



File No. A10-1151

State of Minnesota
In Court of Appeals

In Re the Marriage of

Lisa Jean Passolt,

Petitioner,

Respondent,

and

Jeffrey Robert Passolt,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

**KATZ, MANKA, TEPLINSKY
GRAVES & SOBOL, LTD.**

Brian L. Sobol, #140673
Corwin R. Kruse, #334418
225 South Sixth Street
Suite 4150
Minneapolis, MN 55402
Telephone: (612) 333-1671

Attorneys for Appellant

FREDRIKSON & BYRON, P.A.

Kristy A. K. Rodd, #279122
200 South Sixth Street
Suite 4000
Minneapolis, MN 55402-1425
Telephone: (612) 494-7000

Attorneys 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.....ii.

LEGAL ISSUES..... v.

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS..... 3

ARGUMENT.....10

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT IT WAS PRECLUDED FROM CONSIDERING WIFE’S FUTURE EARNING CAPACITY IN DETERMINING AN APPROPRIATE AMOUNT OF SPOUSAL MAINTENANCE.....10

 A. Standard of Review.....10

 B. The Trial Court is required to consider the maintenance recipient’s ability to contribute to their own support in determining the need for spousal maintenance.11

 C. The Trial Court Erred as a Matter of Law by Conflating Two Distinct Concepts: Imputation of Income and Determination of a Party’s Ability to Meet Needs Independently13

 D. The Trial Court Erred as a Matter of Law by Failing to Consider Wife’s Ability to Meet Her Needs Independently When it Set the Amount and Duration of Maintenance24

II. THE COURT ERRED AND ABUSED ITS DISCRETION IN ITS TREATMENT OF THE GRANDEZZA GOLF MEMBERSHIP, ASCRIBING A VALUE TO THE MEMBERSHIP WHEN SUCH VALUATION WAS SPECULATIVE.....27

CONCLUSION.....29

CERTIFIFCATE AS TO BRIEF LENGTH30

INDEX TO APPELLANT’S APPENDIX.....31

TABLE OF AUTHORITIES

<u>Statutes:</u>	<u>Page</u>
Minn.Stat. § 518.552 (2009)	11, 21
Minn Stat. §518.522, Subd. 1 (2009).....	11, 24
Minn.Stat. § 518.552, subd. 2	12, 16, 26
Minn. Stat. § 518.552, subd. 2(a).....	14, 20, 21
 <u>State Case Law:</u>	
<u>A.J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc.</u> 260 N.W.2d 579, 582 (Minn.1977).....	11
<u>American Nat. General Ins. Co. v. Solum</u> 641 N.W.2d 891, 895 (Minn. 2002).....	10
<u>Antone v. Antone</u> 645 N.W.2d 96, 100 (Minn. 2002).....	28
<u>Burwell v. Burwell</u> 438 N.W.2d 433, 435 (Minn. App. 1989).....	28
<u>Carrick v. Carrick,</u> 560 N.W.2d 407 (Minn. App. 1997).....	8, 13, 15 16, 17, 18 19, 22, 26 27
<u>Erlandson v. Erlandson</u> 318 N.W.2d 36, 39 (Minn. 1982).....	12
<u>Maurer v. Maurer</u> 607 N.W.2d 176 (Minn. App. 2000), <i>rev'd on other grounds</i> , 623 N.W.2d 604 (Minn. 2001).....	17, 18, 22 26, 27
<u>McGowan v. McGowan</u> 532 N.W.2d 258, 260 (Minn. App. 1995).....	28
<u>Nardini v. Nardini</u> 414 N.W.2d 184 (Minn.1987).....	7, 8, 22

<u>Rauenhorst v. Rauenhorst</u> 724 N.W.2d 541 (Minn. App. 2006).....	19, 20, 23 26
<u>Rehn v. Fischley</u> 557 N.W.2d 328, 333 (Minn.1997).....	11
<u>Rogers v. Moore</u> 603 N.W.2d 650, 656 (Minn. 1999).....	25
<u>Schallinger v. Schallinger</u> 699 N.W.2d 15 (Minn. App. 2005), <i>rev. denied</i> (Minn. Sept. 28, 2005)	13, 14, 18 19, 20, 22 23, 26
<u>Unpublished State Case Law:</u>	
<u>Basting v. Makepeace</u> 2010 WL 3304297, p. 4 (Minn. App. Aug. 24, 2010)	13
<u>Daley v. Daley</u> 2009 WL 66623, p.5 (Minn. App. Jan. 13, 2009).....	13
<u>Grimes v. Grimes</u> 2007 WL 1599095, p.4 (Minn. App. June 5, 2007).....	13
<u>Mielke v. Mielke</u> 2001 WL 683060, p.3 (Minn. App. June 19, 2001).....	13
<u>Olson v. Olson</u> 2008 WL 763245, p.3 (Minn. App. March 25, 2008).....	13
<u>Perkovich v. Segan</u> 2011 WL 382622, p.6 (Minn. App. Feb. 8, 2011)	13
<u>Readio v. Readio</u> 2003 WL 21058540, p.3 (Minn. App. May 13, 2003).....	13, 20, 26
<u>Stalcar v. Stalcar,</u> No. A09-1, 2010 WL 346256, p.3 (Minn. App. Feb. 2, 2010).....	13, 14
<u>Wickhem v. Wickhem</u> 2007 WL 2993819, p.4 (Minn. App. Oct. 16, 2007), <i>review denied</i> (Minn. Dec. 16, 2007)	13, 22

