

NO. A04-2387

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State of Minnesota  
**In Court of Appeals**

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Stanley R. McConnell, Jr.,

*Appellant,*

vs.

Beverly J. McConnell,

*Respondent.*

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**APPELLANT STANLEY MCCONNELL, JR.'S REPLY BRIEF**

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## ARGUMENT

Respondent confuses the issue of entitlement to spousal maintenance with the issue of whether permanent, as opposed to temporary, maintenance should have been awarded. Respondent Wife argues that Appellant Husband did not meet his burden to demonstrate that he is in need of spousal maintenance. (Respondent's Brief, p. 9). Whether Mr. McConnell is entitled to spousal maintenance is not at issue in this case. The trial court found that he was entitled to spousal maintenance and that issue was not appealed by Respondent. The only issue in this case is whether Mr. McConnell should have been awarded permanent, rather than temporary, maintenance.

Respondent takes issue with the requirement that permanent maintenance be awarded if it is not *certain* that Mr. McConnell can become fully self-supporting. She argues that it is Mr. McConnell's burden to demonstrate his need for maintenance. (Respondent's Brief, p.9). First, the need for maintenance is not at issue on appeal, just whether the maintenance awarded should have been permanent, rather than temporary. Second, Minn. Stat. § 518.552, subd. 3 mandates an award of permanent maintenance if there is some uncertainty as to the necessity of a permanent award, leaving its order open for later modification.

Contrary to Respondent's argument, just because Mr. McConnell did not offer a vocational evaluation does not mean that he did not provide uncontradicted evidence of his disability and his inability to work gainful employment. The trial court had before it Social Security's determination that McConnell is unable to

engage in any substantial gainful activity and that his physical impairments are of such severity that he is not able to engage in any kind of substantial gainful work. 42 U.S.C.A. § 1382c. (A. A. 49, 50). Before Social Security could make that determination, his physical impairments had to be documented by medically acceptable clinical and laboratory diagnostic techniques. Id.

The 1993 Social Security determination of his inability to engage in any substantial gainful work is evidence of his inability to work. This was uncontroverted. There was no evidence that his medical condition had improved since the Social Security determination. In fact, all of the evidence is that Mr. McConnell's condition has significantly *deteriorated* since that determination.

Mr. McConnell also produced at trial uncontroverted document evidence of his serious medical conditions and his disability. Even Respondent concedes that "the district court was inaccurate in its observation that medical and disability documentation were not part of the record...." (Respondent's Brief, p. 12).

There is no dispute that Mr. McConnell, after Social Security found him to be disabled from gainful employment, had sporadic, short term attempts jointly with his wife to earn income in pyramid sales (long distance calling cards, Amway, pre-paid legal services, coupon books, jewelry sales, real estate foreclosures) for which neither he nor his wife earned any wages or income and a short term attempt with 50 other owners to try to run a restaurant, which similarly produced no wages or income. Mr. McConnell also does not dispute that he could

several years ago, but not now, walk ten blocks with frequent rest stops and that he sometimes helped with snow shoveling and lawn mowing.

However, it is an abuse of discretion and is clearly erroneous to assume, impute, or find from these facts that:

1. jointly doing home based sales with his wife proves that he is able to be to do these tasks alone;

2. these unsuccessful attempts to earn any income show a certainty in the future concerning his likelihood of success in the business world;

3. “he could work at employment such as a greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant;”

4. he could work full time; and

5. if he could find full time work at minimum wage, that would not reduce or stop his Social Security disability benefit.

Respondent argues that the Snoodles restaurant cooperative ownership with 50 other people proves that Mr. McConnell can work full time permanently and he can be fully self-supporting. In response, his “management” in the Snoodles restaurant was for a short time six to eight years prior to the trial. The parties dispute how many hours he was at the restaurant. It produced no wages or income. Its relevance to his ability to obtain a wage paying job now is limited at best. Respondent also argues “Mr. McConnell provided no evidence that his full time employment at the restaurant resulted in a decrease in his social security benefits.” (Respondent’s Brief p. 11). First of all, it was not employment. He earned no wages or income for his efforts. Secondly, since he was not employed, there were no wages or even income to be offset from his Social Security disability payment.

Respondent also points to the trial court's finding that Mr. McConnell "has worked at several different types of employment" "in the last several years." (A. 37, Respondent's Brief, p. 13). It is difficult to see how pyramid or home based sales with his wife that produced no income qualifies as "employment." Furthermore, there was no basis for the trial court to find that these attempts to earn income, done with the assistance of others, prove to a *certainty* that he has an ability to work 40 hours per week for wages.

Respondent cites Gessner v. Gessner, 487 N.W.2d 921 (Minn.App. 1992) in her brief. In fact, in Gessner, there was an 18 year marriage. One year before the divorce, the wife, who had no physical disability, was employed outside of the home and earned nearly \$23,000. Id. at 922. The court initially awarded temporary maintenance. The wife subsequently desired a career change but was unable to complete her coursework. She worked at a number of jobs and at the time of her motion was working as a vocational counselor earning approximately \$21,000 per year from her job and receiving over \$8000 per year from a family trust. Id. 923. The trial court awarded permanent maintenance. The appellate court in Gessner stated:

The trial court only needed to find uncertainty concerning the future in order to justify an award of permanent maintenance. See Nardini v. Nardini, 414 N.W.2d 184, 198 (Minn.1987) (statute requires that uncertainty to "be met by an award of permanent maintenance with the order left open for future modification"). The record reveals that there is substantial uncertainty concerning respondent's likelihood of success in school or the business world, and a corresponding uncertainty in the likelihood of complete rehabilitation.

