

Nos. A08-826 and A08-1010

State of Minnesota
In Court of Appeals

MATTHEW SHANE MELIUS,

Appellant,

vs.

JULIE ANN GOMER
f/k/a JULIE ANN MELIUS,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. Whether the district court abused its broad discretion and/or erred as a matter of law in awarding permanent spousal maintenance to Respondent so that she could meet the marital standard of living based, in part, on a finding that Appellant has the “ability” to earn \$300,000 per year?

The ruling below: The district court, after analyzing the existing law, made findings based on the evidence presented regarding the skills, talent and experience exhibited by Appellant and found that he has the ability to earn \$300,000 per year.

Apposite Authorities:

Minn. Stat. §518.552

Dobrin v. Dobrin, 569 N.W.2d 199 (Minn. 1997); Rauenhorst v. Rauenhorst, 724 N.W.2d 541 (Minn. Ct. App. 2006); Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. Ct. App. 2005); Carrick v. Carrick, 560 N.W.2d 407 (Minn. Ct. App. 1997); Walker v. Walker, 553 N.W.2d 90 (Minn. Ct. App. 1996); Bourassa v. Bourassa, 481 N.W.2d 113 (Minn. Ct. App. 1992); In Re Marriage of Richards, 472 N.W.2d 162 (Minn. Ct. App. 1991); Warwick v. Warwick, 438 N.W.2d 673 (Minn. Ct. App. 1989); Doherty v. Doherty, 388 N.W.2d 1 (Minn. Ct. App. 1986); Wickhem v. Wickhem, 2007 WL 2993819 (Minn. Ct. App. 2007)

- II. Whether the trial court’s determination of Respondent’s needs in light of the marital standard of living and based on the evidence introduced at trial, was an abuse of the trial court’s broad discretion?

The ruling below: The district court found that Respondent’s marital standard of living budget was \$9,950 per month, based on the evidence introduced at trial, including both parties’ testimony regarding the marital standard of living and both parties’ documentation regarding the parties’ expenditures both prior to and following their separation.

Apposite Authorities:

Minn. Stat. §518.552

Sefkow v. Sefkow, 427 N.W.2d 203 (Minn. 1988); Chamberlain v. Chamberlain, 615 N.W.2d 405 (Minn. Ct. App. 2000); Prange v. Prange, 437 N.W.2d 69 (Minn. Ct. App. 1989); Duffey v. Duffey, 432 N.W.2d 473 (Minn. Ct. App. 1988);

Erickson v. Erickson, 2002 WL 206736 (Minn. Ct. App. 2002); Bergeland v Bergeland, 2000 WL 1239754 (Minn. Ct. App. 2000);

- III. Whether the trial court abused its broad discretion in denying Appellant's motion for a new trial based on the trial court's exclusion of a portion of testimony from Appellant's two witnesses, David Olson and Robert Young, based on hearsay, and, if the alleged abuse of discretion resulted in prejudice to Appellant?

The ruling below: The district court denied Appellant's motion for a new trial, finding that it was proper to exclude the testimony of Appellant's two witnesses based on hearsay.

Apposite Authorities:

Minn. R. Evid. 403
Minn. R. Evid. 611
Minn. R. Evid. 801
Minn. R. Evid. 803

STATEMENT OF THE CASE

This is an action for the dissolution of the marriage of Respondent Julie Ann Melius, now known as Julie Ann Gomer, (hereinafter “Wife”) and Appellant Matthew Shane Melius (hereinafter “Husband”). Prior to trial, the parties settled the issues of custody, child support, attorney’s fees, and all but one property-related issue. The terms of the parties’ agreement as to these issues were incorporated into a Stipulated Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered July 9, 2007. (AA. 77-100.)

The two remaining contested issues, spousal maintenance and Wife’s request for a disproportionate division of the marital estate given a large gift to Husband’s mother prior to their separation, was tried before Hennepin County Family Court Referee Kevin McGrath on June 11, 12, and 15, 2007. On November 28, 2007, Referee McGrath filed his Findings of Fact, Conclusions of Law, and Order awarding permanent spousal maintenance to Wife.¹ (AA. 54-76.)

Husband brought a motion for amended findings and/or a trial before the trial court on January 15, 2008. On March 14, 2008, Referee Kevin McGrath issued an Order denying all but one of Husband’s requests. (AA. 45-53.) Finding of Fact 10 was slightly amended, but the amendment did not alter the ultimate outcome regarding Husband’s spousal maintenance obligation to Wife. (AA. 47-48.)

¹ The trial court also addressed the disputed property issue, but neither party appealed that portion of the trial court’s Order. (AA. 73.)

This appeal followed.²

² Husband filed a Notice of Appeal on May 15, 2008. The November 28, 2007 Order directed that an Amended Judgment and Decree be entered incorporating the Court's Findings of Fact, Conclusions of Law, and Order into an Amended Judgment and Decree. The Amended Judgment and Decree had not been entered and thus, Husband filed a Partial Dismissal of Appeal from the November 28, 2007 Order regarding spousal maintenance only. The Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (hereinafter "Judgment and Decree"), which incorporated all prior orders, including the amendment to Finding 10 of the trial court's November 28, 2007 Order, was entered on June 10, 2008. (AA. 1-44.) Husband then filed a second Notice of Appeal from the November 28, 2007 Order, the March 14, 2008 Order, and the June 10, 2008 Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on June 16, 2008. The two appeals were consolidated.

STATEMENT OF FACTS

This is an action for dissolution of the marriage of Wife and Husband. Wife is 41 years old, having been born on September 19, 1966. (AA. 2.) Husband is 42 years old, having been born on November 8, 1965. Id. The parties were married on November 2, 1985 and separated in January 2006. Id. The parties have three children, two of whom were minors at the time of trial. At the time of trial, the parties' middle child was 17 years old, born May 24, 1990 and their youngest child was 16 years old, born June 25, 1991. (AA. 3.)

Prior to the trial in this matter, custody, child support, attorney's fees, and all but one property issue were settled. (AA. 1.) Under the property settlement, each party was awarded approximately \$2,580,000 in liquid and illiquid assets. (AA. 9.) The parties agreed that they would share legal and physical custody of their two minor children. (AA. 29.) They also agreed to reserve child support. (AA. 38.)

The primary issue presented for resolution at trial was spousal maintenance.³ Husband earned substantial income during the parties' marriage, working in the finance-related industry, with his career culminating as an executive for Metris Companies, Inc. (hereinafter "Metris"). (AA. 9.) Husband is well educated and has been in a finance-related profession for over twenty years. (AA. 9, 239.) He was the Chief Operating Officer of Metris and the President CEO of Direct Merchants Bank, a banking subsidiary

³ The Court also decided Wife's request for a disproportionate division of the marital estate given a large gift to Husband's mother prior to the parties' separation, but neither party appealed that decision. (AA. 39.)

of Metris. (AA. 10.) Husband's historical W-2 earnings for the years 2000 through 2006 were as follows:

2000	\$554,975
2001	\$1,446,194
2002	\$620,684
2003	\$384,413
2004	\$679,004
2005	\$3,173,871
2006	\$2,510,233

(AA. 9.)

Husband's earnings included salary, bonus income, and income earned from exercised stock options. Id. Husband signed a change of control agreement during his employment with Metris. (AA. 11.) This agreement provided that if there was a change in control at Metris and Husband decided to leave, he would receive a substantial lump sum payment in exchange for a one-year non-compete agreement. Id. Metris was acquired by HSBC in December 2005 and all of Husband's stock and stock options were liquidated based on the change of control agreement. (AA. 9-10.) Then in January 2006, Husband left HSBC because the parties jointly decided that it would be beneficial for their family. (AA. 10-11.)

