

3

State of Minnesota
In Court of Appeals

CYNTHIA JEAN MAIERS,

Appellant/Petitioner,

vs.

MARTIN JOHN MAIERS,

Respondent

APPELLANT'S BRIEF AND APPENDIX

WRIGHT FAMILY LAW
& MEDIATION, P.L.L.C.
Dianne Wright (#118965)
342 Fifth Avenue North
Bayport, Minnesota 55003-1201
(651) 275-4460

Attorney for Appellant

OJALA LAW OFFICE
Linda Ojala (#81243)
3300 Edinborough Way, #550
Edina, Minnesota 55435
(952) 405-2040

Attorney for Respondent

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).

TABLE OF CONTENTS

Table of Authorities.....	iv
Statement of Legal Issues.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Argument.....	6
Introduction.....	6
Standard of Review for spousal maintenance.....	6
Argument.....	7
Conclusion.....	17
Certification of Brief Length.....	19

TABLE OF AUTHORITIES

Statutes

Minn.Stat. § 518.552.....	1,6-8,10,11,13,16,18
Minn.Stat. § 645.44, subd.16	7

Cases

<i>A.J. Chromy Construction Co. v. Commercial Mechanical Services, Inc.</i> , 260 N.W.2d 579, 582 (Minn. 1977).....	7
<i>Coffel v. Coffel</i> , 400 N.W.2d 371, 374-75 (Minn. App. 1987)	16
<i>Dobrin v. Dobrin</i> , 569 N.W.2d 199, 201 (Minn. 1997).....	1, 6
<i>Durfee v. Rod Baxter Imports, Inc.</i> , 262 N.W.2d 349, 354 (Minn. 1997).....	7
<i>Flynn v. Flynn</i> , 402 N.W.2d 111, 114 (Minn. App. 1987)	17
<i>Gessner v. Gessner</i> , 487 N.W.2d 921, 923 (Minn. App. 1992).....	7
<i>In re Holden's Trust</i> , 207 Minn. 211, 291 N.W. 104 (1940).....	7
<i>Laumann v. Laumann</i> , 400 N.W.2d 355, 359 (Minn. App. 1987), <i>pet. for rev. denied</i> , (Minn. Nov. 24, 1987)	1,10
<i>Marshall v. Marshall</i> , 350 N.W.2d 463 (Minn. Ct. App. 1984).....	16
<i>Maurer v. Maurer</i> , 607 N.W.2d 176, 183 (Minn. App. 2000).....	13
<i>Nardini v. Nardini</i> , 414 N.W.2d 184 (Minn. 1987).....	1, 6, 10-12
<i>Sand v. Sand</i> , 379 N.W.2d 119, 124 (Minn. App. 1985).....	16
<i>Van Dee Loo v. Van Dee Loo</i> , 346 N.W.2d 173, 175 (Minn. Ct. App. 1984).	7
<i>Zamora v. Zamora</i> , 435 N.W.2d 609, 611 (Minn. App. 1989).....	6

STATEMENT OF LEGAL ISSUE

I.

Did the trial court abuse its discretion in failing to award permanent spousal maintenance pursuant to Minn. Stat. §518.552, subs. 2 & 3 (Ad-1, 2)

Trial court's ruling: The wife is entitled to temporary maintenance of five years maintenance, with a reservation.

Minn. Stat. §518.552, subs. 2 & 3 (Ad-1-2)

Nardini v. Nardini, 414 N.W.2d 184, 196 (Minn. 1987) (Ad-6, 9)

Laumann v. Laumann, 400 N.W.2d 355, 359 (Minn. App. 1987), *pet. for rev. denied* (Minn. Nov. 24, 1987)

Dobrin v. Dobrin, 569 N.W.2d 199, 201 (Minn. 1997)

STATEMENT OF THE CASE

A trial was held on April 14, 2008 before the Honorable Gregory G. Galler in Washington County District Court, Stillwater, Minnesota on the issues of spousal maintenance and attorney fees.

