

State of Minnesota
In Court of Appeals

Stanley R. McConnell, Jr.,

Appellant,

vs.

Beverly J. McConnell,

Respondent.

RESPONDENT BEVERLY J. MCCONNELL'S BRIEF

Marcia S. Rowland (#93968)
of Counsel,
CHADWICK AND MERTZ, P.S.C.
600 West 79th Street, Suite 210
P.O. Box 623
Chanhassen, MN 55317
(952) 975-5958

Attorneys for Appellant

A.L. Brown (#0331909)
ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	- 1 -
STATEMENT OF THE CASE	- 2 -
STATEMENT OF THE FACTS	- 3 -
STANDARD OF REVIEW.....	- 7 -
ARGUMENT.....	- 8 -
I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT’S SPOUSAL MAINTENANCE AWARD BECAUSE THE DISTRICT COURT’S FINDING WAS SUPPORTED BY THE FACTS ON THE RECORD.....	- 8 -
A. <i>The District Courts Findings Are Not Clearly Erroneous Because The District Court’s Findings Were Based on a Thorough Analysis of the Evidence Presented.....</i>	- 9 -
B. <i>The Cases Cited by Mr. McConnell Do Not Warrant A Reversal of the District Court.....</i>	- 13 -
CONCLUSION	- 16 -

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<u>Bolithio v. Bolithio</u> , 422 N.W.2d 29, 32 (Minn. App. 1988)	14
<u>Cich v. Cich</u> , 428 N.W.2d 446 (Minn. Ct. App. 1988).....	14, 15
<u>Dobrin v. Dobrin</u> , 569 N.W.2d 199 (Minn. 1997)	9, 11
<u>Duffey v. Duffey</u> , 416 N.W. 2d 830 (Minn. Ct. App. 1987).....	13
<u>Fink v. Fink</u> , 266 N.W.2d 340 (Minn. Ct. App. 1985).....	7, 9, 12
<u>Gessner v. Gessner</u> , 487 N.W.2d 921 (Minn. App. 1992)	7
<u>Lynch v. Lynch</u> , 411 N.W. 2d 263 (Minn. Ct. App. 1987).....	14
<u>Reif v. Reif</u> , 426 N.W. 2d 227 (Minn. Ct. App. 1988).....	13
<u>Rutten v. Rutten</u> , 347 N.W.2d 47 (Minn. 1984)	7
<u>Safford v. Safford</u> , 428 N.W.2d 446 (Minn. Ct. App. 1988).....	14, 15
 <u>Statutes</u>	
Minn. R. Civ. App. Proc. 128.02 subd.2	2
Minn. R. Civ. P. 52.01	8, 12
Minn. Stat. § 518.552	9
Minn. Stat. 518.552, subd. 2.....	8, 9

Question Presented

Mr. McConnell has medical problems and he receives social-security benefits because of his disabilities. But he has also worked many different jobs over the years, including in sales, a restaurant, and in a supervisory capacity. The district court made extensive findings about Mr. McConnell ability to work and concluded that Mr. McConnell could be self supporting right now, if he chose to work (but he doesn't). Did the district court err in awarding Mr. McConnell four years of spousal maintenance rather than the lifetime of maintenance that he would like to have? The district court held that Mr. McConnell was entitled to only four years of spousal maintenance.

Most Apposite Statutory Provisions:

Minn. Stat. §518.22

Statement of the Case

Pursuant to Minn. R. Civ. App. Proc. 128.02 subd.2 a statement of the case is not provided. Ms. McConnell, however, would supplement the statement of the case to include the following: On Ms. McConnell's motion, this Court filed an Order April 27, 2005, dismissing the appeal without prejudice pending the district court's resolution of Ms. McConnell's motion to reduce or terminate her maintenance. On April 29, 2005, the district court denied Ms. McConnell's motion to reduce or terminate her maintenance obligation. On May 27, 2005, this Court granted Mr. McConnell's motion to reinstate this appeal.

Statement of the Facts

Stanley McConnell and Beverly McConnell were married for seventeen years at the time of their divorce in April 2004. The couple had no minor children when they divorced. At the time of the divorce, Ms. McConnell was employed at a law firm in a support-staff position and Mr. McConnell was unemployed and receiving a monthly social security disability award, which he has received since December 1994. A-17.