Husband claims that Wife gave him an ultimatum to leave his lucrative employment, but the trial court assessed the parties' credibility on this issue and determined that the evidence supported the conclusion that Husband left his employment

based on a joint decision. Id. Husband attempted to introduce testimony from two former subordinate employees of his at Metris, Robert Young and David Olson, claiming that Husband confided in them regarding Wife's alleged ultimatum. (AA. 53.) This testimony was properly excluded as hearsay. Id. Regardless, the trial court's determination on Husband's departure from HSBC and the reasoning behind his departure had no bearing on its award of permanent spousal maintenance. (AA. 11.)

Husband was subject to a one year non-compete agreement as part of his severance package and was unable to work in the finance-related field until its expiration in January 2007. Id. As part of the severance package and in exchange for the non-compete agreement, Husband received \$1.8 million in separation benefits. Id. These funds were divided between the parties pursuant to the Stipulated Judgment and Decree. Id.

Upon expiration of the non-compete agreement, Husband formed a new consulting business, F.G. Companies, with four other individuals. Id. Two of Husband's business partners are Robert Young and David Olson, Husband's former subordinates during his employment at Metris and the witnesses whose testimony regarding the alleged ultimatum from Wife was excluded by the trial court based on hearsay. (AA. 11, 53.) Husband initially invested approximately \$120,000 of capital into the company, providing him with a 15% ownership interest. (AA. 11.) As an owner of this business, Husband is not receiving any income and may not receive any income for at least two to three years. (AA. 11; T. 181-182.) If the company performs well, he anticipates earning

\$130,000 in gross annual income, but whether he will ever receive any income from this business venture is suspect at best. (AA. 11.)

Husband admitted at trial that if he were to apply for a position in the Twin Cities area, with a salary of \$130,000, he would be denied because he has too much experience. He also admitted that jobs in the \$300,000 range were available, but that he made a decision based on lifestyle to not seek such positions. (AA. 15; T. 457-458.) Between January 2007 and the date of trial in June 2007, Husband had not applied for one position or submitted his resume to any possible employers. (AA. 13-14.) Instead, he chose to pursue a business venture where he will earn no income for at least two or three years or maybe not ever. Id.

Wife had no meaningful earned income during the marriage. (AA. 25.)

Throughout the parties' long term, twenty-plus year marriage, Wife was predominantly a homemaker and the primary caretaker of the parties' three children. (AA. 25-26.) Wife obtained a degree in elementary education, but taught full-time only two non-consecutive years. (AA. 16.) Wife taught first grade at Medicine Lake Lutheran Academy in 1997 and at Rivers Christian Academy in 2003. Id. Her highest annual income earned as a teacher was in 2003-2004 when she earned \$21,000. (AA. 16-17, 25.) After working these two short periods of time, Wife quickly realized that she was needed at home for the children due to Husband demanding career obligations and thus, she terminated her teaching employment and never again worked in any formal capacity as a teacher. Husband admits that Wife did not need to work and that his employment income was sufficient to pay for all of the family's living expenses. (AA. 9, 16, 22.) Wife has

maintained her teaching license, but she did not develop this career or ever engage in meaningful work experience in the area. (AA. 16-17, 25.) Instead, upon the birth of the parties' first child, Wife was primarily a stay-at-home mother and homemaker. (AA. 25-26.)

What Wife did do, after the first child's birth, is maintain the parties' home and raise the children. Id. She performed all of the home maintenance functions around the home and she raised the children while Husband worked. Id. Throughout the marriage, Wife tended to essentially all of the three children's needs. Id. Husband was the breadwinner, and Wife was the caretaker. Id. At trial, Husband did not dispute this characterization of the parties' respective roles during the marriage. Id.

Husband never asked Wife to earn income or develop a professional career outside the home. (AA. 26.) The parties understood and agreed that Husband would have the career, generate the income and manage the investments, while Wife would manage the home and raise the children. Id. When the parties' children were in their teenage years, Wife returned to work. She is the co-owner of a business known as Twin Towers, Inc., doing business as Curves. (AA. 16.) Wife and her business partner, Kelly Gibas, purchased the business in 2004. (AA. 16, 25.) It is undisputed that this business has not been generated significant profit beyond Wife's and Kelly Gibas' salaries and bonuses. (AA. 16.) However, it is not a question of profit earned from the business, rather it is Wife's career and appropriate employment. Wife has worked full-time since the business' inception and receives an annual draw of \$21,600, or \$1,800 per month, plus bonuses of approximately \$3,000 per year. Id.

At trial, Husband argued that Wife should be required to work as a teacher earning approximately \$35,000 to \$40,000 annually, plus benefits. (AA. 17.) The trial court found that such employment was not appropriate for Wife given her business and the fact that she was earning \$24,600 annually, which was more than she ever earned as a teacher at a parochial school. (AA. 17-18.) In addition, Wife had been working full-time through her business since 2004, which is far longer than any other position held by Wife during the parties' marriage. Id. Husband's contention that Wife should work as a teacher was not supported by evidence in the record. (AA. 17.) Under these circumstances, the trial court properly found that such employment would not be appropriate for Wife given the standard of living during the marriage. Id.

Both parties will have income from investments. (AA. 18.) Under the property division, both parties received liquid assets of approximately \$1,528,500, but neither of them have the full amount available for investment purposes. Id. Husband has spent down some of his liquid assets for purchase of his home, investment of capital into his new business, to purchase a \$47,000 boat, to purchase and install a \$26,000 home entertainment system into his home, to purchase a new Lexus vehicle, and to supplement his living expenses, leaving \$1,360,000 available for investment purposes. (AA. 14, 243; T. 312, ll. 12-19; T. 313, ll. 17-23; T. 329, ll. 17-18.) Thus, at a rate of return of 6%, Husband will have annual investment income of \$81,600. (AA. 18.) The parties' stipulated to apply a 6% rate of return to their investments in order to determine their annual investment income. Id. Wife has spent down more of her liquid assets. She invested \$420,000 into her town home and has been paying her living expenses from her

property settlement, leaving \$879,000 available for investment purposes. (AA. 18.)

With a 6% rate of return to Wife's investments, she will have annual investment income of \$52,740. Id. This amount will reduce further as Wife is forced to spend down her assets in order to meet her reasonable marital standard of living budget. Id.

Husband submitted a budget of \$13,406 per month for himself and the minor children. (AA. 14, 280-281.) Husband apportioned \$8,925 for his own expenses and \$4,481 for the children. Id. During Husband's cross-examination, he admitted he had an additional \$567 monthly expense to dock his new \$47,000 boat, a boat that was purchased during the proceedings and not disclosed until then. (AA. 19; T. 329, ll. 17-18.) Thus, the Court found that his budget was at least \$13,973, not \$13,406, which separates out to \$9,492 apportioned for Husband and \$4,481 for the children. (AA. 14.)

Wife submitted a budget reflecting monthly living expenses of \$11,799. (AA. 22, 271-272.) During her trial testimony, Wife agreed that certain expenses should be removed from her budget, such as college expenses for the parties' oldest child and horse-related expenses for the maintenance of the minor children's horse. Id. Wife included the horse-related costs because initially the parties were going to equally share these costs. (AA. 19, 35.) Just prior to trial, the parties agreed that Husband would be awarded the horse valued at over \$30,000 and as a result, would be responsible for the associated costs. The trial court also reduced certain categories of Wife's budget, such as hair/nails/spa and interior décor and furnishings, thereby reducing Wife's budget from \$11,799 to \$9,950. (AA. 23.) Wife supported this budget with her own testimony and

supporting documents, including bank and credit card statements, invoice and expense receipts and expense summaries. (AA. 22.)