Following the trial, Judge Galler announced that he would make preliminary findings on income and expenses to help the parties with their arguments or settlement discussions. In his letter to counsel dated April 15, 2008 (A-1), he stated "As agreed to at the conclusion of trial, the Court would provide in advance findings as to the parties' respective incomes and reasonable living expenses for purposes of assisting counsel in preparing submissions regarding the issues of child support and spousal maintenance."

Each party then submitted proposed spousal maintenance findings/conclusions based on the judge's findings of income and expenses.

The final decree was entered on July 25, 2008 (A-45). A Notice of Filing of the decision was served by Respondent's attorney on July 31, 2008 (A-74).

Appellant, Cindi Maiers, served a Notice of Motion and Motion for Amended Findings or a New Trial for hearing on September 19, 2008 (A-75). An Order Amending the Judgment and Decree was filed on October 7, 2008 (A-83).

Ms. Maiers' Notice of Appeal was served on December 5, 2008 (A-85). The Certificate as to Transcript delivered on December 10, 2008.

The parties participated in appellate mediation. A letter from the Minnesota Court of Appeal dated June 22, 2009 provides that mediation has been completed but the issue on appeal has not been settled.

STATEMENT OF FACTS

The parties were married for approximately 18 years, having been married on June 2, 1990 and divorced on July 25, 2008. *“The parties were married in their senior year of college and had children soon thereafter. By tacit agreement, the Petitioner stayed at home to care for the 3 young children.”* [A-55: Finding of Fact (FF) XIV (e)].

“Petitioner was the primary caretaker of the children and the Respondent pursued his career.” [A-56: FF XIV (h)].

At the time of trial, the parties’ oldest child was a junior in high school (T. 91), the second oldest was in 9th grade, and the youngest was age 11, and showing some signs of attention deficit disorder (T. 91). The second oldest child had previously been diagnosed with moderate to severe dyslexia and attention deficit disorder (T. 32). Ms. Maiers was awarded \$1,808 per month for their support, which is not contested.

Both parties were age 39 at the time of trial.

Martin Maiers’ job status and income rose steadily during the marriage. He graduated with a degree in Mathematics and Computer Science in 1990 (A-51: FF XIII). *“He has since advanced in his career and graduate education”* (A-51: FF XIII). *“He has continued to take graduate classes but has not fully completed the requirements for the PhD.”* (A-51: FF XIII). The PhD is in Bioinformatics (T. 39). His graduate education spanned the entire marriage. (T. 38). He also participated in a band during the marriage, practicing and performing including trips to Europe (T. 40-42). His job also required travel internationally for conferences approximately five times per year (T. 37)

as well as travel in the United States. His Curriculum Vitae was introduced as Exhibit 5 (A-91).

Ms. Maiers did not obtain any further education (T. 29) beyond her bachelor of arts in social studies in 1991 (T. 28, 29). She did not work full-time during the marriage. (T. 27). She functioned as the primary caretaker of the children [A-56: FF XIV (h)] and participated in volunteer activities (T. 32); dealing with the children's education and special needs (T. 32-33); caring for the children while her husband pursued his education (T. 35); and his career (T. 37).

Her interest at age 18 was in social studies and art history rather than a career goal to become a teacher (T. 99). She was never employed as a social studies teacher (T. 28). Their first child was born in 1990. She managed an apartment building where they were living. After the second child was born, she stayed home full time (T. 31) and later would occasionally do substitute teaching where the children were going to school (T. 28) because she spent so much time there anyway, as a volunteer (T. 36). The substitute teaching that she did was unrelated to social studies. (T. 99). She has no desire to teach social studies (T. 28-29) and has never returned to school since 1991 to update her knowledge in social studies (T.29). She believes that social studies jobs are very limited at this time (T. 29). To update her teaching license, she thought she would have to take some course work and do student teaching (T. 84).

During the divorce proceedings, she was terminated from her part-time job of 16 hours per week at a frame shop because her employer could no longer afford to employ her (T. 22). She had worked there approximately four years and her 2007 W2 showed

gross annual income of \$9,646 (A-90: Exhibit 3).