The district court made extensive findings of fact in the divorce judgment and decree. The district court recognized that Mr. McConnell suffers from many medical problems, including diabetes, coronary artery disease, kidney transplants with end stage renal disease, high blood pressure, cataracts, double above-knee amputations, finger amputations, and complete dentures. A-17. After examining the McConnell's finances, the district court found that Mr. McConnell's net monthly income would be \$600 short of his reasonable monthly living expenses. *Id.* To compensate for this shortfall, the district court, after considering all of the relevant factors, *see* A-19-24, found that Mr. McConnell was entitled to temporary spousal maintenance of \$600 per month, continuing for four years. A-24.

With respect to the time necessary for Mr. McConnell to find appropriate employment and the probability of him becoming fully or partially self-supporting, the district court noted that Mr. McConnell had not submitted a vocational evaluation or any expert statement on the limits of his ability to work. A-19. But the district court also noted considerable evidence of Mr. McConnell's ability to work at several types of employment:

Although Mr. McConnell cannot do standing work due to his amputations, there is no evidence showing he could not do sitting work. He is articulate and intelligent. He has attempted to earn money through various schemes such as through selling Amway, coupon books, jewelry, and phone service. . . . He has not sought or tried regular hourly employment. He has worked at Snoodles restaurant for at least 6 hours at a time from 6 a.m. until at least noon.

A-19. (The district court did not explain why Mr. McConnell—if he is able to work immediately without any further training or education—should receive four years of spousal maintenance, but Ms. McConnell, nonetheless, did not appeal from that ruling.)

Mr. McConnell was unsatisfied with the finding that he is able to work and with an award of only temporary spousal maintenance in the amount of \$600 per month. In July 2004, he moved to amend the district court's findings or for a new trial. A-34. With respect to the amount of the spousal maintenance, the district court, granted the motion and allowed an amendment that now requires Ms. McConnell to pay \$715 per month, A-43, but the court rejected many of Mr. McConnell's arguments about his financial needs as simply unreasonable. For example, Mr. McConnell wanted the district court to consider his needs for hobby or entertainment expenses, his vacation needs, and his satellite TV expenses. A-36-37. The district court noted that Ms. McConnell could not afford "these things for herself" and that she should "not be required to work a second job to support an unreasonable standard of living" for Mr. McConnell. A-37.

With respect to the duration of the spousal maintenance, Mr. McConnell told the district court that four years of maintenance was not enough—that he wanted permanent maintenance. The district court rejected this request. A-37-40. The district court explained that "[t]he Court's determination that [Mr. McConnell] can work is not

conjectural; it is based on evidence in the record regarding task and work he has done in the last several years.” A-37. The district explained that Mr. McConnell has worked at several different types of employment since he began receiving social security benefits:

- “He has work[ed] doing sales presentations.” A-37.
- “He has sold Amway, pre-paid legal services, and coupon books.” Id.
- “He has tried jewelry sales, long distance phone card sales, and real estate foreclosures.” A-37-38.
- “He has worked at a restaurant, where he did various activities, including working as a door greeter, food carrier, and supervisor of employees. He accepted deliveries and went out to purchase items from a store when the restaurant ran out. He even assisted with cooking at time.” A-38.

The district court explained that “there is no evidence in the record that [Mr. McConnell] stopped doing any of these various types of work because of physical limitations. Rather, he stopped these jobs because he was not earning income from them.” Id. In addition to these forms of employment, the district court noted that Mr. McConnell has “also done minor home repairs and maintenance, including some shoveling and mowing. He is able to get out and attend dinners out, movies, concerts, and so forth. During a time period he was working on weight loss, he walked up to one mile with stops as needed.” Id.

As far as the types of jobs that Mr. McConnell could work in the future, the district court also gave this subject considerable attention. The district court explained that “[t]here is not uncertainty regarding [Mr. McConnell’s] ability to become self-supporting.” A-39. Mr. McConnell “is an intelligent, articulate man who presents well.” Id. “[H]e could work at employment such as a greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant.” A-38. “If [Mr. McConnell]

earns the minimum wage and works full time, he will earn net monthly income of \$756, which is sufficient to meet his reasonable and necessary living expenses when combined with his social security benefits.” A-39. And, of course, as the district court explained, “[i]t is likely [Mr. McConnell] could earn more than minimum wage, thereby reducing the number of hours he would need to work to meet his minimum living expenses, or allowing him excess disposable income.” Id.