Wife also testified and the trial court found that in some respects, this budget was a reduction from the marital standard of living. (AA. 20.) For example, Wife moved into more modest housing. Id. Wife purchased a \$420,000 town home, whereas Husband's new home was purchased for \$725,000. Id. During the last five years of the marriage, the parties owned real estate at any given time worth more than \$1,000,000. Id. At the time of separation, the parties' 6,000 to 7,000 square foot marital home was worth more than \$1,000,000. (AA. 22, 255.) They also owned recreational property in Montana that they sold for \$407,354. (AA. 5, 20.) Prior to that, they owned a cabin in northern Minnesota, which they purchased for \$425,000 cash, in addition to their 4,000 square foot home in Plymouth, Minnesota that they sold for \$485,000. (AA. 20, 255.) The trial court accepted most of Wife's budget but found that a handful of entries were higher than the trial court felt appropriate. (AA. 22.)

Husband disputed Wife's claimed budget, claiming that it did not reflect the parties' marital standard of living. (AA. 19.) Husband attempted to paint a picture that the family lived a frugal, middle-class life, despite his six- and seven-figure income. Id. Husband analyzed the family's spending for the three years immediately prior to the parties' separation: 2003, 2004 and 2005. (AA. 20.) Based on his own analysis of this data, Husband submitted a budget for Wife, claiming that her reasonable standard of living budget was approximately \$6,000. (AA. 21, 268-269.) He suggested this as Wife's budget, even though his own Trial Exhibit 11 showed that the parties spent on

average \$47,000 per month between 2003 and 2005. (AA. 22, 267.) In addition, when all housing-related costs are removed from the total, the parties still spent \$18,840 per month. Id. This is hardly middle class and no where near frugal. (AA. 22.)

Husband started his analysis of Wife's budget with the figure of \$13,000 and then went through each line item and allocated expenses between Wife, himself, the children, or some combination thereof. (AA. 21, 267.) He used a completely subjective method to determine how expenses should be allocated, reduced, increased, eliminated, or kept the same as Wife's own budget figures. (AA. 21.) Husband argued that because he labored over financial documents, his results were credible. Id. However, the trial court found Wife's testimony regarding the marital standard of living to be more credible as Husband's. Id. The end result of Husband's exercise resulted in his conclusion that his Wife of twenty-plus years should be forced to live on only \$6,000 per month, while his own budget for him alone was approximately \$9,500 per month, and \$13,973 for himself and the children. Id. The trial court found that Husband's contention that Wife should live on less than one-half of his budget for himself and the children was not supported by the evidence. Id. It was clear that the parties lived a lavish lifestyle with luxurious assets including: a \$1 million home, recreational property in Montana worth approximately \$400,000, boats, Lexus cars, a \$21,000 car for a child, a horse that costs \$2,000 per month and is worth more than \$30,000, all supporting the trial court's findings regarding the high standard of living the family enjoyed. (AA. 21-22.) The trial court properly found that Wife's marital standard of living budget is \$9,950. (AA. 23.)

The trial court determined that Wife lacks the ability to be self-supporting and that Husband has the ability to pay her an appropriate level of maintenance to allow her to maintain the marital standard of living and meet his own needs. (AA. 23-26.) The trial court considered each of the factors outlined in Minn. Stat. §518.552, subd. 2, and thereafter determined that it is fair and equitable for Husband to pay Wife \$8,000 per month in permanent spousal maintenance. Id. The trial court gave Husband six months from the date of the spousal maintenance order to begin payments so that he could find employment in line with his abilities. (AA. 39.) Because the evidence demonstrated that Wife will never become fully self-supporting, the trial court made the award of maintenance permanent. Id.

ARGUMENT

I. THE DISTRICT COURT PROPERLY AWARDED SPOUSAL MAINTENANCE TO WIFE BASED ON HUSBAND'S ABILITY TO MEET HIS OWN NEEDS WHILE MEETING THOSE OF HIS WIFE OF OVER TWO DECADES.

Standard of Review

The Supreme Court decision in Dobrin, provides the general proposition that the standard of review in spousal maintenance cases is whether the trial court below “abused its discretion by making findings unsupported by the evidence, or by improperly applying the law.” Dobrin v. Dobrin, 569 N.W.2d 199, 202 (Minn. 1997). In fact, the Dobrin Court, in reversing the Court of Appeals’ reversal of the trial court’s maintenance decision, was quite emphatic in its description of the deference afforded trial court decisions in spousal maintenance cases:

As we have stated on many occasions, the trial court has broad discretion in deciding whether to award maintenance and before an appellate court determines that there has been a clear abuse of that discretion, it must determine that there must be a clearly erroneous conclusion that is against logic and the facts on the record.

Id. at 202 (emphasis added) (citing Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984)).

Thus, trial courts have broad discretion in determining the duration and amount of maintenance, and the appellate standard of review is that the trial court's determination must be affirmed unless the court clearly abused its discretion. Erlandson v. Erlandson, 318 N.W.2d 36, 38 (Minn. 1982); Gales v. Gales, 553 N.W.2d 416, 423 (Minn. 1996).

This discretion in maintenance cases is “wide” and the standard of review is “accordingly narrow.” O’Brien v. O’Brien, 343 N.W.2d 850, 852 (Minn. 1984).

Similarly, findings of fact must be upheld unless they are clearly erroneous. Minn. R. Civ. P. 52.01; Gessner v. Gessner, 487 N.W.2d 921, 923 (Minn. Ct. App. 1992). A finding is clearly erroneous only if the reviewing court is “left with the definite and firm conviction that a mistake has been made.” Gjovik v. Strope, 401 N.W.2d 664, 667 (Minn. 1987). In addition, simply because the record might support findings other than those made by the trial court, does not show that the court’s findings are defective. *See* Vangsness v. Vangsness, 607 N.W.2d 468, 474 (Minn. Ct. App. 2000).

The trial court’s findings are fully supported by the evidence and the record and as there was no error in application of the law, there was no abuse of discretion.

Husband appeals the trial court’s order because he has been ordered to support his Wife of over two decades by paying her spousal maintenance so that she can live in close approximation to the marital standard of living. The trial court thoroughly examined

Wife's reasonable needs and determined that her marital standard of living budget was \$9,950 per month. (AA. 22-23.) The trial court then analyzed the other Minn. Stat. § 518.552, subd. 2 factors, and found that Husband has the skills, talent and experience to earn \$300,000 per year, which would allow him to meet his own needs and those of his Wife. (AA. 15, 24.) Husband claims that the trial court abused its discretion and applied the wrong legal standard in finding that he has the general ability to earn \$300,000 per year. As will be thoroughly discussed herein, the trial court's award of spousal maintenance is fully supported by the evidence and there was no abuse of discretion. In addition, the trial court analyzed the current case law in conjunction with the plain language of the spousal maintenance statute, Minn. Stat. § 518.552, subd. 2., and therefore did not apply the wrong legal standard. The trial court's order must be affirmed.

Spousal maintenance is an award of "payments from the future income or earnings of one spouse for the support and maintenance of the other." Minn. Stat. § 518.003, subd. 3a. Consideration of an award of maintenance requires a balancing of the recipient's need against the obligor's financial condition. Crosby v. Crosby, 587 N.W.2d 292, 298 (Minn. Ct. App. 1998) (citing Erlandson v. Erlandson, 318 N.W.2d 36, 39-40 (Minn. 1982)). The essential consideration in the award of maintenance is the financial need of the party receiving maintenance and her ability to meet that need balanced against the financial condition of the spouse providing the maintenance. Maeder v. Maeder, 480 N.W.2d 677, 679 (Minn. Ct. App. 1992). Here, Husband earned substantial income during the parties' marriage, ranging anywhere between \$384,413 and

\$3,173,871 during the parties' last seven years of marriage and averaging \$1,338,374 per year in annual income between 2000 and 2006. (\$9,369,374 total income for 2000 through 2006 / 7 years = \$1,338,482 average per year) (AA. 9.)

Maintenance is to be granted if the party seeking maintenance lacks sufficient income (from appropriate employment or property) to provide for her reasonable needs considering the standard of living established during the marriage. Minn. Stat. §518.552, subd. 1. Indeed:

[A] maintenance obligor has a duty, to the extent equitable under the circumstances, to support the maintenance recipient at the marital standard of living.

