No. 126835

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF PETITIONER-APPELLEE

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INTRODUCTION

Stephen agrees that section 502(f) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/502(f) (West 2016)), allowed the parties here to provide that his maintenance obligation is non-modifiable in amount, duration, or both. Stephen does not dispute that he agreed to the language in the parties' martial settlement agreement, which was incorporated into the judgment for dissolution, that his "maintenance payments shall be non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act." (A 31). And Stephen does not suggest that language is somehow ambiguous as to whether his maintenance obligation is nonmodifiable in amount, duration, or both. Instead, he claims that language is unenforceable.

According the Stephen, the Act's terms require "strict compliance," so in order for his maintenance obligation to be nonmodifiable, the judgment needed to contain the verbatim statement from section 502(f) that the "maintenance is nonmodifiable in amount, duration, or both." But there's no evidence the General Assembly intended to include that kind of "magic words" requirement in section 502(f).

The General Assembly knows how to impose a verbatim language requirement when it wants to. See e.g., 705 ILCS 405/5-520(1) (West 1999) (using quotation marks to identify required language for filed pleadings in Juvenile Court Act cases); 735 ILCS 5/1-109 (West 1984) (indicating, after a colon, language that must be substantially contained in a verification by certification). And it has done so in another section of the

Act itself. See 750 ILCS 5/508(f) (requiring specific language, set forth after a colon and within quotation marks, that must be included in written engagement agreements between divorce counsel and his client).

Stephen asks this Court to insert similar punctuation into section 502(f) to create a new verbatim language requirement. But this Court recently reiterated that courts cannot do that. *Palos Community Hospital v. Humana Insurance Co., Inc.*, 2021 IL 126008, ¶ 31 (explaining where the language of a statute is clear and unambiguous, a court must give it effect as written, without "reading into it exceptions, limitations or conditions that the legislature did not express").

Also, Stephen's new verbatim language requirement would lead to absurd results. For instance, if the parties here had intended to have either the amount or duration of Stephen's maintenance obligation be nonmodifiable, under Stephen's view of section 502(f), they were still required to include the phrase "the maintenance is nonmodifiable in amount, duration, or both." Otherwise, both the amount and duration would be modifiable. But inclusion of that phrase would be contrary to their intent. Stephen's view of section 502(f) *creates* ambiguity.

The more reasonable reading of section 502(f) is that it requires the parties to provide a clear expression of their intent as to whether the maintenance obligation is nonmodifiable in amount, duration, or both. Stephen does not dispute that is what the parties did here.

Both the circuit court and appellate court properly rejected Stephen's unworkable and extratextual reading of section 502(f). This Court should so the same, and affirm the decisions of the lower courts.

STATEMENT OF ISSUES

Whether the circuit court and appellate court correctly found Stephen's maintenance obligation was not modifiable where the judgment for dissolution provided that his maintenance obligation "shall be non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act."

STATEMENT OF FACTS

While she disagrees with the various claims made by Stephen in the circuit court and appellate court about whether a substantial change in circumstances has occurred, Betsy agrees that issue is not before this Court. She therefore accepts, for purposes of this appeal only, the Statement of Facts contained in Stephen's brief, which is taken verbatim from the "Background" section of the appellate court's opinion below. See 2020 IL App (1st) 192116, ¶¶ 3-18.

ARGUMENT

I. There's no evidence the General Assembly intended to impose a "magic words" requirement in section 502(f).

The parties agree that, in construing any statute, the Court's goal is to ascertain and effectuate the intent of the legislature in enacting the provision. The statutory language, given its plain and ordinary meaning, is generally the most reliable indicator

of that legislative intent, but a literal reading must fail if it yields absurd, inconvenient, or unjust results. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12.

Stephen claims the General Assembly, in amending section 502(f), imposed a "magic words" requirement in order for a maintenance obligation to be nonmodifiable, requiring that the judgment order contain the phrase: "maintenance is non-modifiable in amount, duration, or both." Any deviation from that precise phrase, according to Stephen, renders the maintenance obligation modifiable upon a substantial change in circumstances.