Finally, the district court explained that “[t]here was no evidence in the record regarding specific limits on [Mr. McConnell’s] ability to work.” Id. He did not present a vocational evaluation. Id. As the district court explained, “[t]he Court was forced to make a ruling on the limited evidence available to it. That evidence showed that [Mr. McConnell] can work.” Id.

Standard of Review

This appellate court must review the trial court's determination of a maintenance award under the abuse of discretion standard. Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984). The trial court's decision with regard to spousal maintenance must be upheld unless there is a finding that the trial court's determinations were clearly erroneous. Gessner v. Gessner, 487 N.W.2d 921, 923 (Minn. App. 1992). Concisely put, "[a] trial court's determination of the amount and duration of spousal maintenance is final unless the court abused the discretion accorded to it." Fink v. Fink, 366 N.W.2d 340, 341 (Minn. Ct. App. 1985).

Argument

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S SPOUSAL MAINTENANCE AWARD BECAUSE THE DISTRICT COURT'S FINDINGS WERE SUPPORTED BY THE FACTS ON THE RECORD.

The standard of review is highly deferential to the trial court because it is the trial judge that has observed the testimony and therefore is in the best position to make judgments in regard to witness credibility. Minn. R. Civ. P. 52.01 (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”).

The district court’s discretion is not wholly unbridled. In determining the length of a spousal maintenance award the district court must consider the statutory factors in Minn. Stat. 518.552, subd. 2. The statute requires that the district court consider (1) the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet needs independently; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance; (6) the age, and the physical and emotional condition of the spouse seeking maintenance; (7) the ability of the spouse from whom maintenance is sought to meet needs while meeting

those of the spouse seeking maintenance; and (8) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property. Minn. Stat. 518.552, subd. 2.

The sole issue on appeal is Mr. McConnell's contention that his health condition entitles him, as a matter of law, to a permanent award of spousal maintenance. Mr. McConnell's Brief at Statement of The Case ("The only issues on appeal are the trial court's findings of fact relating to [Mr. McConnell's] medical status and his ability to work and whether he is entitled to permanent . . . maintenance."). The health of the party seeking maintenance is only one-eighth of the statutory considerations. Minn. Stat. 518.552, subd. 2. In that no one factor alone is dispositive—this appeal is fundamentally flawed. Fink, 366 N.W.2d at 341. The district court's decision must stand because it followed the law and came to reasonable conclusion that was supported by the facts on the record.

A. *The District Courts Findings Are Not Clearly Erroneous Because The District Court's Findings Were Based on a Thorough Analysis of the Evidence Presented.*

Mr. McConnell argues that "[t]he facts of record do not and cannot support a finding that for certain Mr. McConnell is capable of working full time and supporting himself." Mr. McConnell's brief at 12. This argument is without merit. Mr. McConnell fails to appreciate that it is his burden to demonstrate that he is in need of spousal maintenance. Dobrin v. Dobrin, 569 N.W.2d 199, 202 (Minn. 1997) (holding, "[i]mplicit in Minn. Stat. § 518.552 is that the spouse seeking maintenance demonstrate the need therefore. . . ."). It was Mr. McConnell's burden to demonstrate that he could not

adequately self-support and not Ms. McConnell's, nor the district court's, burden to show that Mr. McConnell could self-support. The district court accurately noted that Mr. McConnell failed to offer any vocational evaluation or expert statements of limits on Mr. McConnell's ability to work. A-39. As a result the district court was "forced to make a ruling on the limited evidence available to it. That evidence showed that [Mr. McConnell] can work." A-39. Mr. McConnell has failed his burden and this Court should affirm the district court.

With the burden properly placed on Mr. McConnell, this Court should affirm the district court's award because it was reasonable and supported by the record. For example, the record supports the district court's findings that Mr. McConnell's previous jobs, post amputations, were indicative of his ability to work. The record demonstrates that Mr. McConnell, after his amputations, was part owner of a restaurant in which he operated the restaurant's cash register, answered the phones, supervised employees, washed dishes, greeted customers, and received the supplies from the vendors. (Transcript at 57-60, 128). Mr. McConnell, after his amputations, also tended bar, waited on tables, and shopped for groceries in connection with the restaurant. (Transcript at 57-60, 82). Mr. McConnell is wrong when he contends that there was no evidence that he had the "ability to do these activities for any length of time." Mr. McConnell's Brief at 12. To the contrary, the court heard testimony that Mr. McConnell would do these various tasks Monday through Friday from 6:00 a.m. or 7:00 a.m. until about 3:00 p.m. or 4:00 p.m. (Transcript at 127). Mr. McConnell conflates the lack of financial success he experienced in his restaurant venture with his ability to work. The record supports a

finding that Mr. McConnell worked in this effort for five days a week— nine hours a day. The fact that Mr. McConnell worked full time, post amputations, certainly justifies a finding that he can work and become adequately self-supporting. It is on this substantial record that the court concluded “[t]here is no uncertainty regarding [Mr. McConnell’s] ability to become self-supporting.” A-39. This court should affirm the district court’s well founded findings of facts.