Peterka v. Peterka, 675 N.W.2d 353, 359 (Minn. Ct. App. 2004) (emphasis added). Thus, to determine whether Wife is entitled to maintenance, the trial court below looked at Wife's income and her reasonable budget, in light of the marital standard of living, to determine whether Wife needed maintenance. Finding that she did, the Court then applied the factors outlined in subdivision 2 of Minn. Stat. §518.552 to determine the amount and duration of maintenance and Husband's ability to provide such support, while meeting his own needs. In the absence of certainty that Wife will someday become fully self-supporting at the marital standard of living, the Court was required to, and did, award permanent maintenance. Minn. Stat. §518.552, Subd. 3.

Husband goes so far as to argue that the trial court misapplied and stretched Minnesota law by finding that bad faith need not be found for spousal maintenance obligors when looking at a party's ability to earn income and that the court "radically" extended Minnesota case law, creating the " 'perfect storm' by imputing phantom

income” to him without sufficient evidentiary support. (Husband’s Brief, p. 16.)

Husband is wrong. The trial court’s finding that Husband has the ability to meet his own needs and pay spousal maintenance to his Wife of twenty-plus years so that she is able to live in close approximation to the marital standard is fully supported by the evidence in the record and the findings are not clearly erroneous. Husband cannot deny his earnings history. In fact, he does not dispute any of the evidence upon which the trial court relied in finding that he has the ability to pay his own expenses and those of Wife. Husband simply does not agree with the court’s legal analysis. Husband argues that there is no basis in law for the trial court’s award of maintenance to Wife and that the trial court incorrectly analyzed the law.

The trial court properly found that Husband has the ability to earn \$300,000, based on his ability, skills, experience, and earning capacity. (AA. 15.) In a dissolution action, a finding that a party has the ability to meet needs by full-time employment is not an “imputation of income.” See Rauenhorst v. Rauenhorst, 724 N.W.2d 541, 544 (Minn. Ct. App. 2006); Schallinger v. Schallinger, 699 N.W.2d 15, 17 (Minn. Ct. App. 2005).⁴

While “imputation of income” is a method of establishing self support, it is not the only way a court can find that a party has the ability to meet needs. Id.

⁴ Wife recognizes that in order for a court to “impute income” to a spousal maintenance obligor or obligee, it must first make a finding of bad faith underemployment or unemployment. See Carrick v. Carrick, 560 N.W.2d 407 (Minn. Ct. App. 1997); Bourassa v. Bourassa, 481 N.W.2d 113 (Minn. Ct. App. 1991). At the time of trial, Wife recognized that a finding of bad faith at that point in time would be difficult and did not argue for such a finding. (AA. 12.) However, pursuant to Minnesota law, Wife sought a finding that Husband had the ability to earn income commensurate with what he earned during the marriage. Id.

The Rauenhorst Court held that finding bad faith is not a prerequisite to finding that a party has the ability to earn more income and to meet the party's needs by full-time employment, provided that "imputation" language is not used. *See* 724 N.W.2d 541. In Rauenhorst, the trial court found that the party had supported herself for much of her adult life, was capable of supporting herself and had the ability to meet her needs, and thus there was no need for a finding of bad faith. *Id.* In Schallinger, the Court found that the party seeking maintenance had the ability, skills, experience, and earning capacity to meet her necessary monthly expenses and her choice not to seek full-time employment did not mean that she lacked the ability to be self-supporting. 699 N.W.2d 15, 22. There was no finding of bad faith underemployment or unemployment, rather the trial court's findings regarding the ability to meet her needs simply reflected the party's general ability to be self supporting. *Id.*

In this case, Husband has the ability to meet his own needs and those of Wife. He is educated and highly trained in the financial-related industry. (AA. 9.) Husband needs no additional training or education to obtain employment in the field in which he has worked since 1989. Husband's choice not to seek employment for which he would be compensated an amount equivalent to what he earned during the marriage does not mean that he lacks the ability to obtain such employment and support both his Wife of over two decades and himself in line with the marital standard of living. It is clear beyond any dispute that Husband has the general ability to meet his own needs and those of Wife commensurate with their marital standard of living, as found by the trial court.

Husband contends that these two cases relate only to the spousal maintenance obligee, and not to the obligor. He does not disagree with this Court's analysis regarding an obligee's "ability" to meet her needs independently. (Husband's Brief, p. 18.) In fact, Husband agrees that this Court properly upheld the trial court decisions in both the Rauenhorst and Schallinger, clarifying that the trial court did not "impute" any specific amount of income but simply reflected Wife's ability to be self-supporting. *See* Rauenhorst v. Rauenhorst, 724 N.W.2d 541, 544; Schallinger v. Schallinger, 699 N.W.2d 15, 17. While Husband agrees with this Court's ruling that a spousal maintenance obligee's "abilities" should be taken into consideration when determining spousal maintenance, he does not think that he should be subject to the same standard even though he was the breadwinner and primary, if not sole, source of income during the marriage. Husband seeks a reversal of the trial court's ruling, which would force his Wife of twenty-plus years to deplete her marital assets in order to pay for her living expenses.

Similar, or in some cases the same, standards apply to both the obligor and obligee for purposes of calculating a spousal maintenance award. Both a spousal maintenance obligor and obligee may have income imputed to them if a court makes a finding of bad faith. *See* Carrick v. Carrick, 560 N.W.2d 407. In addition, the language used by the Rauenhorst and Schallinger courts addresses the "ability" of the obligee to meet needs independently and took into consideration earning ability. *See* Minn. Stat. § 518.552, subd. 2 (a); *see also* Rauenhorst, 724 N.W.2d 544; Schallinger, 699 N.W.2d 17. Within

the same statute, Minn. Stat. § 518.552, subd. 2 (g), identical language is used with regard to the “ability” of the obligor to meet needs while meeting those of the obligee.

The trial court acknowledges that there is no appellate case law that bases an award of maintenance on the maintenance obligor’s “ability” to meet the payor’s needs while meeting those of the spouse. (AA. 12.) But Minnesota law instructs trial courts to look to the plain language of the statutes when making application of the law to the facts presented at trial. Minn. Stat. § 645.16. The trial court thoroughly analyzed the plain language of the spousal maintenance statutes and, in conjunction with the cases of Rauenhorst v. Rauenhorst and Schallinger v. Schallinger, determined that a spousal maintenance obligor’s ability to meet his own needs while meeting those of the obligee could be a basis for setting spousal maintenance. 724 N.W.2d 541 (Minn. Ct. App. 2006); 699 N.W.2d 15 (Minn. Ct. App. 2005). Given that the same language is used for both the obligee and obligor in the spousal maintenance statute, the same standard applies to obligors.

Again, Husband earned substantial income during the parties’ marriage. Husband’s own Trial Exhibit 21 reflects that his historical average bonus was approximately \$600,000 and the historical average received via restricted stock and options was \$150,000, all in addition to his base salary, which was \$365,000 in 2005. (RA. 39.) Husband’s own exhibit illustrates that he was earning on average over \$1 million per year in income as an executive in the finance-related industry. Id.

Why should the same standard regarding “ability” not be applied to both the spousal maintenance payor and recipient? It would be illogical to allow Husband to

refrain from earning any income and avoid supporting his Wife of over twenty years, especially in light of the facts in this case, where Wife was the primary caretaker of the children and primarily a stay at home parent who maintained the home and children while Husband was the bread-winner and earned the income to pay for the family's expenses. Husband was the party who worked during the whole of the marriage, not Wife. If a court is able to find that an obligee has the "ability" to meet her own needs independently through employment and thus, either deny the obligee's request for maintenance or order it at a lesser level than requested, why should the spouse who worked throughout the marriage be allowed to refrain from earning any income when that was not the practice during the marriage?