Other Authority:

Minn. R. Civ. P. 52.0111

LEGAL ISSUES

1. Whether the trial court erred in applying the factors of Minn. Stat. §518.552 in determining the appropriate level of future spousal maintenance, overstating Wife's need for future maintenance by \$3,000 a month, by failing to consider Wife's ability to contribute to meeting her own needs following retraining, after finding that following a twenty five year marriage that fifty two year old Wife, who though not having worked full time in her profession for twenty years was in good health, had a bachelor's degree in teaching, could retrain in less than a year, and, based on the job market would be able to find a full time teaching position earning a starting salary of \$36,000?

The trial court, though finding that it wanted to reduce Husband's maintenance award by \$3,000 a month, erroneously concluded that it was precluded from doing so, erroneously believing that such future consideration of Wife's earning capacity was a prohibited imputation of income, conflating the prohibited present or past imputation of income without a finding of bad faith, with the accepted and required consideration of future ability to contribute to self support.

Most Apposite Authority:

Minn. Stat. §518.552, subd. 1, 2.

Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005)

Rauenhorst v. Rauenhorst, 724 N.W.2d 541 (Minn. App. 2006)

Carrick v. Carrick, 560 N.W.2d 407 (Minn. App. 1997)

2. Whether the trial court erred in valuing a golf club membership at a set value and awarding said asset to Husband rather than providing for the division of the sale proceeds of said asset if and when sold, when the evidence established its value was speculative, and that Husband might not be able to sell the asset for twenty years or more?

The trial court erroneously valued the golf club membership at \$17,000, and awarded the membership to Husband at said value, offsetting this award with an award of \$17,000 of other assets to wife.

Most Apposite Authority:

Burwell v. Burwell, 438 N.W.2d 433, 435 (Minn. App. 1989).

McGowan v. McGowan, 532 N.W.2d 258, 260 (Minn. App. 1995)

STATEMENT OF THE CASE

The parties in this case were married on June 1, 1979. Prior to trial, the parties were able to reach agreement on most issues. The matter came on for trial on October 21 and November 16, 2009, relative to the primary unresolved issue - amount and duration of spousal maintenance.

The court issued Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on January 27, 2010. The court also issued a separate document entitled Findings of Fact and Memorandum of Law Regarding Spousal Maintenance, which was incorporated into the Judgment and Decree by reference.

Notwithstanding extensive and strongly worded dicta articulating the Court's belief that Respondent should be contributing to her support, the Court erroneously concluded that it was precluded as a matter of law, from considering Respondent's future ability to contribute to her self support in determining an appropriate level of spousal maintenance. The Court refused to consider that Respondent had the ability to earn at least \$36,000 per year in determining Respondent's need for maintenance, erroneously concluding that to consider this future ability to contribute to her self support was imputation of income without evidence of bad faith.

Appellant thereafter served a Motion for Amended findings or, in the alternative, a New Trial, arguing that the court had erred as a matter of law by concluding that it was precluded from considering respondent's future earning capacity, and that in fact such a consideration was required pursuant to Minn. Stat. §518.552 in determining an appropriate

level of future spousal maintenance. On May 10, 2010, the court issued an Order Granting in Part, Denying in Part Motions for Amended Findings and New Trial, denying Appellant's motion for a new trial, but granting in part and denying in part appellant's motion for amended findings. The issues raised in this appeal, however, were left unchanged. In denying Appellant's motions, the court referred back to its memorandum issued in conjunction with the original judgment and decree and again erroneously concluded that it was precluded by law from considering Respondent's future earning capacity.

Appellant served Notice of Appeal on July 1, 2010. Thereafter, the matter was stayed and referred to appellate mediation. Mediation took place on September 8, 2010, but was unsuccessful. In an Order filed on September 15, 2010, this Court dissolved the stay and directed an initial transcript certificate be filed by September 27, 2010. That certificate was filed by the court reporter, and showed an estimated completion date of November 24, 2010. Because the court reported did not deliver a certificate or motion for an extension of time to complete the transcript, this Court issued an order on December 9, 2010, directing the court reporter to deliver the transcript by December 20, 2010. Thereafter the court reporter moved for an extension, which this Court granted by Order dated December 14, 2010, extending the deadline until January 12, 2011.

Subsequently, notwithstanding an initial Certificate of Transcript Delivery, erroneously claiming delivery of the transcript on January 28, 2011, a complete copy of both volumes of the transcript was not delivered to Appellant until March 8, 2011; with

Respondent's copy delivered on March 9, 2011. The Clerk of Appellate Court was apprised of the problems in obtaining a complete and accurate transcript.

FACTS

The parties in this case were married on June 1, 1979. Of their two children, one remained a minor child at the time of trial. That child graduated high school in June, 2010. Prior to trial, the parties were able to reach agreement on most issues, including the valuation of various assets, the issues of legal and physical custody of their minor child, and the disposition of the parties' Florida condominium and Florida home.