After losing her job, she sought employment counseling through the State of Minnesota (T. 80) and used the State of Minnesota employment resource office as a resource, checking classified ads and looking on-line for available positions (T. 80). She also made informal inquiries to teacher acquaintances. She had previously flown on Mesaba as a volunteer medical courier transporting bone marrow (T. 23) so she applied at Mesaba. She was offered a full time job as a flight attendant immediately after the first interview so she did not apply elsewhere (T. 80). Soon afterwards, she started her five weeks of training (T. 21).

The job allows her the flexibility to select her own schedule so she can be with the children, and to have health, dental, optical, and life insurance, retirement, and travel benefits (T. 24) and she loves the job. (T. 24). She is paid \$15.08 for flight hours (guaranteed 75 flight hours per month) and \$1.58 per hour for non-flight hours (T. 19). She works full-time (T. 88). For purposes of spousal maintenance and child support, the parties stipulated to her income at \$21,000 (A-50: FF XII, p. 7).

Mr. Maiers submitted Exhibit 56 (A-96) which was a document that he obtained from the internet for the Minnesota Department of Employment (T. 140) showing the median income of secondary teachers in Minnesota and surrounding areas (T. 143).

Ms. Maiers was awarded temporary spousal maintenance for five years with a reservation.

INTRODUCTION

The reason for this appeal is the trial court's award of temporary five year maintenance rather than permanent maintenance. This case represents a traditional marriage and the trial court correctly found that "*Each party contributed equally, and substantially, to the acquisition, preservation, and appreciation of the family's marital estate. Petitioner was the primary caretaker of the children and the Respondent pursued his career. Both parties' efforts were essential to maintaining the family and the marital estate.*" [A-56: FF XIV (h)]. The trial court also found that there was some uncertainty that Ms. Maiers could be self-sufficient in five years, but nevertheless awarded temporary rather than permanent maintenance. This is directly contrary to Minn. Stat. §518.552, subd. 3 (Ad-2); the *Nardini* case, *supra* (Ad-6), and every Minnesota case afterwards which has consistently followed the interpretation of Minn. Stat. §518.552, subd. 3 (Ad-2) set down in *Nardini* (Ad-6), that uncertainty of self-sufficiency shall be met by an award of permanent maintenance, with the order left open for later modification.

As discussed hereinafter, the trial court's findings in arriving at the temporary award is not supported by Minnesota law.

STANDARD OF REVIEW

The trial court has broad discretion in setting the amount and duration of spousal maintenance. *Zamora v Zamora*, 435 N.W.2d 609, 611 (Minn. App. 1989). A district court abuses its discretion when it makes findings unsupported by the evidence or when it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W. 2d 199, 202, & n.3 (Minn.

1997). “Findings of Fact concerning spousal maintenance must be upheld unless clearly erroneous.” *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992).

Conclusions of law are not binding on appellate courts. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 354 (Minn.1977); *A.J. Chromy Construction Co. v. Commercial Mechanical Services, Inc.*, 260 N.W.2d 579, 582 (Minn.1977). In such circumstances, an appellate court is free to exercise its independent judgment. *Van Dee Loo v. Van Dee Loo*, 346 N.W.2d 173, 175 (Minn. Ct. App.1984) (determination of marital or non-marital property is question of law). Moreover, findings of fact that are controlled or influenced by errors of law will be set aside by a reviewing court. *In re Holden's Trust*, 207 Minn. 211, 291 N.W. 104 (1940).

ARGUMENT

To determine the amount and duration of spousal maintenance, Minn. Stat. § 518.552, subd. 2 (Ad-1) directs the court to consider all relevant factors including the eight factors listed in the statute. If, after examining the factors, Minn. Stat. §518.552, subd. 3 (Ad-2) states that if “there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.” Legislation using the term “shall” is mandatory. Minn. Stat. §518.552, subd. 3 (Ad-2). Minn. Stat. §645.44, subd. 16 (Ad-5). The trial court erred in findings of fact which are not supported by the record, and in findings of fact which are based on an erroneous interpretation of the law.