It is undisputed that Husband is highly motivated and has extensive finance-related professional experience, working in the finance-related field since 1989. Husband does not deny that he could obtain employment comparable with his earnings at Metris, rather he argues that in order to do so, he would need to relocate to the east coast. (AA. 15.) However, other than Husband's own testimony, he provided no evidence to support this assertion. Id. Husband admitted that he had not submitted even one employment application and had not sent out his resume to any prospective employers between the time when the non-compete agreement expired in January 2007 and the time of trial in June 2007. (AA. 13-14.) Husband testified that if his new business venture, FG Companies, begins making money, he will earn \$130,000 in annual gross income. (AA. 11.) However, when asked whether he has sought employment in the Twin Cities area where he would be paid at the annual rate of \$130,000, Husband stated that he was

advised that he was overqualified for any such positions. (T. 457-458). It should be noted that what Husband hopes to earn is only one-tenth the amount of what he earned on average (approximately \$1.3 million) during the parties last seven years of marriage.

Husband also argues that because the language of Minn. Stat. § 518.552, subd. 2, has not changed since 1978 and the cases requiring a bad faith underemployment or unemployment finding for imputation of income were decided after 1978 and have been in place for quite some time, that the trial court's analysis of the statutory language cannot justify the ruling that it made. This argument makes no sense.

The spousal maintenance statutory language has been in effect since 1978, but that does not mean that Husband is not subject to the same standard as a spousal maintenance obligee with regard to "ability" to meet needs. Minnesota case law guides us in determining the proper standards for both obligors and obligees and not all cases and standards have been in place since 1978, case law is in a constant state of change and Husband cannot deny that. The first and primary cases that addressed the bad-faith requirement for imputation of income to spousal maintenance obligors recipients were not decided until 1986, 1989, and 1992. *See Bourassa v. Bourassa*, 481 N.W.2d 113, 116 (Minn. Ct. App. 1992); *Warwick v. Warwick*, 438 N.W.2d 673, 677-678 (Minn. Ct. App. 1989); *Doherty v. Doherty*, 388 N.W.2d 1, 3 (Minn. Ct. App. 1986). The same bad faith standard for spousal maintenance payors was extended to spousal maintenance recipients in 1997. *See Carrick v. Carrick*, 560 N.W.2d 407, 410.

If Husband's contention were true, then Schallinger and Rauenhorst would not have been decided as they were and there would never be any changes to legal standards.

Schallinger, 724 N.W.2d 541; Rauenhorst, 699 N.W.2d 15. For example, the standard of bad faith underemployment would not have been extended from spousal maintenance obligors to obligees. Husband agrees with this Court's rulings on Rauenhorst and Schallinger even though those cases were not decided until 2006 and 2005, respectively. (Husband's Brief, p. 18.) Husband is contradicting himself because if he truly stood behind his argument, then it would be his contention that the obligees in both cases could not have their "ability" to be self supporting considered by the Court without first finding bad faith underemployment or unemployment.

Husband also argues that if this Court extends the Rauenhorst and Schallinger standard to maintenance obligors, that this will affect obligors when they retire, claiming that obligors could not retire without being held to his or her "ability" to earn. The case law is well established with regard to the standard applied in determining whether an obligor has retired in good faith. *See In Re the Marriage of Richards*, 472 N.W.2d 162 (Minn. Ct. App. 1991). Husband, again, is wrong. This is not a case where Husband's retirement is a consideration for the Court. Husband is only 42 years old and is no where near retirement and the trial court finding that Husband has the ability to meet his own needs while meeting those of his Wife under Rauenhorst, Schallinger, and Minn. Stat. § 518.552, in the instant case would not necessarily apply to a case in which the obligor is retiring in good-faith retirement. The facts in this case and those that a court considers when determining whether an obligor has retired in good-faith are completely different.

Husband also claims that the trial court created a double standard by criticizing Husband for his employment plan, but not doing the same to Wife. Husband argues that

Wife abandoned her teaching career to start a Curves business, but fails to acknowledge that Wife taught school only two full school-years during twenty-plus years of marriage, with the last year of teaching occurring in 2003-2004. Following Wife's last year of teaching, she purchased her business with a business partner. Wife, with Husband's approval, infused marital funds into her business and she has maintained this employment, earning the same income that she earned during the marriage. (AA. 16-18.) Wife was not employed outside the home during the most of the parties' marriage and her longest duration of outside employment was with Curves from 2004 through the dissolution of the parties' marriage. Id.

Husband is the spouse who worked throughout the entire marriage, but now he claims that he should be able to avoid supporting his former Wife because he has chosen to start a new business where he is earning no income, and the possibility of earning income in the future is suspect. Plus, the amount that he hopes to earn in two to three years is approximately one-tenth of that which he earned on average between 2000 and 2006. If spousal maintenance obligors were allowed to make such employment choices so that they would avoid paying any support to their spouse of over twenty years, an injustice would occur. The double standard that Husband speaks of would occur if spousal maintenance obligors could avoid providing support for their spouse if there was no showing of bad faith, but obligees could be denied maintenance based on a finding that one's skills, abilities, and capabilities can be considered by the court in determining whether an obligee is able to be self-supporting.

Husband also claims that if this Court affirms the trial court's decision, it will create situations where an obligor is penalized for changing employment. He then cites examples to support his argument, such as a private practice attorney changing employment to become a judicial officer or a physician who leaves private practice to serve in a small rural area being held to their prior earned income in determining maintenance. Husband provides these examples to sway this Court in determining whether spousal maintenance obligors on the whole should be held to the same standard as obligees.

In general, there is no legal standard that applies to all cases across the board with the same degree of fairness and reasonableness to each and every case. As clearly articulated by the Minnesota Supreme Court case of Dobrin, each marital dissolution proceeding is "unique and centers upon individualized facts and circumstances of the parties and that, accordingly, it is unwise to view any marital dissolution decision as enunciating an immutable rule of law applicable in any other proceeding" *See Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997). Legal standards are established as general rules to be applied to a given fact scenario. If, for example, an attorney at a private firm wishes to become a judicial officer and, as a result, take a reduction in pay, the court has the discretion, given the specific facts and circumstances of that case, to determine whether such a change is appropriate.

In addition, one could craft examples where it would seem unfair for an obligee to have spousal maintenance either reduced or denied based on their ability to be self-supporting based on their skills and abilities. For example, the wife was an architect

when the parties married, but then the parties had a autistic child and as a result, the wife stayed home with the child for the next five years of the marriage based on the parties' joint decision. Then, when the parties divorced, a court found based on Schallinger and Rauenhorst that the wife had the ability to earn her prior income and thus, denied her spousal maintenance claim. This could be an example where the court would exercise its discretion given the unique facts and circumstances and find that Wife did not have the ability to be self supporting.

The trial court found that Husband has the ability to earn \$300,000 annually. (AA. 15.) The Court based this finding on the evidence presented, and Husband's skills, talent, and experience. Id. Husband admitted that jobs paying \$300,000 annually were available and he presented as a well-educated, highly trained and experienced professional capable of earning far more than \$130,000, the amount which according to his own testimony, he may or may not earn for two to three years, if at all. Id.

The trial court recognized that Husband would need time to find employment where he could earn the income he has the ability to earn and, as a result, spousal maintenance payments were not required until six months from the date of the trial court's order. (AA. 39.) *See Wickhem v. Wickhem*, 2007 WL 2993819 (Minn. Ct. App. Oct. 16, 2007).⁵ In Wickhem, the court relied upon Schallinger v. Schallinger, and found that the obligee had the ability to be self supporting and found that a period of six months would be a sufficient amount of time for her to find such employment. Id. In this matter,

⁵Pursuant to Minn. Stat. § 480A.08 (3), a copy of this unpublished case and other unpublished cases cited herein are attached. Unpublished opinions of the Court of Appeals are not precedential, but may provide examples of other fact scenarios. Id.