At trial, the primary issue before the court was the amount and duration of spousal maintenance for respondent. Both parties were 52 years old, were in good health and had sufficient training and work experience to be capable of gainful, full-time employment. Appellant is employed as a TV news anchor for a Twin Cities television station. Respondent has a bachelor degree in special education, mental and handicapped certification, which she received in 1980 following the parties' marriage. (T. Vol. II, at 24) She taught for approximately five years prior to the birth of the parties' older daughter, but did not thereafter teach for pay during the remainder of the marriage. (T. Vol. II at 29)

The trial Court found that Respondent could reactivate her license to teach after only eight semester hours of classroom education, which could be completed in less than one year.

(Amended Finding of Fact 12 j; A-105)¹ The Court also found that there is a demand for special education teachers in this community, and that Respondent could reasonably be expected to obtain a full-time special education teaching position after reactivating her license, with a reasonable starting salary of \$36,000 annually. (Amended Findings of Fact 12 k, 12 l; A-105) Although Appellant will briefly below summarize the facts leading to the above referenced findings of fact, in that Respondent has not appealed these findings, it is submitted that these findings are the law of the case as it relates to the sole legal issue submitted to this Court for review as to the issue of spousal maintenance.

The evidence presented at trial established that Respondent, although she had not held full-time employment during the marriage, was capable of contributing to her future self support, and that with minimal training she could re-attain her teaching certificate and return to her vocation as a special education teacher. Throughout the marriage, Respondent home schooled the parties' younger daughter. (T. Vol. II. at 60) Respondent worked as a fitness instructor part time. (T. Vol. II. at 30) She also worked throughout the marriage on a volunteer basis, coaching the St. Louis Park Parkettes Dance Line and helping with other dance related activities, including choreography for fashion expos. (T. Vol. II. at 30, 119) She also worked for a year as a dancer for the Minnesota Timberwolves. (T. Vol. II. at 119)

¹ The trial court's findings as to maintenance are contained in a separate document entitled Findings of Fact, and Memorandum of Law Regarding Spousal Maintenance, which was then incorporated by reference into the separate Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree. (A - 47 - 66)

Teaching and coaching were both vocations she enjoyed. (T. Vol. II. at 59) Interestingly, Respondent testified that she wanted to continue to volunteer coaching tennis and teaching dance line, but she didn't want to do this for pay, even though were she to return to teaching, she could get paid for this work. (T. Vol. II. at 60-61)

The record at trial established that with minimal training, Respondent could return to the job market within a year, working full time as a special education teacher. This evidence was introduced through the testimony of a vocational evaluator retained by Appellant, Suanne Grobe, who performed a vocational evaluation of Respondent. Additional evidence was introduced in the form of a rebuttal report from another vocational evaluator retained by Respondent, Jan Lowe. Pursuant to the Court's directive, both expert reports were received as the witnesses' direct testimony, subject to cross and redirect examination. Ms. Grobe's report was received as Exhibit 57 (A-133) and her cross examination appears in T. Vol. I. at 5 - 37 and 49-51; redirect examination T. Vol. I. at 37 - 49 and 51-52, 83. Ms. Lowe's report was received as Exhibit 8 (A-143) and her cross examination appears in T. Vol. I. at 52- 74, 80-81; redirect examination T. Vol. I. at 74 - 80.

Ms. Grobe's report and the testimony established that Respondent only needed to return to school and obtain twelve to fourteen quarter credits (eight semester credits) to become re-certified as a teacher - and thereafter 125 hours of approved continuing education or obtain a position contingent upon obtaining an updated license; that she had the ability to reenter the job market within three to six months; that through networking she had the ability to obtain a special education teacher position for the 2010-2011 school year; that because of

the demand for special education teachers her age and absence from the job force was not an impediment to obtaining employment; and, that she could reasonably expect in such a position to start at a salary of approximately \$51,765 annually, with the ability to earn up to \$54,000. (Exhibit 57; T. Vol. I at 9, 13, 22-23, 28 - 30, 33 -34, 37 - 49, 51-2; T. Vol. II., at 19-20, 22)

Ms. Lowe conceded that teaching was an appropriate vocation for Respondent, that she did not leave teaching because she didn't like to teach, and that teaching would be the area in which she could earn the most money were she credentialed. She also conceded that teaching was a job that Respondent could do, and it was possible for her to reenter the job market as a teacher and earn \$37,000 to \$39,000 a year. (T. Vol. I. at 56 - 60, 63-64, 67 - 70) She also conceded that Special Education was an in demand profession. (T. Vol. I. at 73).