1. **The trial court erred in finding that Ms. Maiers is not entitled to maintain the parties’ standard of living beyond five years in the future; and that**

after five years, she should adjust to a more appropriate life style. The reason given by the trial court is that Ms. Maiers' enjoyment of the parties' comfortable standard of living occurred only during the last ten years of marriage. This is set forth three times by the trial court. First, in Finding of Fact XIV (a) (A-53) under "ability to meet needs independently," the trial court found that "*Petitioner's living expenses will decrease for two reasons.*** Petitioner is not entitled to, in the long term, maintain the comfortable standard of living she acquired only in recent years.*" The next place in the opinion that this issue is addressed is in Finding of Fact XIV (c) (A-55) of the decree where the trial court found: "*From late 1997 to the parties' separation in 2007, the Respondent's income progressively increased along with the parties' standard of living. Consequently, it is only during the last 10 years that the parties began to experience a more comfortable type of lifestyle. The Petitioner should not reasonably expect to maintain indefinitely into the future a standard of living that lasted for such a short duration during the marriage.*" The third reference in the opinion is in the "Conclusion" portion of Finding of Fact XIV (A-57) of the decree where the trial court summarizes its reasons for awarding temporary maintenance of five years: "*The Petitioner's living expenses will decline as the children emancipate and the Petitioner adjusts to a more appropriate standard of living.*" (emphasis supplied)

a. **There is no legal basis for limiting Ms. Maiers' standard of living based on the finding that their current standard of living was enjoyed for only the last ten years of the marriage.** Standard of living is one of the factors to consider in Minn. Stat. §518.552, subd. 2 (c) (Ad- 1). Standard of living is also mentioned twice in Subd. 1 (Ad-

1) when discussing the needs of the spouse seeking maintenance and the ability to be self supporting. There is nothing in the statute about limiting the time frame during the marriage that the standard of living is considered. It should be standard of living that the parties enjoy at the time of the divorce.

The Maiers, like many couples, married in their early 20s and their wealth and income grew over time. What is important is that the standard of living enjoyed at the time of the divorce is the fruition of many years of sacrifice and labor by both parties.

Mr. Maiers will no doubt continue his upward advancement. As stated by the trial court in Finding of Fact XIII (A-51), *“The Respondent has since advanced in his career and graduate education at the National Marrow Donor Program. In November 1997, he was promoted to manager at a base salary of \$67,000. He then received progressive raises in his salary and a promotion to his current job as Director of Bioinformatics and his current earnings level of \$131,503. He also regularly received a performance bonus that has been accounted for in the determination of gross income. He continues to take graduate classes ...”*

In five years, however, the spousal support for Ms. Maiers terminates because the trial court found that parties’ standard of living should no longer continue for Ms. Maiers and she should “adjust to a more appropriate standard of living.” (A-52: FF XIV).

It is error for the trial court to terminate maintenance based on the fact that the parties’ more comfortable standard of living occurred in the last ten years of marriage, when in reality their current life style began developing the day the parties were married.

b. **The parties should be treated similarly when considering standard of living in the future, especially since both parties contributed “equally and substantially” in acquiring the standard of living.** In Finding of Fact XIV(1)(h) (A-56) the trial court found *“Each party contributed equally, and substantially to the acquisition, preservation, and appreciation of the family’s marital estate. Petitioner was the primary caretaker of the children and the Respondent pursued his career. Both parties’ efforts were essential to maintaining the family and the marital estate.”* Ms. Maiers helped create this standard of living by foregoing her career to care for the children and assist Respondent in advancing his career.

It is error to apply different standard of need to each party, especially considering the fact that the Ms. Maiers contributed “equally and substantially” in acquiring the comfortable standard of living enjoyed by the parties. In *Laumann v. Laumann*, 400 N.W.2d 355, 359. (Minn. App. 1987), *pet. for rev. denied*, (Minn. Nov. 24, 1987) the court held that the trial court’s failure to award permanent spousal maintenance based on different standard of need was error, and the decision of the trial court was reversed.

2. It is error to award temporary maintenance where there is some “uncertainty” as to Ms. Maier’s ability to be self-sufficient.

Minn. Stat. §518.552, subd. 3 states (Ad-2): “Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.”