Husband had six months following issuance of the order to find employment commensurate with that which he earned during the marriage. (AA. 39.) In reality, Husband's "ability" as determined by the trial court is actually far less than what Husband earned during the marriage, but allows him to meet his own needs and those of his Wife.

Husband insists that he should be allowed to earn no income for at least two to three years, even though he made no less than \$384,000 between the years of 2000 and 2006 and averaged an annual income of approximately \$1.3 million, forcing his wife to spend marital assets in order to meet her reasonable monthly budget. (AA. 9.) He also claims that if the trial court's ruling is affirmed, the result would be inequitable for spousal maintenance obligors. To the contrary, if the trial court's ruling is not affirmed, an inequitable result will be created for spousal maintenance recipients, whereby maintenance may be denied or set at a reduced amount based on the recipient spouse's "ability" to meet their needs independently, even when they did not necessarily work during the marriage at the level to which the court has found they have the "ability" to meet their own needs; whereas the obligor, who worked throughout the entire marriage is allowed to earn no income and force his ex-spouse to share in his choice, thereby requiring her to spend down her marital assets to pay for her reasonable living expenses.

The trial court's findings are fully supported by the evidence on the record and should be affirmed. Husband's arguments to achieve this unfair result are unsupported in law and fact, and should be rejected by this Court on appeal. The lower court did not

abuse its broad discretion, reach conclusions against logic, or make findings unsupported by evidence, and its decision must therefore be affirmed.

II. WIFE'S BUDGET, AS FOUND BY THE DISTRICT COURT AND AS ESTABLISHED BY EVIDENCE IN THE RECORD, IS CONSISTENT WITH THE MARITAL STANDARD OF LIVING AND THUS, THE TRIAL COURT'S BROAD DISCRETION SHOULD BE AFFIRMED.

Standard of Review

Because Husband is challenging the trial court's findings regarding Wife's marital standard of living budget, as it relates to an award of spousal maintenance, the same general standard of review applies. The standard of review in spousal maintenance cases is whether the family court below "abused its discretion by making findings unsupported by the evidence, or by improperly applying the law." Dobrin v. Dobrin, 569 N.W.2d 199, 202 (Minn. 1997). In fact, the trial court has broad discretion in deciding whether to award maintenance and before determining that there has been a clear abuse of that discretion, this Court must determine that there must be a clearly erroneous conclusion that is against logic and the facts on the record. Id. at 202 (emphasis added); *see also* Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984). The appellate standard of review is that the trial court's determination must be affirmed unless the court clearly abused its discretion. Erlandson v. Erlandson, 318 N.W.2d 36, 38 (Minn.1982); Gales v. Gales, 553 N.W.2d 416, 423 (Minn. 1996). Further, findings of fact must be upheld unless they are clearly erroneous, which means that the reviewing court is convinced that a definite mistake has been made. Minn. R. Civ. P. 52.01; Gessner

v. Gessner, 487 N.W.2d 921, 923 (Minn. Ct. App. 1992); Gjovik v. Strobe, 401 N.W.2d 664, 667 (Minn. 1987).

Husband's arguments for the trial court's reversal of its findings regarding the marital standard of living are unfounded in law and fact and must be rejected by this Court.

Husband is not mistaken in his recitation of the general law surrounding the issue of spousal maintenance. Spousal maintenance is, in fact, need-based and if there is no need, then it is error to award spousal maintenance. Sefkow v. Sefkow, 427 N.W.2d 203, 216 (Minn. 1988). Furthermore, in determining one's need for spousal maintenance, one of the important factors to be considered is the standard of living established during the marriage. See Minn. Stat. S 518.552, subd. 1. The cases of Chamberlain v. Chamberlain and Prange v. Prange provide that spousal maintenance is set so that the obligee can continue to live in close approximation to the standard of living that the obligee experienced during the marriage. Chamberlain v. Chamberlain, 615 N.W.2d 405, 409-11 (Minn. Ct. App. 2000); Prange v. Prange, 437 N.W.2d 69, 71 (Minn. Ct. App. 1989). Husband clearly does not want Wife to continue to live "in close approximation to the standard of living she had during the marriage." Prange v. Prange, 437 N.W.2d at 71. Rather, as will be discussed below, Husband seeks an order requiring his Wife of over two decades to live a far diminished lifestyle in comparison to the marital standard of living.

The trial court determined Husband's spousal maintenance obligation on the basis of Wife's needs, considering the marital standard of living and Wife's own resources available for self support. The findings and conclusion are neither against logic nor an

abuse of discretion, and should be affirmed by this Court. Husband argues that the trial court awarded an amount of maintenance based on a budget that does not reflect the marital standard of living. The evidence and the trial court's findings do not support this claim.

Husband challenges the trial court's findings regarding the parties' marital standard of living and Wife's monthly budget. The trial court's findings on these issues are supported by the evidence and should be affirmed. Husband is dissatisfied with the trial court's Findings because the trial court found that he was not as credible credible and that Wife's budget, with several downward adjustments, was more realistic given the testimony heard and evidence adduced relating to the marital standard of living. (AA. 21.) The evidence considered by the trial court in determining the marital standard of living included Husband's own Trial Exhibit 7. (AA. 267.)

Husband essentially creates his own legal standard for determination of the marital standard of living by arguing that the:

standard, correct practice is to determine the standard of living in the recent years prior to the commencement of a dissolution proceeding, when a party or the parties may live at a standard(s) which is or are greatly different than that established during the marriage.

(Husband's Brief, p. 38.) Although this may be one method used by a party to help demonstrate a marital standard of living, it is certainly not the only method used.

Wife used a different method for analyzing the marital standard of living. Husband claims that she completed no analysis simply because she did not complete her analysis in the same manner as him. Husband is wrong. It is undisputed that Husband

maintained the parties' financial records during the marriage. (AA. 20.) As Husband testified, he kept Quicken records and input data from credit card and bank statements in order to track the parties' spending and finances. Id. This is the data upon which Husband relied in completing what he suggested to be Wife's marital standard of living budget. (AA. 20-21.) Wife had no direct knowledge regarding whether Husband's record-keeping was accurate and did not have access to it. (AA. 22.) Thus, she completed her analysis as best as possible under the circumstances.

Wife and Husband were married for over twenty years. During those twenty-plus years as a stay at home parent and housewife, Wife bought her own clothes and clothes for the family, she bought the family groceries, filled her car with gas, purchased cleaning products, and paid for her own dining out and entertainment. Upon separation, Wife continued to live the same lifestyle that she experienced during the marriage and spent in the same manner. Id. The financial data that Wife gathered following separation merely supported Wife's figures within her budget, as she lived her life in the same manner as she had prior to separation. Id. Wife credibly testified to this. Id. Husband claims that simply because Wife could not quantify in exact dollar amounts what she spent on her clothing or personal dining in 2005, that she is not credible. (Husband's Brief, pp. 44-45.) If the courts handled all spousal maintenance cases in this way, then only spouses who maintained financial programs during the marriage would be found as credible witnesses regarding marital standard of living and the trial court's credibility determinations of both spouses' accountings of the marital standard of living would not be necessary.

Husband goes on to argue that the cases of Duffey v. Duffey, Erickson v. Erickson, and Bergeland v. Bergeland, all support his contention that because Wife relied upon her post-separation expense information as a part of her analysis of the marital standard of living, that her analysis should be rejected by the court. *See* Duffey v. Duffey, 432 N.W.2d 473 (Minn. Ct. App. 1988); Erickson v. Erickson, 2002 WL 206736 (Minn. Ct. App. Feb. 12, 2002); and, Bergeland v. Bergeland, 2000 WL 1239754. The facts of all three cases are absolutely distinguishable from the facts in this case.