But Stephen provides no evidence the General Assembly intended to do that. Nowhere in the plain language of section 502(f) does the General Assembly signal an intent to impose a verbatim language requirement in order for a maintenance obligation to be nonmodifiable. And there are plenty of examples showing the General Assembly knows how to do that when it wants to.

II. Statutory examples where the General Assembly imposed verbatim language requirements.

For instance, in section 5-520(1) of the Juvenile Court Act of 1987, the General Assembly requires that all filed petitions and subsequent court documents "shall be entitled 'In the interest of…, a minor.'" 705 ILCS 405 5-520(1) (West 1999). There, the legislature used quotation marks to indicate its intent to require verbatim language in filed pleadings under that statute.

Section 1-109 of the Code of Civil Procedure sets out the requirements for the verification by certification of particular documents such as a complaint, answer to

interrogatories, an affidavit, etc. 735 ILCS 5/1-109 (West 1984). That provision requires that "[t]he person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form: 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 and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true." *Id.* Though the General Assembly did not require verbatim language that must be used, it utilized a colon to signal suggested language that the certification must "substantially" mimic.

And, notably, the General Assembly has utilized both of these grammatical clues, i.e., quotation marks and a colon, in the Illinois Marriage and Dissolution of Marriage Act to impose a verbatim language requirement. See e.g., 750 ILCS 5/508(f) (requiring specific language, which is set forth after a colon and within quotation marks, that must be included in written engagement agreements between divorce counsel and his client).[1]

[1] This Court has also provided an example of how to require verbatim language. See Illinois Supreme Court Rule 216(g) (requiring several "[s]pecial [r]equirements" for the propounder of requests to admit, including mandating "the following warning in a prominent place on the first page in 12-point or larger boldface type: **'WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served**

There's no similar indica of a verbatim language requirement in section 502(f). But those statutory examples show, as this Court has recently recognized in another context, that "the legislature knows how to include [verbatim language] requirements into a statute when that is its intent," and the General Assembly's "decision not to include such language" in section 5/502(f) "demonstrates that it did not intend for the statute to contain that type" of requirement. See *Palos Community Hospital v. Humana Insurance Co., Inc.*, 2021 IL 126008, ¶ 33, citing *Whitaker v. Wedbush Securities*, 2020 IL 124792, ¶ 16 ("The most reliable indicator of legislative intent is the statutory language ***.").[2]

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with this document, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine.'" (emphasis in original).

[2] This Court has steered clear, whenever possible, of recognizing "magic word" requirements. See e.g., *People v. Phipps*, 238 Ill. 2d 54, 66 (2010) (explaining that while section 103–5(a) of the Criminal Code requires criminal defendants to object to any attempt to place the trial date outside the 120–day period to prevent the speedy-trial clock from tolling, the statute does not mandate any "magic words" constituting a demand for trial, only some affirmative statement in the record requesting a speedy trial); *People v. Hicks*, 101 Ill. 2d 366, 376–77 (1984) (finding the trial judge complied with the requirements of section 5–8–4(b) of the Criminal Code when he imposed consecutive sentences even though he did not employ the "magic words" of

It's well established that where the language of a statute is clear and unambiguous, a court must give it effect as written, without "reading into it exceptions, limitations or conditions that the legislature did not express." See *Id.*, ¶ 31, quoting *In re Hernandez*, 2020 IL 124661, ¶ 18. Yet, that is exactly what Stephen is asking this Court to do; to find a verbatim language requirement exists, as Stephen suggests, this Court would need to insert punctuation into the statute, thereby adding a new statutory condition the legislature did not express.

III. Stephen's verbatim language requirement is unworkable and would lead to absurd results.

Stephen's verbatim language requirement also does not make sense linguistically. Here, the marital settlement agreement, which was incorporated into the judgment for dissolution, sets out a detailed maintenance payment schedule with the amounts owed to Betsy, when those amounts are due, and how long the payments

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the statute itself because "[w]hat is required is that the record show that the sentencing court is of the opinion that a consecutive term is necessary for the protection of the public[;] [t]here is no need to repeat the language of the statute verbatim"); *Waukegan Cmty. Unit Sch. Dist. 60 v. City of Waukegan*, 95 Ill. 2d 244, 255 (1983) (recognizing that "magic words" are no longer determinative in analyzing a home rule tax on the sale of services and that "[t]he mere recitation in the ordinance that the tax is upon purchasers of services does not eliminate the evils the delegates to the convention sought to prevent").

would continue. (A 31). In other words, the agreement sets forth both the amount and duration of Stephen's maintenance obligation.

