt to persuade the Court of this proposition.

A succinct summary of the law regarding the treatment by a subsequent court contemplating the modification of the terms of a stipulated agreement concerning maintenance is contained in the case of *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn.App.,2000) which states as follows:.

The district court's refusal to terminate appellant's maintenance obligation was based partly on its conclusion that appellant had agreed "that his obligation was permanent." However, appellant's agreement to pay permanent maintenance does not preclude later modification or termination of maintenance. While permanent maintenance does not compel future self-sufficiency by the recipient, it also does not preclude an obligor from subsequently demonstrating that a recipient has, in fact, become self-sufficient. *See Poehls v. Poehls*, 502 N.W.2d 217, 218 (Minn.App.1993) ("permanent maintenance" is term of art that places burden on obligor to demonstrate that maintenance award should be modified due to changed circumstances).

Absent language in a stipulation divesting the district court of jurisdiction, the district court retains authority to consider whether changed circumstances warrant modification. *See Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn.1981). The stipulation identifies the baseline circumstances against which claims of substantial change are evaluated. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn.1997). When determining whether a substantial change has rendered the terms of the original decree unreasonable and unfair, the stipulation may be relevant if one party claims this change was not or could not have been anticipated. *See Beck v. Kaplan*, 566 N.W.2d 723, 726 (Minn.1997).

*Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000).

Respondent implies that because the stipulated agreement does not mention retirement as grounds for “terminating” the maintenance obligation that a modification or termination could not occur as a result of modification. However, there is no evidence that either party discussed the issue of retirement when negotiating the stipulated agreement or that either party considered that possibility as a factor when determining what would be the appropriate amount of maintenance based upon the parties’ circumstances *at that time*. Failure to consider the possibility of a particular event during negotiations concerning a stipulated maintenance agreement does not preclude the court from determining that a substantial change of circumstances has occurred. See e.g. *Buscher v. Buscher*, 2002 WL 1751087, 2 (Minn. App. 2002) a copy of which was attached as part of the appendix to Appellant’s initial Brief pursuant to the Rules.

In its order, the court quoted the spousal maintenance provision and emphasized the sentence providing for termination of spousal maintenance

upon respondent's remarriage or death. The court also found that when the parties entered into their stipulation, they "were well within [their] retirement-contemplation years." To the extent that the court relied upon the parties' stipulation to preclude modification of spousal maintenance, such reliance was improper: if the parties had intended these conditions to be the sole grounds for termination, the stipulation should have expressed this intention. *See Loo v. Loo*, 520 N.W.2d 740, 745 (Minn.1994) (stating that courts should not assume that the parties specifically bargained to supplant the statutory modification procedure without a clear expression of intent to do so).

*Buscher v. Buscher* 2002 WL 1751087, 2 (Minn. App. 2002).

In conclusion, the fact that the parties did not address the issue of retirement in the stipulated agreement concerning spousal maintenance does not preclude the Court from modifying or terminating Appellant's spousal maintenance obligation based upon the change of circumstances resulting from his retirement.

**B. APPELLANT IS PROPERLY CONSIDERED TO BE "RETIRED" REGARDLESS OF THE FACT THAT HE HAS NOT COMPLETELY WITHDRAWN FROM THE WORKFORCE.**

Respondent also argues that because Appellant continues to remain employed in some part-time capacity that he is not "retired" because he has not entirely withdrawn from the workforce. Although this case does not involve the interpretation of a statute, Appellant asserts that in the absence of a technical definition most words should be construed according to their common meaning. See e.g. that under Minn.Stat. § 645.08(1), otherwise undefined terms contained in statutes are construed in accordance with their "common meaning."

Furthermore, when construing the language contained in instruments, the Minnesota Supreme Court stated in the case of *Franklin Co-op. Creamery Ass'n v. Employers' Liability Assur. Corp.*, 200 Minn. 230, 234-235, 273 N.W. 809, 811 (Minn.1937), as follows:

'The principle upon which the words are to be construed in instruments is very plain-when there is a popular and common word used in an instrument, that word must be construed prima facie in its popular and common sense. If it is a word of technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the court, from the instrument itself or from the circumstances of the case, that the word ought to be construed, not in its popular and primary signification, but according to its secondary intention.'

*Franklin Co-op. Creamery Ass'n v. Employers' Liability Assur. Corp.*, 200 Minn. 230, 234-235, 273 N.W. 809, 811 (Minn.1937) [citations omitted].

According to the New Lexicon Webster's Dictionary of the English Language the primary meaning of "retire" is "to give up active participation in a business or other occupation". New Lexicon Webster's Dictionary of the English Language 1989 Edition page 849. Webster's Online Dictionary defines to "retire" as "to withdraw from one's position or occupation."

In an unpublished decision of the Minnesota Court of Appeals *Vaudrin v. Vaudrin* 1993 WL 152142, 1 (Minn.App.1993) (a copy of which is contained in the Appendix to the Reply Brief), the Court was required to interpret language contained in a divorce decree which addressed the question of retirement.

Whether the language in a dissolution decree is ambiguous is a question of law. *Halverson v. Halverson*, 381 N.W.2d 69, 71 (Minn.App.1986). Ordinarily the term “retirement” is not ambiguous. Due to the unique nature of the airline industry, however, and the fact that pilots are required to retire at age 60, the term “retirement” as used in this decree is reasonably subject to more than one interpretation. The decree is ambiguous. *See id.*

Where the language of a dissolution decree is ambiguous, its intended meaning is a question of fact and resort may be had to extrinsic evidence. *Empire State Bank v. Devereaux*, 402 N.W.2d 584, 587 (Minn.App.1987). In such a case, the trial court's construction should not be reversed unless clearly erroneous. *Id.*

*Vaudrin v. Vaudrin*, 1993 WL 152142, 1 (Minn.App.,1993)

As the Court points out in *Vaudrin*, the term retirement is not particularly ambiguous. If one reaches the customary age of retirement and decides to slow down and leave one’s profession and take on a part time job, one is generally considered “retired”. One does not generally debate the issue, it is simply understood that the person in that position is retired.

Furthermore, it is not disputed that Mr. Hemmingsen is no longer earning an income from real estate sales. There was no evidence submitted which suggested that in point of fact he was still working in the field and receiving moneys from the sale of real estate. Respondent is simply arguing that he could earn income from that if he had not chosen to retire.

The fact is that Appellant has “fully retired” from the real estate business as he stated in his affidavit. See Appendix to Appellant’s Brief page A20. This was his occupation, as is acknowledged by Respondent in her responsive brief. He is currently receiving his social security benefits and is working on a part-time basis

after his retirement from the real estate business. Essentially, the Respondent is asking this Court to treat the decision of a man of 65 years to retire from his occupation or customary business no differently than it would treat the decision of 40 year old man with a spousal maintenance obligation to quit working. Appellant contends, as is set out in more detail in his initial brief, that this is not the law of the State of Minnesota.

### CONCLUSION

In conclusion, Appellant respectfully requests that the decision of the Trial Court denying his motion to terminate his maintenance obligation, awarding Respondent attorney's fees in the total amount of \$1,500 and the denial of his motion to amend findings by characterizing said motion as a "motion for reconsideration", be reversed.

**RESPECTFULLY SUBMITTED,**

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Dated: October 13, 2008

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***APPELLANT DANIEL E. HEMMINGEN'S CERTIFICATE OF COMPLIANCE***

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The brief filed herewith complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, Subd. 3(a). This brief was prepared using Microsoft Office Word 2003, which reports the brief contains 199/ 1632 lines/words.

Dated: October 13, 2008

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