In contrast to Respondent's stated desire to focus primarily on playing tennis and engaging in part time volunteer work following the marriage, the record indicated that Appellant works long hours at his primary anchor job, on a typical day not getting home until 11:30 p.m.,² and in addition works a second job two days a week at a local radio station, leaving home at 6:30 a.m. for a 7:00 to 10:00 a.m. shift, to earn the funds necessary to support himself and to pay the current levels of maintenance. (T. Vol. II. at 130, 161)

Despite the trial court's findings that Respondent, after only minimal retraining, was fully capable of returning within a year to the job market full time as a special education

² There is a typographical error in Vol. II, page 130, line 11 of the transcript, which erroneously reads that Appellant gets home at "1:30" rather than 11:30.

teacher, at a starting salary of \$36,000, the court thereafter went on to concluded that it was precluded from considering respondent's future earning capacity, believing that such a finding would be an inappropriate imputation of income. Accordingly, the court set spousal maintenance without considering Respondent's future ability to earn \$36,000 a year, which would reduce her future need for maintenance by \$3,000 a month. (Amended Findings of Fact, and Memorandum of Law Regarding Spousal Maintenance, pp. 9-14)

After reaching this erroneous conclusion, the court went on to expound that the conclusion it felt it was compelled to reach was wrong. The trial court stated in part:

“The trial court is troubled by this outcome. The evidence in this case established that Petitioner is a healthy, intelligent, and active member of society. While the couple agreed that Petitioner would principally be a homemaker while the children were in the home, the Court cannot find that they agreed that Petitioner would stay out of the workforce once the children were grown. Now, the children are grown. Petitioner is relatively young at 52 and had no plans for herself for the future except to continue to teach a fitness class 2-3 hours per week, volunteer as she chooses, be available to her adult children (presumably as they choose), and to travel and play tennis.

Yet, she could reactivate her professional teaching license with less than a year's coursework and return to teaching. And she appears to be a lifelong teacher. She chose a profession and has been a teacher throughout her life right up to the present; first as a professional teacher, and then, for over 20 years, as a coach in two sports to schoolchildren, and as a fitness instructor for over 20 years. She also homeschooled her own child for several years prior to the child's attendance at a private high school.

It is one thing for society to value the contributions of a homemaker during the marriage. But there is something wrong analytically and from a policy standpoint in allowing former homemaker status to trump a dispassionate analysis of a person's future earning capacity at the time of dissolution. First, to conclude that homemaker status makes a workplace re-entry difficult if not impossible, as the *Nardini* court suggests, cavalierly disregards the individual

nature of every case. Moreover, it appears to approve the false logic that since the homemaker logged years as a homemaker, she should be compensated by being allowed to continue not to work outside the home. That logic presumes, erroneously, that the marital bargain was unfair. The law does not inquire into the fairness of any couple's marital bargain. That is part of what it means to have a no fault dissolution statute. Moreover, in this particular case, while the Petitioner homemaker's contribution was significant during the marriage, it was balanced by the significant contribution of Respondent as a non-homemaker who worked extremely hard and extremely successfully to provide a secure and affluent lifestyle for the family. Given that both contributed during the marriage, both spouses should be on equal footing at the time of the dissolution with neither being able to claim that their contributions during the marriage absolve them of adult autonomy and responsibility following the dissolution. *Finally, from a policy standpoint, it does not seem sound to this Court to effectively conclude that 30 years of homemaking is such a disabling condition that a former homemaker is rendered incapable of functioning as a productive member of the paid workforce for the remainder of her life - a full 13 years earlier than normal retirement age for members of the workforce.*

.....The Court is also struck by another potential unfairness. District Courts frequently require that a 20 year old father with a criminal record, no high school diploma, and no work experience work to support his children.....Yet here, the Court is expected as a matter of law to excuse Petitioner from working for her own support for the rest of her life because she would prefer not to - even though she is healthy, relatively young, college-educated person with a respectable résumé of teaching and relevant volunteer experience....the societal message is troubling...

This Court believe that it is time to scrutinize the societal assumptions underlying *Nardini, Carrick*, and its progeny. But that is not the job of this Court. *If this Court were permitted to impute income to Petitioner, it would. Specifically, it would conclude that the record supports a spousal maintenance program in which Petitioner is permitted to continue to limit her work until the youngest child graduates from high school in June, 2010; then Petitioner would be expected to engage in rehabilitative education to restore her teaching credentials, which would take no more than an additional year of no increased earnings. Then, beginning in June 2011, the Court would impute income to Petitioner of \$36,000 per year, the starting income for a special education teacher in this community. At that*

time, the Court would reduce spousal maintenance accordingly, still considering, of course, all of the statutory factors relevant to amount.”

Amended Findings of Fact, and Memorandum of Law Regarding Spousal Maintenance, pp. 14-18, (A-116 - 120) (Emphasis added, footnotes omitted)

The trial Court accordingly erroneously failed to consider Respondent’s ability to contribute to her future needs, and set permanent spousal maintenance at \$17,175 per month until the minor child’s emancipation, thereafter reducing to \$16,740 a month, commencing in June of 2010. Findings of Fact 12 aa, 12bb. (A-71) Although Appellant earns a comfortable living (Exh. 56; T. Vol. II at 126-27, 129-30)³ and while the Court felt that even at this level of maintenance Respondent would essentially cash flow assuming a budget of \$12,286 per month, with Appellant having surplus cash flow assuming a budget of \$11,986 per month, based on the current level of maintenance, it is a struggle for Appellant, who lives paycheck to paycheck.⁴

Appellant raises one property issue in this appeal. During the marriage the parties