Husband contends that Bergeland and this case are very similar to one another and cites it for the standard that district court is required to consider the standard of living that occurred “during the marriage not just at the time of separation or dissolution.” Bergeland v. Bergeland, 2000 WL 1239754 (Minn. Ct. App. Sept. 5, 2000). Husband is wrong, these cases are not similar to one another. In Bergeland, the wife submitted a budget of \$19,000 per month as her temporary budget and one of \$23,000 per month as her trial budget. *Id.* The trial court compared the expenditures category by category and found that the wife had inflated her needs. *Id.* What Husband fails to recognize is that the trial court’s finding of inflation in Bergeland was also due, in large part, to the fact that the parties’ average spending for the four years prior to trial was \$16,507 per month. *Id.* Thus, the wife’s claimed needs at trial for herself alone were \$2,500 to \$6,500 more than the average spending for both parties. *Id.* In this case, Husband’s own Exhibit 11 showed that the parties spent on average \$47,000 per month during the period of 2003 through 2005. (AA. 22, 267.) Here, the trial court properly found that Wife’s marital standard of living was \$9,950. (AA. 23.) Clearly, these cases are factually dissimilar

from one another and should not be considered by this reviewing court in Husband's quest to reverse the trial court's finding regarding marital standard of living.

Husband also cites the unpublished decision of Erickson v. Erickson as support for his argument that Wife's analysis of the marital standard of living should be rejected. *See Erickson v. Erickson*, 2002 WL 206736. Husband is accurate in the statement that the Erickson court rejected the wife's monthly expenses and found that she provided inadequate pre-separation documentary evidence to support her claimed expenses, but he completely ignores the fact that the court also found the husband's testimony concerning the parties' standard of living to be more credible. Id. There is absolutely no discussion that the husband provided any documentary evidence and if so, what evidence he submitted other than testimony. Id. Erickson does not support Husband's claim.

The trial court found Wife's testimony about her expenses to be more credible as Husband's, a fact that Husband ignores in his argument to this Court. Reviewing courts generally affirm district court's credibility determinations, because the district court is in the best position to assess the witness. Sefkow v. Sefkow, 427 N.W.2d 203, 210. (Minn. 1988). Husband chastises Wife for analyzing the marital standard in a different way from him, essentially claiming that his way is the only proper way to establish the marital standard of living. The trial court did not agree with him. Wife's testimony and documentation supporting her budget were accepted by the trial court due, in part, to the fact that Husband kept the financial records during the marriage and also after the Court ascertained the parties' credibility. (AA. 21-22.) It is certainly within the Court's

discretion to determine credibility, especially when Husband and Wife were the only witnesses to testify on their expenses and the marital standard of living.

The trial court found that most of Wife's budget was reasonable and consistent with the marital standard of living. (AA. 22.) The Court even noted that Wife had reduced her claimed expenses and lifestyle in some respects to below the marital standard of living. Id. The Court did reduce some of Wife's claimed budget items as well, items that Wife conceded to reducing and those reduced after the trial court's credibility determinations and review of the evidence. (AA. 23.) Husband's attempt to sway the trial court to believe that the parties were middle class instead of upper class did not bode well given the lavish lifestyle the parties experienced, including a \$1 million home, recreational property worth more than \$400,000, boats, Lexus cars, a \$21,000 car for their child, and a horse worth more than \$45,000 which costs \$2,000 per month to maintain. (AA. 20-21.) Husband admits that the family spent an average of \$47,000 per month in the years 2003 to 2005, this evidence came directly from Husband's own Trial Exhibit 11. (AA. 21, 267.) After deducting the housing-related costs, the parties still spent \$18,840 per month, but Husband proposed a frugal and indeed, an insulting budget of only \$6,000 for his Wife of over twenty years. Id. In addition, Husband's failure to include his \$567 per month boat docking (and new boat) that was elicited through cross-examination damaged his credibility. (AA. 19.)

Duffey v. Duffey also does not support Husband's argument. Duffey v. Duffey, 432 N.W.2d 473. In Duffey, the trial court found that wife had greatly increased certain expenses after the parties separated in contrast to their frugal lifestyle during the

marriage. Id. The trial court specifically found that they did not live a lavish, extravagant lifestyle, rather they were relatively frugal, driving older vehicles and taking only one vacation to the husband's parents home in Palm Springs, whereas following separation, the wife participated in world-wide travel. Id. This case provides no help to Husband. Here, the trial court specifically found that the parties live an upper class lifestyle that included significant spending for real estate, travel, clothing and personal items, spending approximately \$47,000 per month on living expenses. (AA. 19-20, 22.) Clearly, these parties did not live a frugal lifestyle so that Wife's expenses herein reflected a substantial difference. (AA. 22.)

Husband continues to attack Wife's budget, even the figures Wife agreed to reduce at the commencement of her testimony. Husband argues that the category for home furnishings submitted by Wife was high, but the trial court reduced that budget item and adjusted Wife's budget accordingly. (AA. 23.) The trial court carefully reviewed the evidence and made judgments on credibility, ultimately finding Wife's reasonable marital standard of living budget to be \$9,950 per month. Id. This number is supported by Husband's own evidence that the family spent approximately \$19,000 per month, exclusive of housing-related costs, during the years 2003 through 2005. (AA. 22, 267.)

Husband's arguments on appeal for reversal of the trial court's findings regarding marital standard of living are unfounded both in law and fact and should be rejected. The amount and duration of maintenance awarded by the family court, while less than that sought by Wife, is likely sufficient to allow Wife to meet (but certainly not exceed) the

marital standard of living as found by the Court. Given its wide discretion in determining maintenance, combined with its compliance with existing law and support in the evidence, the trial court's award of maintenance should not be disturbed on appeal.

III. THE DISTRICT COURT'S EXCLUSION OF A PORTION OF TESTIMONY FROM HUSBAND'S TWO WITNESSES, DAVID OLSON AND ROBERT YOUNG, WAS NOT AN ABUSE OF DISCRETION, NOR DID SUCH EXCLUSIONS RESULT IN PREJUDICE TO HUSBAND.

Standard of Review

Husband argues that he is entitled to a new trial because the trial court abused its discretion by excluding a portion of the testimony from his two witnesses, David Olson and Robert Young, based on hearsay. Husband correctly states the general standard of review with regard to denial of a motion for a new trial; a trial court's denial of a motion for a new trial generally will not be disturbed on appeal absent a clear abuse of discretion. See Stoebe v. Merastar Insurance Company, 554 N.W.2d 733, 735 (Minn. 1996); Dostal v. Curran, 679 N.W.2d 192,194 (Minn. Ct. App. 2004). Husband also properly recites that when a motion for a new trial is based on a question of law, the district court's conclusions do not bind an appellate court and the appellate court need not give deference to the district court's decision. Stoebe v. Meratar Insurance Company, 554 N.W.2d at 725.

However, Husband fails to recognize that the standard of review for denial of a motion for a new trial depends on the standard of review for the underlying legal error alleged. Errors in the admission or exclusion of evidence may support a motion for a new trial, but the appellate court will reverse a trial court's ruling on the admissibility of

evidence only if the trial court abused its discretion and that abuse of discretion resulted in the prejudice to the objecting party. May v. Strecker, 453 N.W.2d 549, 554 (Minn. Ct. App. 1990). The unpublished decision of Longbehn v. City of Moose Lake discussed the different standards. Longbehn v. City of Moose Lake, 2005 WL 1153625 (Minn. Ct. App. May 17, 2005) (*compare* Dostal v. Curran, 679 N.W.2d 192 with Myers v. Winslow R. Chamberlain Co., 443 N.W.2d 211 (Minn. Ct. App. 1989)). Therefore, Husband must show that the trial court abused its discretion and that the abuse in discretion resulted in a prejudice to him. Evidentiary rules require a case-by-case analysis, which analysis should be left to the trial court familiar with the circumstances of the case. Benson v. Northern Gopher Enter, 455 N.W.2d 444, 446 (Minn. 1990).

The testimony of Husband's two witnesses was properly excluded as hearsay and regardless, there was no prejudice to Husband.