Mr. McConnell’s has also had other jobs outside of his restaurant business. The record is clear that after Mr. McConnell’s amputations he sold products for Amway and legal services for Prepaid Legal. A-37. In addition, Mr. McConnell also sold phone services and coupons. Id. The record also shows that Mr. McConnell was an active handyman who did minor home repairs which included, electrical work, shoveling and mowing. A-38. The district court also noted that Mr. McConnell is capable of walking significant distances. A-38. Mr. McConnell, by his own admission, intends to take up golf. (Transcript at 219). The district Court’s findings are not clearly erroneous and must be affirmed.

Mr. McConnell also challenges the district court’s premise that his social security benefits would not change if he worked. Again this record supports that premise. Mr. McConnell began receiving social security disability benefits in December 1994. It was after December 1994 that Mr. McConnell began working five days a week—nine hours a day at the restaurant. Mr. McConnell provided no evidence that his full time employment at the restaurant resulted in a decrease in his social security benefits. Again, it is Mr. McConnell’s burden to show that he needs the spousal maintenance. Dobrin, 569

N.W.2d at 202. Mr. McConnell failed this burden in this regard and therefore this Court should affirm the district court's award.

Mr. McConnell's appeal of the district court's determination is hinged on his health condition. There is no doubt that the district court was well aware of Mr. McConnell's physical condition. The district court was aware of Mr. McConnell's health condition but simply rejected the argument that a disability invariably renders a person useless. To the contrary, the district court found that Mr. McConnell is intelligent and articulate and able to [become self-supporting] after a short period of re-entry into the work force." A-19. While the district court was inaccurate in its observation that medical and disability documentation were not part of the record, the district court was accurate when it found that there was no vocational evaluation or expert statements of limits on Mr. McConnell's ability to work. A-39. Moreover, the law is clear—no one factor, in isolation, is dispositive. Fink, 366 N.W.2d at 341. Accordingly, the district court granted Mr. McConnell a four year spousal maintenance award. Due deference should be afforded to the district court's factual determination and therefore the district court must be affirmed. Minn. R. Civ. P. 52.01.

Inexplicably, Mr. McConnell's brief also frames the issue of Mr. McConnell's capacity to become self supporting around his race. To phrase the issue in that manner is uncivil, insulting and irrelevant. This Court should reject such arguments out of hand.

B. The Cases Cited by Mr. McConnell Do Not Warrant A Reversal of the District Court.

Mr. McConnell is wrong when he argues that Reif v. Reif and Duffey v. Duffey supports a reversal of the district court. 426 N.W. 2d 227 (Minn. Ct. App. 1988); 416 N.W. 2d 830 (Minn. Ct. App. 1987). The parties in Reif and Duffey lived an affluent or upper middle class standard of living. 426 N.W. 2d at 228; 416 N.W. 2d at 831. The spouses in Reif and Duffey who sought spousal maintenance worked at home caring for their minor children. 426 N.W. 2d at 228; 416 N.W. 2d at 833. As a result to the homemaker status, the spouses in the Reif and Duffey were out of the work force for significant time, Ms. Reif for 23 years and Ms. Duffey for 21 years. 426 N.W. 2d at 230; 416 N.W. 2d at 832. Most noticeably, the district court in Reif based its calculations of the wife's ability to earn on a specific profession—nursing. See Reif, 426 N.W. 2d at 231. None of this can be said of this case. The district court found that the McConnells “lived beyond their means.” A-20. In addition, Mr. McConnell was not a homemaker and the district court made the factual determination that Mr. McConnell has worked various jobs within “the last several years.” A-37. Unlike the district court in Reif, the district court in this case did not base Mr. McConnell's earning capacity on a particular job or profession but on the conservative assumption that Mr. McConnell would earn the lowest amount permitted by state and federal law. A-38. The Reif and Duffey cases offer no support for the proposition that a spouse's poor health entitles the spouse to permanent maintenance. This Court should affirm the district court because its determination were based on reason and supported by the record.

