No: 126835

In the Supreme Court of Illinois

In re Marriage of	**)**	**Appeal from the Circuit Court of**
	)	**Cook County, Illinois,**
Betsy Dynako,	**)**	**Domestic Relations Division**
Petitioner-Appellant	**)**	
	)	**No. 2015 D 002531**
and	**)**	
	)	**Hon. Judge David Haracz,**
Stephen Dynako,	**)**	**Presiding**
Respondent-Appellee	**)**	

REPLY BRIEF OF RESPONDENT-APPELLANT STEPHEN DYNAKO

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Oral Argument Requested

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ARGUMENT

1. Stephen Does Not Advocate A "Magic Words" Requirement.

Stephen's position is that the statute means what it plainly says in unambiguous terms: **The parties may provide that maintenance is non-modifiable in amount, duration, or both. If the parties do not provide that maintenance is non-modifiable in amount, duration, or both, then those terms are modifiable upon a substantial change of circumstances.**

The language plainly requires – not once, but twice – that, for a non-modifiability provision to be effective, it must designate that the maintenance obligation is non-modifiable in amount, or in duration, or in both amount and duration. And that if this designation is not made, the maintenance obligation is modifiable.

Betsy devotes most of her brief to refuting a caricature of Stephen's position, claiming that Stephen is demanding the use of "magic words," that a non-modifiability provision must quote the precise language of the statute in full.

Betsy ridicules this straw man argument, going so far as to say it would require the full recitation of "amount, duration, or both," leading to absurdity.

Of course, this is not Stephen's argument.

Stephen's argument is, for the non-modifiability provision to successfully strip the court of jurisdiction to follow the normal rule of allowing modification when there's a change of circumstances, there must be some designation made as to whether the provision applies to amount, or duration, or both amount and duration.

Stephen nowhere argues that magic words must be used, or that any specific formulation must be used. But some designation as to whether the non-modifiability provision pertains to amount, or duration, or to both, must be made. Otherwise, the provision is ineffective, and the maintenance obligation is modifiable.

Betsy is not argument against "magic words" is not dismissing Stephen's argument.

Betsy is dismissing the statute itself as "magic words." She is calling on the trial court and this Court to dismiss the statutory requirement.

This has been Betsy's argument throughout. The statute is a bunch of "magic words." No one follows the statutory requirements, and the Court shouldn't be bothered to comply with the statute, either. It's just a bunch of "magic words".

> Mr. Jones: How much more clear could it be?
> THE COURT: It could say it's non-modifiable by amount, duration or both.
> MR. JOENS: Well, theoretically I suppose that it could, but I don't think I've ever prepared an agreement with that language in there. And I don't know that very many practitioners in this division have prepared agreements with that language in there.

Sup R 23, lines 8-16.

If Betsy were to prevail with her effort to dismiss statutes as "magic words," which attorneys and the courts may dismiss, then no one will know what the law really provides.

Betsy cites Palos Community Hospital v Humana Insurance Co., Inc., 2021 IL 126008 for the proposition that the statute should be given effect without

reading into it exceptions, limitations, or conditions that the legislature did not express.

In Palos, this Court noted that trial courts had adopted a common practice of denying motions for substitution of judge where the judge concluded a party had been "testing the waters," though the relevant statute made no provision for such a basis to reject a motion to substitute.

This Court held that the statute is to be given effect, and that the trial courts may not decide for themselves to decline to apply the statute as written.

Similarly, in this case, this Court should not validate a practice of dismissing the plain requirements of the statute on the grounds that the statute is just "magic words."

2. **The Court Should Not Insert Into the Judgment A Designation of "Both Amount and Duration."**

Aside from her straw man "magic words" argument, Betsy argues that, since no designation was made, this Court must INFER that the parties intended to choose to make the maintenance non-modifiable as to both amount and duration.

Why this inference – most adverse to Stephen – should be made when Betsy's counsel drafted the agreement, and Stephen was unrepresented by counsel – is unstated by Betsy.

In drafting the settlement agreement, Betsy's lawyer could have rendered the non-modifiability provision complaint with the statutory requirement with simple, non-magical language, and presented that to Stephen.