It would make no sense, as Stephen suggests, to have required the parties to then insert the phrase: "maintenance is nonmodifiable in amount, duration, *or both*." The "or both" language is superfluous; no one would write it that way.

True, the parties could have written: "The maintenance is nonmodifiable in amount or duration." But, under Stephen's view of section 502(f), failing to include the words "or both" renders the maintenance obligation modifiable in both amount and duration, which is directly contrary to the parties' intent here. (Note, Stephen does not dispute that was the parties' intent, nor does he claim any ambiguity in the language that was used here. He does not, for instance, suggest he believed either the amount or duration of his maintenance obligation was modifiable).

But let's assume the General Assembly did intend to include the verbatim language requirement Stephen proposes. What if the parties intended that either the amount or the duration of the maintenance obligation was modifiable, but not both? That can't be done under Stephen's reading of the statute. Why? Because after stating that the amount or duration of the maintenance obligation is nonmodifiable, Stephen says the drafter must then include the phase, "maintenance is nonmodifiable in amount, duration, or both," which would directly contradict the intent the parties and create an ambiguity. That is an absurd result.

The more reasonable reading of the statutory phrase, "The parties may provide that maintenance is non-modifiable in amount, duration, or both," is that if the intent of the parties is to make the amount, duration, or both, of a party's maintenance obligation nonmodifiable, the agreement must plainly express that intent. That reading of the statute is confirmed by subsection (f)'s next sentence: "If the parties do not provide that maintenance is nonmodifiable in amount, duration, or both, then those terms are modifiable upon a substantial change of circumstances."

So, under the statutory scheme set forth in section 502(f), if the agreement indicates that "the maintenance amounts are nonmodifiable," then the duration would be (assuming a substantial change of circumstances exist). If the agreement states "the duration of the maintenance payments are not modifiable," then the amounts owed can be changed (again, assuming a substantial change of circumstances exist). If the language of the agreement is silent as to whether the amount or duration is modifiable, then both the amount and duration can be modified. And if the language of the agreement evidences the parties' intent that neither the amounts owed nor the duration of the payments are modifiable, then neither can be changed. That is the situation here.

A fair reading of the language used in section 2.1 of the parties' marital settlement agreement demonstrates a clear intent that Stephen's maintenance payments be nonmodifiable. (A 31). Stephen does not argue otherwise.

After setting forth a detailed maintenance payment schedule, the agreement states: "Said maintenance payments shall be non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act." (A 31). The prefatory word, "Said," can only refer to the maintenance payments set out immediately before in the previous sentences. Thus, the only reasonable reading of this language is that the amount and duration of Stephen's maintenance payments detailed in section 2.1 "shall be non-modifiable." Notably, Stephen does not offer *any* alternative reading of section 2.1.

And the parties' citation in section 2.1 to section 502(f) solidifies their compliance with the statute. The only possible reason for the parties to have cited to section 502(f) is to confirm that Stephen's maintenance obligations are nonmodifiable; the modifiability of terms in a judgment for dissolution is the only topic covered in subsection (f).

IV. Stephen's "strict compliance" argument is misplaced.

Stephen contends the "[b]ecause the maintenance obligation is a creation of statute" and is in "derogation of the common law[,]" "common law contract principles of interpretation do not apply, and the law requires *strict compliance* with the requirements of the statute before the remedies are available." (Resp. Br. at 17 (emphasis in original); 19). There are a couple problems with this argument.

First, it is well established that "[a] marital settlement agreement is construed in the manner of any other contract, and the court must ascertain the parties' intent

from the language of the agreement." *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). So common law contract principles do, in fact, apply. And, as noted above, the plain language in section 2.1 of the marital settlement agreement demonstrates a clear intent that Stephen's maintenance obligation be "non-modifiable" – Stephen does not argue otherwise.