³ In fact, due to a changing market, Appellant was forced to renegotiate his contract in 2008, resulting in 13% pay cut; working within an industry sensitive to ratings and with increasingly difficult demands, with no guarantee of continued employment at the end of the current contract period. (T. Vol. II. at 126-129) Appellant also does at least two charity appearances each month, sometimes more as Appellant never turns down a request to appear at any diabetes or Colitis fundraisers, as he suffers from both diabetes and Crohn’s disease. (T. Vol. II. at 140-41)

⁴ The court, pursuant to an earlier stipulated agreement of the parties could not and did not take into consideration that Appellant has over \$4,000 per month of additional expenses attendant with the Florida real properties awarded to him, above the budget found by the court. (Exh. 62; T. Vol. II. at 139)

purchased property in Florida, which included a golf member known as the Grandezza Membership, which was valued by the Court at \$17,000. Unrebutted testimony was introduced at trial, however, that the membership might not be sold for over twenty years and it was also possible Appellant would not receive \$17,000 for this membership. There are currently 83 people on a waiting list above Appellant to sell their memberships; the person who is currently 4th on the list to sell his membership was 7th on the list six years ago. Further, based on the economy and number of members trying to sell their memberships, it is speculative to conclude Appellant would or could ever receive \$17,000 for this membership. (T. Vol. II. at 151-52). Appellant proposed that the parties each be awarded one half of the sale proceeds if and when the membership sold, or if the membership did not sell during the parties lifetime, that their interests flow to the parties' children. The Court however, awarded the property to Appellant at a value of \$17,000.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT IT WAS PRECLUDED FROM CONSIDERING WIFE'S FUTURE EARNING CAPACITY IN DETERMINING AN APPROPRIATE AMOUNT OF SPOUSAL MAINTENANCE.

A. Standard of Review

Where, as here, the district court's decision is an interpretation of law, rather than an exercise of discretion, a *de novo* standard of review applies. American Nat. General Ins. Co. v. Solum, 641 N.W.2d 891, 895 (Minn. 2002). Fact determinations are reviewed under a clear-error standard, but the court of appeals independently reviews the application of law

to a given set of facts. Minn. R. Civ. P. 52.01; A.J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc., 260 N.W.2d 579, 582 (Minn.1977). In reviewing mixed questions of law and fact, the appellate court will correct “erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.” Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn.1997).

B. **The Trial Court is required to consider the maintenance recipient’s ability to contribute to their own support in determining the need for spousal maintenance.**

Spousal maintenance awards are governed by section 518.552 of the Minnesota Statutes. Pursuant to subdivision 1 of that section, a court:

..... may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:

(a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or

(b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Minn. Stat. § 518.552, subd. 1 (2009).

If the Court concludes that an award of spousal maintenance is appropriate, it is to consider the factors set forth in Minn.Stat. § 518.552 (2009), to determine the amount and

duration of the award. These factors include:

(1) the financial resources of the party seeking maintenance and the party's *ability to meet needs independently*; (2) the time necessary to acquire *education or training* to enable the party seeking maintenance to find employment and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting; (3) the age and physical and emotional condition of the spouse seeking maintenance; and (4) the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.

Minn.Stat. § 518.552, subd. 2 (emphasis added).

No single factor is dispositive and each case must be determined on its own facts. Erlandson v. Erlandson, 318 N.W.2d 36, 39 (Minn. 1982). The essential consideration is the financial needs of the spouse requesting maintenance and the spouse's ability to meet those needs balanced against the financial condition of the spouse paying the maintenance. *Id.* at 39-40.

That the law requires consideration of the future earning capacity of a spouse seeking maintenance in analyzing a spouses future ability to meet their needs, and that the bench and bar regularly consider this factor in deciding a spouse's ability to meet their future needs requires little exposition. Over the past decade dozens of cases before this court have appeared in which the future earning capacity of a spouse who either was not employed outside of the home during the marriage or was only employed part time during the marriage was considered and found to have been an appropriate factor in determining future entitlement to spousal maintenance. The concept is so accepted that none of said cases have

been deemed as establishing new law and accordingly the majority of cases dealing with this issue are unpublished.⁵

It is readily apparent that consideration of a spouse's future ability to contribute towards their self support following a period of retraining, in determining future need for spousal maintenance is a consideration mandated by statute, and followed by this Court.

C. The Trial Court Erred as a Matter of Law by Conflating Two Distinct Concepts: Imputation of Income and Determination of a Party's Ability to Meet Needs Independently.

In the present case, the district court in a lengthy discourse in its memorandum appropriately expressed its concern over the outcome it felt compelled to reach. Findings of Fact, and Memorandum of Law Regarding Spousal Maintenance ("Memo") at 14-18. This outcome, however, was based on the Court's erroneous conclusion that an intractable conflict exists in the case law between the line of decisions following Carrick v. Carrick, 560 N.W.2d 407 (Minn. App. 1997), and the line of cases following Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005). A close reading of the