Instead of "maintenance payments shall be non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act," Betsy's lawyer could have written, "Maintenance payments shall be non-modifiable *in amount* pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act," or "Maintenance payments shall be non-modifiable *in duration* pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act," "Maintenance payments shall be non-modifiable *in both duration and amount* pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act."

The parties then could have decided whether to agree to said language and, if they had, the language would have been effective.

Instead, Betsy lawyer did not do so. The language therefore fails to comply with the statutory requirement. Betsy now asks this Court to supply the missing words that are most prejudicial to Stephen.

But such rewriting of the judgment would stand the statute on its head.

The statute as written by the legislature provides: **If the parties do not provide that maintenance is non-modifiable in amount, duration, or both, then those terms are modifiable upon a substantial change of circumstances.**

Betsy asks this Court to rewrite the statute essentially to provide: **If the parties do not provide that maintenance is non-modifiable in amount, duration, or both, *then those terms are non-modifiable as to both amount and duration*.**

3. The parties did not intend to make maintenance non-modifiable in both amount and duration.

Betsy falsely maintains that Stephen does not dispute that the parties intended to make maintenance non-modifiable as to amount or duration.

The appellate briefs contain no argument concerning the intent of the parties in negotiating the marital settlement agreement because the Court ruled, and the parties agreed, at the hearing on the Motion to Modify Maintenance, that the sole question at issue – and the sole issue before this Court – is whether the plain language of the marital settlement agreement strips the Court of jurisdiction to entertain a motion to modify. Sup R 10 line 9 – Sup R 11 line 10.

The Court ruled, and the parties agreed, that this is a purely legal question, and that testimony regarding the intent of the parties was not relevant. *Id.*

Testimony as to the intent of the parties behind the plain language of the agreement was therefore not presented because it's not relevant to the issues in this case – whether the non-modifiability provision complies with the statutory requirement.

To the extent it is relevant, Stephen has consistently argued that he did not intend to agree to making maintenance non-modifiable. In his Affidavit in Support of his Motion to Modify Maintenance, Stephen swears:

> I believed that the [settlement agreement was], as promised, merely a formal version of our agreement, including what was absolutely essential: We give each other one month notice regarding changes to this agreement and changes of employment. C-142, paragraph 12.
>
> If I had known that the divorce papers said that the money I was paying to Betsy could not be modified, I would never have signed the papers. C-143, paragraph 30.

To emphasize, if the intent of the parties in negotiating the language of the agreement were to be at issue, Stephen believes the evidence would establish that he did not intend to enter into an agreement to make maintenance non-modifiable as to both amount and duration.

Betsy does not provide any evidence external to the judgment to support her assertion as to what the parties intended. She cannot cite any such evidence because none was taken. The question before this Court is purely whether, as a matter of law, a court is barred from entertaining a motion to modify maintenance where a non-modification provision in a marital settlement agreement does not make the designation, as required by the statute, as between amount, duration, or both amount and duration.

4. Betsy's Argument Concerning "Strict Compliance" is Misplaced.

Betsy places weight on a claimed distinction between "strict construction" and "strict compliance" with a statutory requirement.

Betsy argues "strictly construing" a statute means that the Court will not add anything to the statute. Betsy cites this principle in opposing Stephen's supposed argument that Stephen is asking this Court to modify the statute by requiring "magic words." But, as noted above, this is a caricature of Stephen's argument. Stephen is not asking this Court to invent quotation marks or otherwise change the statute. Stephen is simply asking this Court to hold that the statute means exactly what it says, no more, no less.

Betsy then argues against "strict compliance" with the statute. She argues the requirement that the agreement designate amount, duration, or both is permissive, not mandatory, because the statute uses the word "may" instead of "shall."

This makes no sense. The "may" in the statute is permissive in the sense that it permits litigants to agree to render maintenance non-modifiable IF certain conditions are met. If those conditions are not met, then the statute explicitly states that maintenance is modifiable. Compliance with the statutory requirement is necessary for the non-modifiability provision to be an effective bar to the court's jurisdiction to entertain a motion to modify. This is not a "permissive" statutory requirement.

Betsy the argues that, even if the designation of "amount, duration, or both" is mandatory, not permissive, the Court should not require strict compliance.