Second, Stephen conflates two distinct legal principles in arguing that section 502(f) "requires strict compliance" because it is "a statute in derogation of the common law." Whether or not section 502(f) is in derogation of the common law (Stephen has not cited any authority for that proposition), such statutes are to be "strictly *construed*." *In re W.W.*, 97 Ill. 2d 53, 57 (1983) (reciting "the well-established rule that statutes in derogation of the common law are to be *strictly construed* in favor of persons sought to be subjected to their operation") (emphasis added); see also *Cityline Const. Fire & Water Restoration, Inc. v. Roberts*, 2014 IL App (1st) 130730, ¶ 10 ("The rights created under the [Mechanic's Lien] Act are statutory and in derogation of the common law, and the technical and procedural requirements necessary for a party to invoke the benefits of the Act must be *strictly construed*") (emphasis added).

The "strict compliance" concept, on the other hand, arises when a question exists as to whether language in a particular statute is mandatory or permissive. See *People v. Robinson*, 217 Ill. 2d 43, 50-60 (2005) (explaining "mandatory-permissive dichotomy" and collecting cases).

This "strictly *construed*" versus "strict *compliance*" distinction matters here because, as this Court has recognized, "strictly construing" a statute that is in derogation of the common law means (a) "courts will read nothing into such statutes by intendment or implication" and (b) "such statutes will not be extended any further than what the language of the statute absolutely requires by its express terms or by clear implication." *Id.* Inserting punctuation into section 502(f) to create a verbatim language requirement, as Stephen asks this Court to do, therefore, would not be "strictly construing" section 502(f). So this legal principle, in fact, undermines his argument.

The "strict compliance" principle does not help Stephen either. Generally, when the legislature uses the word "shall," it intended a mandatory obligation. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 16.

Here, section 502(f) does not contain the word "shall." Section 502(f) does, however, contain the word "may" in the context of the modifiability of maintenance obligations, which normally indicates a permissive-reading was intended. See, *e.g., People v. Reed,* 177 Ill.2d 389, 393 (1997) ("Legislative use of the word 'may' is generally regarded as indicating a permissive or directory reading, whereas use of the word 'shall' is generally considered to express a mandatory reading").

But even if section 502(f) were construed as imposing a mandatory obligation to render a maintenance obligation nonmodifiable, strict compliance is not always required. *Fehrenbacher v. Mercer Cty.*, 2012 IL App (3d) 110479, ¶ 15. Substantial compliance can satisfy a mandatory provision if: (1) the purpose of the statute was

satisfied; and (2) the opposing party was not prejudiced. *Id*, ¶ 16. Both of those factors are met here.

Stephen cannot seriously argue that the language in the judgment for dissolution does not substantially comply with section 502(f). The judgment states that Stephen's maintenance obligation is "non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act." Because that language expresses the parties' intent that Stephen's maintenance obligation be nonmodifiable, a point Stephen does not dispute, the purpose of section 502(f) is satisfied.

And Stephen does not argue he was prejudiced by the language in the judgment. For instance, he does not claim he believed his maintenance obligation was modifiable or that the language is somehow ambiguous. Instead, he is just attempting to find a loop-hole to avoid that agreed-to maintenance obligation.

CONCLUSION

There is no evidence the General Assembly intended to include a magic-word requirement in section 502(f). Stephen is asking this Court to do what it has said, time and again, it cannot do: read a condition into section 502(f) that the legislature did not express. What's more, Stephen's verbatim language requirement is unworkable and would lead to absurd results. This Court should affirm the decisions of the circuit court and appellate court, finding Stephen is bound by the maintenance obligation set out in the martial settlement agreement and judgment for dissolution of marriage, which the

parties agreed would be "non-modifiable pursuant to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act."

Respectfully submitted,

/s/Colin H. Dunn

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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 3,221 words.

/S/Colin H. Dunn

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	)	Presiding

NOTICE OF ELECTRONIC FILING

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The undersigned certifies that, on June 1, 2021, he electronically filed the attached **BRIEF OF PETITIONER-APPELLEE** with the Clerk of the Supreme Court of Illinois.

/s/Colin H. Dunn

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn on oath, deposes and states that on June 1, 2021, he caused a true and correct copy of the foregoing Notice of Filing and Brief of Petitioner-Appellee upon Counsel for Appellant by Odyssey e-filing at august@staas.com.

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/Colin H. Dunn

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