⁵ . See generally, Perkovich v. Segan, 2011 WL 382622, p.6 (Minn. App. Feb. 8, 2011); Basting v. Makepeace, 2010 WL 3304297, p. 4 (Minn. App. Aug. 24, 2010); Stalcar v. Stalcar, 2010 WL 346256, p.3 (Minn. App. Feb. 2, 2010); Daley v. Daley, 2009 WL 66623, p.5 (Minn. App. Jan. 13, 2009); Olson v. Olson, 2008 WL 763245, p.3 (Minn. App. March 25, 2008); Wickhem v. Wickhem, 2007 WL 2993819, p.4 (Minn. App. Oct. 16, 2007), *review denied* (Minn. Dec. 16, 2007); Grimes v. Grimes, 2007 WL 1599095, p.4 (Minn. App. June 5, 2007); Readio v. Readio, 2003 WL 21058540, p.3 (Minn. App. May 13, 2003); Mielke v. Mielke, 2001 WL 683060, p.3 (Minn. App. June 19, 2001). (A -183 - 235)

cases demonstrates that reaching such a disturbing outcome is neither necessary nor warranted. Imputation of income and consideration of earning capacity are separate concepts. As the courts have held, considering a spouse's future earning capacity to determine their ability to meet their needs independently does not constitute a finding of bad faith or improperly impute income to the spouse seeking maintenance.

A distinction must be drawn in the present case between imputation of income (which is not allowed) and a statutorily-based determination of ability to be self-supporting (which is required). The former is based on, and necessarily implies, a finding of bad faith. It is also a determination of what a party should be earning *at present*, or should have earned *in the past*. The latter involves no finding of bad faith, and involves a determination of what a party's earning capacity will likely be *in the future*. A finding that a party has the ability to meet needs independently based on a determination of future earning capacity is not an imputation that she should be earning that income at present. As this Court has recently noted, it is proper for a district court to consider the earning capacity of a party seeking maintenance to determine the extent to which she could meet her needs independently and that such a determination is not an imputation of income. Stalcar v. Stalcar, 2010 WL 346256, pg 3 (Minn. App. Feb. 2, 2010) (A-223) (citing Schallinger, 699 N.W.2d at 22 and Minn. Stat. § 518.552, subd. 2(a)). The district court thus erred in concluding that it was prohibited as a matter of law from considering Respondent's future earning capacity and

ability to become self-supporting.⁶

The primary focus of the district court's concern in this case was Carrick v. Carrick, 560 N.W.2d 407 (Minn.App.1997). In Carrick, the district court found that the wife was intentionally underemployed, completely capable of working full time, had above-average intelligence, and offered no justification or medical reason for not being employed full-time. Id. at 410. Although it recognized her role as a homemaker, the court found that the wife's participation in the parties' landscaping business, together with her "transferable skills," made her capable of obtaining full-time employment at a considerably higher wage. Id. Because the district court found that the wife continued to work part-time and did not seek to change her employment situation in the time between the parties separation and the subsequent dissolution of their marriage, it determined that she had "acted in bad faith by remaining intentionally underemployed' and imputed her income to be her earning capacity." Id.

The Court of Appeals reversed, holding that:

As a matter of law ... a court may not find bad faith underemployment where ... a homemaker has continued to work the same part-time hours at the time of dissolution as she did during the marriage, has been employed in the same type of position as she was during the marriage, and where there is no evidence of any intent to reduce income for the purposes of obtaining maintenance.

⁶The district court suggested that husband argued that the court was required to impute income to wife, thus leading to the supposed conflict between two lines of case law. In reality, husband was not arguing for an imputation of income, simply an assessment of wife's ability to be self-supporting.

Id. This emphatically does not mean that the court found consideration of the statutory factors improper. See, id. at 410, 411 n.1 (noting that when determining the amount and duration of maintenance, a court “should consider” the factors in section 518.552, subd. 2 and that one of these factors is the recipient’s “ability to meet needs independently”).

It is important to note the limited scope of the Carrick holding. Although it is improper to find bad faith and impute income to a homemaker at the time of the dissolution, this does not mean that it is inappropriate to make an assessment of that homemaker’s future ability to independently meet her needs for the purpose of determining the amount and duration of maintenance. In fact, such an assessment is both logically-necessary and statutorily-required prior to setting maintenance.

Determination of earning capacity is separate from imputation of income – one can do the former without doing the latter, and vice-versa. The court in Carrick implicitly recognized the distinction between determining earning capacity and imputing such earning capacity as income. Id. at 410 (noting that to do the latter requires a finding of bad faith). After noting that the district court had determined wife’s earning capacity – finding, *inter alia*, that wife had above average intelligence, and no medical restrictions precluding full-time work, and had transferrable skills that would serve her well in a variety of employment opportunities – the Carrick court stated:

While the court's findings may constitute a *proper assessment of the likelihood that appellant will be successful in rehabilitating after the dissolution*, the court's assessment is punitive when applied retroactively to a traditional homemaker whose work history is of a part-time nature.

There is no authority for finding bad faith underemployment *at the time of an initial award of maintenance* merely because a potential obligee *has not yet* rehabilitated when the record indicates the obligee has continued in the same employment and there is no evidence of an intent to reduce income for the purposes of obtaining maintenance.

Id. at 410-11 (emphasis added). Thus, the court recognized the appropriateness of assessing a party's ability to be self-supporting in the *future* – a process of which determination of earning capacity is an integral aspect – while prohibiting the *retroactive* imputation of income to that party. Id.