Betsy asserts the requirement is satisfied with substantial compliance, if (1) the purpose of the statute was satisfied, AND (2) Stephen was not prejudiced.

This argument fails because, first, there was no substantial compliance with the statutory requirement. The statute requires a designation of amount, duration, or both. There is no such designation. There is nothing approaching substantial compliance, and therefore, it cannot be said the purpose of the statute was satisfied.

Second, to sustain this "substantial compliance" argument, there would have to be no prejudice to Stephen.

If the non-modifiability provision is held to be satisfied, and the Court barred from entertaining a motion to modify, Stephen intends to show he will be utterly ruined. Not only will he have a debt that can never be paid, he will have 9% interest added on to his impossible debt, which can never be discharged or modified. He will have to come into court on a regular basis with the burden of persuading the court that he has exhausted all efforts since the last court date to find enough money to keep himself out of jail. Was his purchase of a pair of new shoes really necessary, or could he have made them last another season?

As the court noted in its ruling:

Mr. Staas: . . . let me also make another point, Your Honor. There's another point that has a real practical effect on this case, which is if you're finding that you're without authority to make any modification, we have talked earlier from the bench about possible ways to get our lives back on track here and spreading out the payments over a longer period of time. I would submit that based on the ruling you just made, you would have to find you're without authority to do that, because you can't modify the duration of the obligation. The practical effect of that is that we're going to wind up having statutory interest continue to accrue against my client at 9 percent.

THE COURT: Correct.

MR. STAAS: And what happens then is he will never even be able to pay the interest that's due and accruing. So this is -- I don't know how -- I just want to make sure I understand that that's your same understanding of what your ruling means that you can't modify the judgment to stretch out the total amount due over a longer period of time.

THE COURT:· Unless the parties agree.

Sup R 31 line 12 – Sup R 32 line 13.

On the other hand, if this Court holds that the statute is not "magic words," but that the statute means what it says and is to be taken seriously, then the prejudice to Betsy is non-existent.

All that happens to her is that the trial court may consider whether the circumstances have changed and the maintenance obligation should be modified. If the circumstances have not changed, and Stephen is indeed able to fulfill the obligation, the obligation remains. No damage is done to Betsy.

If the circumstances have changed, and Stephen is unable to fulfill the obligation, the Court may modify the obligation to fit Stephen's ability. Instead of having Stephen caught between the hammer and the anvil, Betsy will receive whatever the Court deems to be reasonable in accordance with the maintenance statute, just like every other maintenance obligee.

CONCLUSION

For the reasons set forth above, Stephen Dynako prays this Court reverse the ruling of the trial court and the Appellate Court that the trial court is without authority to modify the maintenance obligation in the judgment of dissolution, and remand for further proceedings affording Stephen Dynako to show the court a change in circumstances, and allow the court to modify the maintenance obligation in accordance with the factors set forth in the statute.

John August Staas
Counsel for Appellant Stephen Dynako

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.

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John August Staas
Counsel for Appellant Stephen Dynako

No: 126835
IN THE SUPREME COURT OF ILLINOIS

In re Marriage of Betsy Dynako,	)	On leave to appeal from the
	)	Appellate Court of Illinois, First District
Petitioner - Appellee	)	No. 1-19-2116
	)	
and	)	There on appeal from the Circuit Court
	)	of Cook County, Illinois, Domestic Relations
Stephen Dynako,	)	Division,
	)	No. 2015 D 002531
Respondent - Appellant	)	
	)	Honorable David Haracz, Judge Presiding

NOTICE OF ELECTRONIC FILING

To: Colin Harvey Dunn
chd@colindunnlaw.com

I, John August Staas, attorney for Respondent/Appellant Stephen Dynako, state that on June 16, 2021, I electronically filed the attached Appellant's Reply Brief with the Clerk of the Supreme Court of the State of Illinois.

/s/John August Staas

_____
John August Staas, attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn on oath. deposes and states that on July 16, 2021, I caused true and correct copies of the foregoing Notice of Filing together with the Appellant's Brief, to be served upon the above party by Odyssey at the email address above.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/John August Staas

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