Husband produced two witnesses, his former subordinates at Metris and his current business partners at FG Companies, in order to testify as to the reasons why Husband left HSBC, stating that Wife gave Husband an ultimatum to leave his \$1 million job or she would leave him. (AA. 10, 47, 53.) The trial court properly excluded both witnesses from testifying with regard to this issue based on hearsay.⁶ Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801 (c).

⁶ Husband made an offer of proof with regard to both Mr. Olson and Mr. Young, and thus, what their testimony would have been if the trial court had admitted their testimony is known. (T. 163, l. 24 - 165, l. 24; 168, l. 18 - 169, l. 24.)

Husband alleged during his trial testimony that Wife gave him an ultimatum in late December 2005, requiring him to leave HSBC or she would leave him. (AA. 10.) Wife credibly testified that the parties made a joint decision for Husband to leave HSBC. (AA. 10-11.) The trial court assessed the parties' testimony and found Wife's recollection more credible. Id. Regardless, and as acknowledged by the trial court, the circumstances of Husband leaving his employment was not relevant to the issue before the court regarding spousal maintenance and in fact, Husband was attempting to bring fault into this matter, which is barred by the legislature. Id.

Husband attempts to persuade this Court that the testimony was offered to corroborate Husband's testimony and bolster his credibility and thus, is non-hearsay as defined in Minn. R. Evid. 801 (d) (1) (B). Husband produced these two witnesses in order to testify regarding why he left HSBC, claiming that he told them that Wife gave him an ultimatum. Id. Husband produced these two witnesses to prove that the conversation between Husband and Wife took place and the substance of such alleged conversation. Thus, it is offered to prove the truth of the matter asserted and is clearly hearsay.

This testimony was not introduced to bolster Husband's credibility with regard to why he left HSBC, as it was not an issue that the trial court found relevant. There was no allegation that Husband left HSBC in bad faith or against Wife's objection. (AA. 12.) Wife agreed that it was a joint decision, but Husband's goal was to inject fault into this proceeding. (AA. 10.) In addition, the rules make it clear that the trial court has the discretion to control the mode and order of presenting evidence and to exclude

cumulative evidence. *See* Minn. R. Evid. 801 (d) (1) - Committee Comment - 1989; Minn. R. Evid 611; Minn. R. Evid. 403. In addition, mere proof that the witness repeated the same story in and out of court does not necessarily bolster credibility. *See* Minn. R. Evid. 801 (d) (1) - Committee Comment - 1989. The trial court properly excluded their testimony, as it was undoubtedly hearsay and its exclusion was well within the trial court's discretion.

Husband also claims that the excluded testimony was non-hearsay because the statement was Husband's "present sense impression" made contemporaneously with the event or immediately thereafter. Minn. R. Evid. 801 (d) (1) (D). This definition of non-hearsay requires that the statement be made "while the declarant [Husband herein] was perceiving the event or condition or immediately thereafter." *Id.* It is clear that Husband did not make this statement to his former subordinates contemporaneously with the event, as both parties agree that they were the only parties present during the discussion regarding Husband's departure from HSBC. (AA. 10-11.)

Further, there is absolutely no evidence in the record to suggest that Husband told his former subordinates about this alleged discussion "immediately thereafter." Both Mr. Olson and Mr. Young testified that the alleged conversation occurred in "mid-December" (T. 158, ll. 24-25; T. 159, ll. 1-2; T. 167, ll. 20-25; T. 168, ll. 18-25). "Mid-December" could be any number of days and thus, could not be viewed as occurring "immediately" after the alleged discussion. These statements are clearly hearsay.

Husband finally argues that if this Court finds that the statements offered by Mr. Olson and Mr. Young were in fact hearsay, the statements are “still excluded as hearsay”⁷ under Minn. R. Evid. 803 (3). (Husband’s Brief, p. 54.) Husband claims that they were statements of Husband’s then existing state of mind, evidencing Husband’s intent to leave his employment due to Wife’s alleged ultimatum. Husband’s state of mind regarding why he left HSBC is irrelevant. There was no finding of bad faith underemployment. The trial court did not apply this standard in awarding spousal maintenance and found that the reasoning behind Husband’s departure from HSBC had no bearing on the trial court’s ultimate decision. (AA. 10-11.) Husband’s state of mind was not an issue and thus, it is irrelevant and was properly excluded by the trial court.

In addition, Husband fails to articulate how the alleged error prejudiced him. An error is prejudicial if it “might reasonably have changed the result.” Behlke v. Conwed Corp., 474 N.W.2d 351,354 (Minn. Ct. App. 1991) (quoting Poppenhagen v. Sornsin Constr.Co., 300 Minn. 73, 79-80.) The trial court correctly ruled on this issue, but even if it had not, regardless of whether or not Mr. Olson and Mr. Young testified, Husband was not denied a fair trial and there was no prejudice, nor does he allege any such prejudice. The trial court did not make a finding that Husband left his position at HSBC, in fact Wife acknowledges that it was a joint decision. (AA. 10-11.) The trial court specifically found that this information was not relevant to the issues before the

⁷ Minn. R. Evid. 803 lists the exceptions to the hearsay rule. If in fact these statements were “excluded as hearsay,” they would be hearsay and fall under the non hearsay rule.

court and that even if it were relevant, it would not have impacted the court's ultimate decision. The trial court found as follows:

What is left for the Court is first, whether the reason for resignation is even relevant, and, if the reason is important, who to believe. To consider the circumstances of the resignation brings the Court perilously close to injecting fault into this proceeding, which is barred by the legislature. But even if the Court were able to come to a conclusion, the conclusion would not impact the Court's decision as the Court must deal with the circumstances of these parties during the proceeding.

(AA. 10.) Whether Husband's decision to leave HSBC was based on his scheming to dissipate the marital estate, Wife issuing an ultimatum, or the parties' joint decision-making, makes no difference to the end result. The trial court found that the reason behind his departure was not relevant and would not impact the trial court's decision.

(AA. 10-11.) There was no abuse of the trial court's discretion and there was no prejudice to Husband. Husband's request for a new trial must be denied.

CONCLUSION

This Court should reject Husband's arguments on appeal and affirm the lower court's findings and order for spousal maintenance. The family court referee who presided at the trial in this matter is an experienced, capable and highly qualified member of the Hennepin County Family Court, who, after observing the testimony of live witnesses and analyzing voluminous documentary evidence, rendered a thoughtful and thorough decision which is supported by the evidence and applicable law. The Family Court judicial officer below properly awarded permanent spousal maintenance to Wife in the amount of \$8,000.

The court scrutinized Wife's need, including her budget and its consistency with the marital standard of living, and Husband's ability to support himself and the needs of Wife, given his earnings history and personal capabilities. After thoroughly analyzing all of the facts and the law, the trial court ordered Husband to pay Wife \$8,000 per month in spousal maintenance, commencing six months after the issuance of the trial court's order, thereby giving Husband reasonable time to become employed in line with his general abilities. If Husband pays this amount, assuming that he is earning income to which he is capable, he will have more than enough income to meet his own needs, while Wife's needs will be met so that both parties are able to live in close approximation to the marital standard of living.

If the trial court's award of \$8,000 per month in spousal maintenance is affirmed, Husband will still have, after paying spousal maintenance, more than enough income to meet his own living expenses. And yet Husband is not satisfied. He continues to pursue his arguments in attempting to reduce Wife's standard of living. His arguments must be rejected. Husband has the ability to support his former spouse, and her need is well established and properly found by the trial court. The trial court did not abuse its broad discretion in rendering the maintenance award and did not error as a matter of law, and this Court should affirm.

In addition, the trial court clearly did not abuse its discretion in excluding the testimony of Mr. Young and Mr. Olson, as it was hearsay and not an exception to the rule. Even if Husband had prevailed in showing that the trial court abused its discretion,

he failed to prove that there was any prejudice to him. Thus, his request for a new trial must be denied.

Dated: September 24, 2008

Respectfully submitted,

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