As explained in *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987) (Ad-12), *“The statute requires that uncertainty to be met by an award of permanent maintenance with*

the order left open for later modification. Minn.Stat. § 518.552, subd. 3 (1986). That the trial court retains jurisdiction over a temporary award does not make temporary maintenance an acceptable alternative when it is uncertain that the spouse seeking maintenance can ever become self-supporting.” Id. at 198-99. It is not an acceptable alternative because, by its terms, maintenance automatically ends even though the dependent spouse might not be self sufficient. She would have the difficult burden of establishing that she is in a worse situation than at the time of the divorce.

That the trial court retains jurisdiction over a temporary award does not make temporary maintenance an acceptable alternative when it is uncertain that the spouse seeking maintenance can ever become self-supporting. An award of temporary maintenance is based on the assumption that the party receiving the award not only should strive to obtain suitable employment and become self-supporting but that he or she will attain that goal. Although equity would support modification of the temporary award if that person cannot become fully self-supporting during the period of the temporary award, a petition for modification does not comfortably fit the statutory format. The basis for modification of an award of maintenance is a change of circumstances which makes the terms of the award unreasonable or unfair—substantially increased or decreased earnings or need of a party, receipt of public assistance, or a change in the cost-of-living. Minn. Stat. § 518.64 (1986). Although the court is required on a motion for modification to apply, in addition to all relevant factors, the factors for an award of maintenance under section 518.552, the person who cannot secure employment or who can become only partially self-supporting is hard pressed to meet the burden of proving either that the petitioner’s earnings have decreased or his or her need has increased. The actual fact is that the change in the Petitioner’s circumstances is insufficient or nonexistent, yet by the terms of the decree maintenance is to cease. Id. at 198-99 (Ad-12).

*“By awarding permanent maintenance, leaving its order open, the spouse paying maintenance is not without a remedy: “*** if there is a change in the earnings or needs*

of the maintenance payer which makes the terms of the award unfair or unreasonable, the change will support a petition for modification. “ Id.

The trial court in *Maiers* terminated maintenance in five years, even though the court found that “there is some uncertainty” that she will be self-sufficient at that time. These findings are at Finding of Fact XIV (A-54) “*However, there is some uncertainty if 5 years is sufficient period of time to attain self sufficiency*” and again on p.13 (A-57) “*But given there is some uncertainty whether Petitioner can accomplish self-sufficiency within five years, it is appropriate to reserve the issue of spousal maintenance.*”

The trial court record supports a finding that it is not only uncertain, but doubtful that Ms. Maier’s income will reach the point of self-sufficiency no matter how many hours she works. Ms. *Maiers* worked only part-time during the entire marriage, raising the parties’ three children; supporting Mr. *Maiers* in his endeavors to obtain advanced degrees and advance in his career as well as his income. Given all the facts of this case including the standard of living attained by the parties, there is uncertainty that Ms. *Maiers* will ever earn Mr. *Maiers*’ income of over \$100,000 no matter what she does. As the court stated in *Nardini*, “It seems to us most unlikely that Marguerite can realize an annual income from investments and employment that approaches the \$100,000 mark, no matter how skillfully she invests her share of the marital assets and no matter how hard she labors.” *Nardini* at 198 (Ad-12).

3. **It is error to award temporary maintenance on the assumption that Ms. *Maiers* will have more income once the children have emancipated.**

The trial court in the present case made several finding that Ms. Maiers will have more income when the children are emancipated. This finding is based upon two incorrect facts.

First, Ms. Maiers will have less income when the children emancipate because she will lose \$1,808 in child support; (but there is no guarantee that her expenses for the children will automatically terminate). Loss of child support is a reason to increase maintenance, not decrease it. Loss of child support has been one of the reasons for providing “uncertainty” with regards to the wife’s ability to support herself. In *Maurer v. Maurer*, 607 N.W.2d 176, 183 (Minn. Court App. 2000), the court of appeals affirmed a permanent award, stating “[b]ecause the district court found that it was uncertain whether appellant would be able to support herself once child support payments cease in June 2000, the court’s permanent maintenance award was appropriate. See Minn. Stat. § 518.552, subd. 3 (1988) (stating that “[w]here there is some uncertainty as to the necessities of a permanent [maintenance] award, the court shall order a permanent award leaving its order open for later modification (citations omitted).” *Id.* at 183.