Carrick is thus distinguishable from the present case. What Appellant sought from the district court, per statute, was a consideration of Respondent's earning capacity and concomitant determination of the likelihood of her future ability to meet her needs independently; he did *not* ask the court to apply this assessment retroactively or impute such earning capacity to her as income. Neither did Appellant ask the Court to make a finding of bad faith underemployment at the time of the initial award of maintenance; rather, he asked the Court to determine Respondent's capacity for self-support and, in conjunction with any maintenance award, provide her a reasonable time to achieve that level of self support, at which time her need for maintenance would be reduced.

Maurer v. Maurer, 607 N.W.2d 176 (Minn. App. 2000), *rev'd on other grounds*, 623 N.W.2d 604 (Minn. 2001), another case analyzed by the trial court, is similarly distinguishable. There, the district court, in setting spousal maintenance, had imputed income to the wife because it found that although capable of working full-time, she only

worked 75 percent of full time. 607 N.W.2d at 180. This Court, citing Carrick, reversed. *Id.* at 182.

In Maurer, as in Carrick, when the district court set an award of maintenance for the wife, it imputed to her income *at the time of the dissolution*. *Id.* at 180. To do so, necessarily implied a finding by the court that the wife was underemployed in bad faith. *Id.* As a matter of law, such a finding was inappropriate. *Id.* at 180-81 (citing Carrick, 560 N.W.2d at 410).

The district court in Maurer thus erred by considering what the wife was capable of earning if she worked full-time and imputing that income to her at the time of the dissolution. 607 N.W.2d at 180-81. Importantly, it was not the determination of earning capacity that was problematic, it was the retroactive application thereof. “[A]lthough the trial court’s findings may be an appropriate assessment of the likelihood that the petitioner would become self-sufficient *after the dissolution*, applying the findings *retroactively* [in such a case] is punitive.” *Id.* at 181 (citing Carrick) (emphasis added). Once again, this is *not* what Appellant has asked the Court to do in this case.

On point, and far more illuminating, are Schallinger and its progeny. In Schallinger, this Court affirmed a trial court’s finding denying the wife’s request for an award of spousal maintenance, where the wife only worked part-time. *Id.* at 22. The district court found that the wife was “in good physical and emotional health, and has no health conditions that prevent her from seeking full-time employment.” *Id.* It further found that the wife “had the ability, skills, experience, and earning capacity to provide adequate income to meet her necessary monthly expenses...[her] choice not to seek full-time employment does not mean

that she lacks the ability to be self-supporting.” Id. The evidence presented at trial indicated that if the wife worked an additional two days per week, she would be able to meet her monthly expenses without spousal maintenance. Id. Therefore, the court found that she did not require an award of such maintenance. Id.

The wife in Schallinger then appealed, citing Carrick and arguing that the district court had improperly imputed income to her, necessitating a finding of bad faith. *Id.* This Court disagreed, affirming the decision and stating:

The district court did not "impute" any specific amount of income. The district court's findings simply reflect appellant's general ability to be self supporting. While "imputation of income" is a method of establishing self support, it is not the only way a district court can find that a party has the ability to meet needs independently.

Id. Thus, unlike Carrick, which held it impermissible, under certain conditions, to find bad faith unemployment on the part of a homemaker and retroactively impute income to that person, Schallinger affirmed the ability of the district court to follow the statutory guidelines and make an assessment of a party's earning capacity for the purpose of determining that person's ability to be self supporting going forward. *Compare Carrick*, 560 N.W.2d at 410-11, *with Schallinger*, 699 N.W.2d at 22.

This Court also addressed this issue in Rauenhorst v. Rauenhorst, 724 N.W.2d 541 (Minn. App. 2006), once again finding that calculation of earning capacity to determine the extent to which a party seeking maintenance could meet needs independently was not an improper imputation of income. In Rauenhorst, the court issued a judgment based on the

agreement of the parties and resolving all issues except spousal maintenance. Id. at 543. After the parties made final submissions, the court issued an amended order finding the wife capable of supporting herself and denying spousal maintenance. Id. In considering the requisite statutory factors, the court found that the wife was working part-time for \$10 per hour although a vocational evaluator had found her capable of earning between \$11 and \$18 per hour. Id. at 544. The court further noted that wife was a college graduate with no physical impairments and no need for retraining. Id. Accordingly, the court found it “reasonable to impute to [wife] \$35,000 annual gross income.” Id. The wife then appealed, arguing that the court erred by imputing income to her without finding bad faith. Id.

This Court affirmed, stating that the “essence” of the district court’s decision was its finding that she had the ability to meet needs independently per Minn. Stat. § 518.522, subd. 2(a). Id. (citing Schallinger). This Court recognized that the district court’s “imputation” language was “poorly chosen,” but concluded that the district court was actually finding that wife was capable of full-time employment, a finding that was “merely explanatory of the essential finding that [wife] is able to meet her needs independently by [such] employment.” Id. at 545. Because the court would have had no need nor reason to make a finding of bad faith absent the “imputation” language, its failure to make such a finding was irrelevant. Id.