Mr. McConnell also overstates the application of Bolithio v. Bolithio to his case. 422 N.W. 2d 29 (Minn. Ct. App. 1988). Mr. McConnell enlists Bolithio to argue that “any uncertainty that [he] can become self supporting mandates an award of permanent maintenance.” Mr. McConnell’s brief at 19. This general statement of the law, however, does not apply in this case because the district court did not waiver in its assessment of Mr. McConnell’s ability to become self supporting. Again, the district court stated, “[t]here is no uncertainty regarding [Mr. McConnell’s] ability to become self-supporting.” A-39. This finding is polar to the district court’s finding in Bolithio v. Bolithio. In Bolithio the district court expressly stated, “future employment and income [are] uncertain.” 422 N.W.2d 29, 32 (Minn. App. 1988). This Court overturned the grant of temporary maintenance “[i]n view of [that] finding.” Bolithio 422 N.W.2d at 32. The district court, based on the record, indicated no uncertainty in its determination of spousal maintenance. This Court should affirm the district court’s reasonable application of its broad discretion.

Mr. McConnell’s reliance on Lynch v. Lynch, Cich v. Cich, and Safford v. Safford is likewise misplaced. 411 N.W. 2d 263 (Minn. Ct. App. 1987); 428 N.W.2d 446 (Minn. Ct. App. 1988); 391 N.W. 2d 548 (Minn. Ct. App. 1986). The only similarity between the Lynch, Cich, and Safford cases and this case is that the spouses seeking maintenance in all these cases have complex medical conditions. Lynch, 411 N.W. 2d at 264; Cich, 428 N.W.2d at 452-453; Safford, 391 N.W. 2d. at 550. This Court affirmed the permanent maintenance award in Lynch, in part, because the trial court found that Ms. Lynch was “competitively unemployable.” Id. at 265. This Court went on to state

that Ms. Lynch was “unemployed and will likely remain so because of her age, physical condition, and employment experience.” Id. This Court affirmed the permanent maintenance award in Cich, in part, because Ms. Cich had doctor imposed work restrictions that severely limited her employment opportunities and had not worked in over 31 years. Cich, 428 N.W.2d at 452-453. This Court affirmed the permanent maintenance award in Safford because it found that Ms. Safford was “totally incapable of gainful employment and has no other means of supporting herself.” Safford, 391 N.W. 2d. at 550. This Court should likewise affirm the district court’s award of temporary spousal maintenance because no such determinations were made in this case. To the contrary, the district court found that Mr. McConnell could work as a “greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant.” A-38. The record supports these findings and this Court should affirm the lower court’s award of a temporary maintenance award.

CONCLUSION

The record below provides an ample basis to support the district court's findings.

This Court must affirm that decision because the district court did not abuse its discretion nor clearly erroneously apply the law. Ms. McConnell asks this Court to affirm the district court.

Date: June 30, 2005.

Respectfully Submitted,

Robins, Kaplan, Miller & Ciresi L.L.P.

A. L. Brown (#0331909)

2800 LaSalle Plaza

800 LaSalle Avenue

Minneapolis, MN 55402-2015

612-349-8500

Attorneys for Respondent, Ms. McConnell

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Stanley R. McConnell

**CERTIFICATE OF BRIEF
LENGTH**

Appellant

vs.

**APPELLATE COURT CASE
NUMBER: A04-2387**

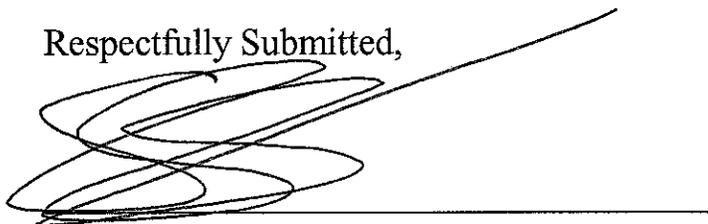
Beverly J. McConnell,

Respondent

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 for a brief produced with proportional font. The length of this brief is 2,179 words. This brief was prepared using Microsoft Word 2003.

DATED: June 30, 2005

Respectfully Submitted,



A.L. Brown (MN Lic. No.331909)
Robins, Kaplan, Miller & Ciresi L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500
Attorney for the Respondent