Secondly, the trial court incorrectly found that Ms. Maiers currently works part-time, and will have more hours of work once the children are emancipated; and thus her income would automatically increase.

Finding of Fact XII (A-51): “Other than providing opportunity to be with the children, the Petitioner provided no credible reason why she could not work more hours.”

Finding of Fact XIV(2)(a) (A-53): “As to her income, the Petitioner will be able to earn more in the future because she will have more time available. Now, she is in reality only working part time. As the children become older, they will require less direct parenting involvement. As a result, the Petitioner will have available increasing amounts of time

for work. Petitioner provided no credible reason for not being able to work more hours.”

This conclusion is contrary to the record wherein Ms. Maiers testified that she is already working fulltime. It is true that her job allows flexibility so that she does not have to work 9:00 to 5:00, but she still works full time hours (T. 80). The finding that the Petitioner will have more income merely because of the children’s emancipation is speculation.

4. The record does not support the trial court’s finding that Ms. Maier’s ability to teach is not outmoded and that she could even earn \$34,000. The trial court made the following findings of fact:

Finding of Fact XIV (1) (d) (A-55) “Petitioner’s teaching skills are likely not outmoded because of her substitute teaching experience, despite never having updated her education in that field. The Petitioner’s capacity as a teacher has not been permanently diminished.”

Finding of Fact XII (A-51) “Given her limited experience in teaching, the Petitioner might be capable of earning an entry level teaching salary of about \$34,000 (i.e., in the lower 10th percentile of teacher’s salaries. However, Petitioner does not wish to pursue a teaching career. Rather, she would prefer to keep working at Mesaba”

The record shows that Ms. Maiers was a senior the year she married and obtained a bachelor of arts in social studies in 1991 (T. 28, 29), with an emphasis in art history (T. 99). It was not a career goal to become a teacher (T. 99); and she was never employed as a social studies teacher. She did do some substitute teaching (T. 28) where her own children were going to school because she spent so much time there as a volunteer (T. 36). The substitute teaching that she did was at the elementary level and was unrelated to social studies (T. 99). She has no desire to teach social studies (T. 28-29) and has never returned to school since 1991 to update her knowledge in social studies (T. 29).

These facts were not disputed by Respondent and are supported by the record. The finding by the trial court that substitute teaching qualifies Ms. Maiers to teach secondary social studies, is not supported by the record.

The finding by the trial court that she could possibly earn \$34,000 as a social studies teacher is based on an internet document which Respondent found regarding the salaries of teachers (A- 96: Exhibit 56). There is no other support in the record or evidence of any kind. The finding that Ms. Maiers could earn this salary given her lack of experience, lack of knowledge about social studies and lack of evidence about the job market, is speculative.

5. Ms. Maiers is not obligated to pursue a career in which she has no interest, experience, and where her education is outdated, having been concluded in 1991. The trial court admonished Ms. Maiers for her career choice and training at Mesaba Airlines and her lack of interest pursuing a career as a teacher.

Finding XII (A-50), *“Although Petitioner still has a teaching license, she has taken no action to maintain her licensure. In particular, she has not attempted to complete the required educational course work.”*

Finding XIV (1) (b) (A-54), *“Petitioner has shown little inclination to improve her prospects for obtaining better employment. Rather, she is content with her present part time employment and does not wish to pursue other education or training.”*

Finding XIV(b) (A-54), *“At this stage, it is reasonable to allow Petitioner 5 years to obtain full time employment and the opportunity to obtain additional appropriate training.”* (emphasis supplied).

Finding XIV (A-57), *“She can “obtain further training to pursue a suitable career.”* (emphasis supplied).

As explained by Ms. Maiers on the record, she does not need time to pursue additional training; she has already completed her training with Mesaba Airlines and is employed full time in a job she loves and intends to keep.