Id. at 924. Similarly, in the case before us, there is uncertainty concerning Mr. McConnell's likelihood of success in the business world and ability to become self-supporting.

Respondent also objects to Appellant Husband pointing out the fact that he is Black in addition to being 55 years of age and disabled on the issues of: whether there is any uncertainty about his future earning potential; whether there is uncertainty regarding his ability to become self-supporting; and for how long he will need maintenance. Established history of race and age and disability discrimination is a fact, as evidenced by numerous state and federal laws enacted in response to this discrimination. Mr. McConnell's age, race, and disabilities combined are clearly relevant to the issue of whether it is a certainty or not that he can become fully employed and self-supporting.

It is interesting to note that the appellate courts have not said that because full time homemakers may have tried home based sales with no success, because they could walk for 10 blocks several years ago if they took frequent rest stops, because they could prepare meals or pay bills, or because they could shovel or mow the lawn, that the court should at least impute a minimum wage 40 hour work week to them working as a greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant. Despite Respondent's repeated reference to Mr. McConnell's statement that he would like to see if he could play golf, there is no case that states that a disabled person, who has never played golf but would like to look into the sport, is not disabled.

The Respondent's arguments also heavily rely on the trial court's taking judicial notice that Mr. McConnell is physically able to do and there are jobs available as greeter, parking ramp cashier, phone salesperson, and customer service. There are no facts to support such a finding and it was not an appropriate subject for judicial notice. The trial court abused its discretion by doing so. Reif v. Reif, 426 N.W.2d 227, 231 (Minn. App. 1988). As in Reif, there was no evidence in our case of the physical requirements of these jobs, whether Mr. McConnell could physically do them, or even whether such jobs are available in Mr. McConnell's living area.

Finally, Respondent argues that the cases awarding permanent maintenance on the basis of complex medical conditions hinge on whether the trial court found the disability prevented any gainful employment. (Respondent's Brief, p. 14-15). This is not so. Contrary to Respondent's arguments, poor health is a proper reason for awarding permanent maintenance. Safford v. Safford, 391 N.W.2d 548, 550 (Minn. App. 1986).

In fact, in Cich v. Cich, a qualified rehabilitation consultant hired by the husband testified that the wife was qualified for various jobs, including domestic service companion, assembler of small parts, waitress, child monitor, housekeeper, or salesperson and could likely start a wage of \$3.50 to \$5.00 per hour with wages subsequently increasing. Cich v. Cich, 428 N.W.2d 446, 448 (Minn. App. 1988). Contrary to Respondent's assertion, the facts were not that the wife had not worked in over 31 years. (Respondent's Brief, p. 15). In fact, the wife had a 25

percent permanent partial disability of the spine and was restricted from sitting for longer than one hour or standing over one-half hour. The wife had worked short duration jobs at several minimum wage jobs in the past ten years and as a clerical workers over 20 years previously. She also was a “traditional homemaker.” Cich at 448. The court did not assume she would be qualified to do telephone sales or parking ramp attendant or greeter. The appellant court upheld the award of permanent maintenance of \$800 per month even though the husband had a net monthly income of \$1,963.72 (wages and a \$100 rent payment). Id.

In the Lynch v. Lynch case, the wife was a full time homemaker with significant medical problems, but arguably less permanent and severe than Mr. McConnell’s medical problems. Lynch v. Lynch, 411 N.W.2d 263, 264-265 (Minn. App. 1987), review denied October 30, 1987. She was able to entertain and prepare meals for her husband’s business associates on a regular basis. Id. Despite the wife’s having obvious social skills and intelligence, the Lynch court did not assume she could work as a parking ramp cashier or customer service or telephone sales. The appellate court noted that “her chronic and acute medical problems offer no present prognosis for recovery. The evidence supporting permanent maintenance is substantial.” Id. at 265. Similarly, Mr. McConnell’s chronic and acute medical problems offer no present prognosis for recovery.

## CONCLUSION

The trial court's findings and conclusions on whether Mr. McConnell is entitled to permanent maintenance are clear error. There are no facts on which the trial court could conclude that it is certain that Mr. McConnell will be able to become self-supporting. Further, it was an abuse of discretion for the trial court to take judicial notice that: Mr. McConnell is able to work; that he is able to work 40 hours per week; that he could physically work at employment such as a "greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant;" and such work would be available.

The trial court's award of temporary maintenance should be overruled and an award of permanent maintenance made. In the alternative, if there is any uncertainty about Mr. McConnell's ability to become self-supporting, the trial court's award of temporary maintenance should be overruled and an award of permanent maintenance made, subject to leaving its order open for later modification.

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Dated: July 7, 2005

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Appellant,

CERTIFICATION OF BRIEF  
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,305 words. This brief was prepared using Microsoft Word XP, version 10.0.

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