According to the trial court's own findings, this job provides the highest income she has ever earned: “*** the Mesaba job is the highest paying one the Petitioner has ever had.” (A-50: FF XII).

Ms. Maiers sought vocational assistance through the Minnesota Unemployment Office and looked for jobs online. She was hired by Mesaba immediately after her first interview and did not apply for other jobs.

Minnesota law does not require her to obtain different employment. In *Coffel v. Coffel*, 400 N.W.2d 371, 374-75 (Minn. App. 1987), the court of appeals found: “Appellant's contention that Minn.Stat. § 518.552 requires respondent to change her vocation for a more lucrative position is unsupported by the language of the statute. Minn.Stat. § 518.552, subd. 2(b) refers to ‘the time necessary to acquire sufficient education * * * to find appropriate employment.’ *Id.* This factor does not require a change in vocation. Rather, the factor addresses the situation where the spouse receiving maintenance lacks job skills and must receive an education before attempting to find employment. *See, e.g., Marshall v. Marshall*, 350 N.W.2d 463 (Minn. Ct. App.1984) (spouse entitled to maintenance while pursuing a law degree in order to eventually become self-supporting).” *Id.* at 374. In *Coffel*, the wife was already employed in three part-time jobs and did not need additional training. *Also see, Sand v. Sand*, 379 N.W.2d 119, 124 (Minn. App. 1985) *pet. for review denied* (Minn. Jan. 31, 1986 (spouse seeking

maintenance does not incur and obligation to increase her earning power through occupational retraining; *Flynn v. Flynn*, 402 N.W.2d 111, 114 (Minn. App. 1987) (despite training and experience as a teacher, spouse chose a different career).

The trial court's finding that Ms. Maiers "has shown little inclination to improve her job prospects for obtaining better employment" is not supported by the record. When she was terminated from her part-time job of four years, Ms. Maiers immediately sought and found other employment for Mesaba Airlines, and began her job training. (T. 21). This is a full-time job that provides her with important benefits needed by a single parent: the flexibility to select her own schedule for the children, and to have health, dental, optical, and life insurance, retirement, and travel benefits. (T. 24) and she loves the job. (T. 24). She is paid \$15.08 for flight hours (guaranteed a minimum of 75 flight hours per month) and \$1.58 per hour for non-flight hours (T. 19). She works at full time (T. 88).

That she did not interview for other jobs is irrelevant. She testified that she was hired by Mesaba after her first interview (T. 80). According to the trial court's own findings, this job provides the highest income she has ever earned: *"*** the Mesaba job is the highest paying one the Petitioner has ever had."* (A-50: FF XII).

For purposes of spousal maintenance and child support, the parties stipulated to her income at \$21,000 (A- 51: FF XII). The trial court used this income in awarding spousal maintenance. The trial court's conclusions that Ms. Maiers should be working more hours, etc. seems to be irrelevant.

CONCLUSION

Ms. Maiers was an active participant in the children's lives, an active volunteer,

and the trial court found that she was essential to maintaining the family and the marital estate. Ms. Maiers did not pursue an outside career during her marriage to Respondent, but she fostered and supported her husband's education and career advancement. Given her situation, Ms. Maiers' career choice is appropriate and reasonable vs. seeking to become a secondary teacher in a field where she has no interest, experience, her degree is outdated, and there is no evidence of job availability. Ms. Maiers is earning the highest income she has ever earned, but no matter what she does, it is unlikely that she will achieve self-sufficiency considering the parties' standard of living. Where there is uncertainty, Minn. Stat. §518.552, subd. 3 (Ad-2) and Minnesota case law requires the court to order permanent maintenance, leaving its order open for further modification. The trial court's award of temporary maintenance should be reversed.

FORM 132. CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of
Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional
font. The length of this brief is 4,869 words. This brief was prepared using Microsoft
Office Word 2003 software.

WRIGHT FAMILY LAW & MEDIATION, P.L.L.C.

Dated: July 24, 2009

BY:

Dianne Wright
Dianne Wright (#118965)
Attorney for Appellant
White Pine Building
342 Fifth Avenue North
Bayport, MN 55003-1201
Telephone: 651-275-4460