In Readio v. Readio, 2003 WL 21058540 (Minn. App. May 13, 2003) (A-219) this Court was presented with a situation that is quite similar to the present case. There, the parties divorced after almost 25 years of marriage. *Id.* at p.1. They had two children, ages 16 and 17. *Id.* The husband was an electrical engineer, earning \$112,000 annually, and the

wife was an attorney, making \$25,000 per year. *Id.* The husband's income had allowed the wife to work part-time and "be readily available to meet the children's needs." *Id.*

At the time of the divorce, the district court concluded that the wife's income was insufficient to provide self-support. *Id.* She sought permanent maintenance, however, considering, among other things, the fact that her skills as a lawyer had not become outmoded, the court awarded her temporary maintenance for 48 months. *Id.* The wife then appealed, arguing that the court had erred by finding that she was deliberately underemployed and imputing additional income to her. *Id.* at p.2.

This Court affirmed, noting that when addressing spousal maintenance, the court is to consider the factors in section 518.552, including the ability of a party to meet needs independently. *Id.* (citing Minn. Stat. § 518.552, subd. 2(a)). The Court further found that the district court properly:

calculated appellant's ability to meet her expenses based on the monthly child support and the spousal maintenance. After considering these factors, along with the children's ages and appellant's testimony regarding her law practice, the court determined that appellant will become self-supporting in a few years. The court *did not impute income* to appellant, and did not find bad faith underemployment. Appellant *mistakenly views the court's findings as to her present income and her potential future income as equating to a finding that she is, at this time, voluntarily and in bad faith, underemployed.* The district court made no such finding, nor do we. Appellant and respondent worked out a rational agreement between two working professionals to provide for the needs of their children. It is not unreasonable for the district court to assume that as the children become young adults, appellant will become able to continue her present career and work more hours.

Id. at p.3 (emphasis added).

Wickhem v. Wickhem, 2007 WL 2993819 (Minn. App. Oct. 16, 2007), rev. denied (Minn. Dec. 19, 2007)(A-230) is likewise informative. In Wickhem, when awarding maintenance, the district court found that wife was able-bodied and capable of employment, could renew her nursing license by taking a two-month refresher course, had the ability to become partially self-supporting since she could enter the workforce as a nurse earning between \$41,000 and \$44,000 per year. Id. at p.4. Wife appealed, arguing that the district court had improperly imputed income to her. Id. This Court affirmed, citing Schallinger and holding that the district court's finding that wife was capable of becoming employed and meeting some of her needs was not an improper imputation of income. Id.

In the present case, the district court stated that it believed the assumptions underlying Nardini, 414 N.W.2d 184 (Minn. 1987), Carrick, and their progeny should be scrutinized, but that it was not the place of the district court to do so. Thus, based on Carrick and Maurer, the court erroneously concluded that it was prohibited as a matter of law from considering Wife's earning capacity or determining the extent to which she could meet her needs independently. Memo at 13-14 (A - 115-16). In so concluding, the court discussed what it saw as a contradiction between the Carrick line of cases and Schallinger and noted that it was unable to "elegantly reconcile the analytical differences" between the two. Memo at 14 -18. (A - 116-20) The district court thus declined to "impute income" to Wife, erroneously conflating an assessment of ability to meet needs independently with such an imputation. Memo at 14 -18. (A - 116 - 20)

In its Memo, the trial court specifically noted its desire to consider Wife's earning

capacity in determining her ability to independently meet her needs, as well as its conclusion that it was proscribed as a matter of law from doing so.

If this Court were permitted to impute income⁷ to [Wife], it would. Specifically, it would conclude that the record supports a spousal maintenance program in which [Wife] is permitted to continue to limit her work until the youngest child graduates from high school in June 2010; then [Wife] would be expected to engage in rehabilitative education to restore her teaching credentials, which would take no more than an additional year of no increased earnings. Then, beginning in June 2011, the Court would impute income⁸ to [Wife] of \$36,000.00 per year, the starting income for a special education teacher in this community. At that time, the Court would reduce spousal maintenance accordingly still considering, of course, all of the statutory factors relevant to amount.

Memo at 17-18. (A - 119 - 20) The trial court's analysis is, of course, precisely what is required by statute and its conclusion expressly permitted as noted in Schallinger and Rauenhorst. Accordingly, the district court erred in conflating imputation of income with a determination of a party's ability to meet needs independently.

D. The Trial Court Erred as a Matter of Law by Failing to Consider Wife's Ability to Meet Her Needs Independently When it Set the Amount and Duration of Maintenance.

As discussed above, the ability of a party to meet his or her needs is a factor in setting

⁷As discussed earlier, the court would not be imputing income to Wife; rather, it would be considering her earning capacity to determine her ability to independently meet her needs.

⁸Once again, this is not an imputation of income, but a finding that Wife is capable of full-time employment and thus able to be at least partially self-supporting. See Rauenhorst, 724 N.W.2d at 545 (finding by trial court that it was "reasonable to impute" \$35,000 annual income to wife if she worked full-time, was not truly an imputation of income, actually a "finding that appellant is capable of full-time employment").

an award of spousal maintenance. Whether that ability is immediate or whether a period of rehabilitation is necessary affects the appropriateness of a maintenance award. Here, Appellant acknowledges that Respondent is entitled to an award of spousal maintenance at this time pursuant to Minn. Stat. §518.552, subd.1, as her current income is insufficient to meet her monthly expenses. The amount she seeks in perpetuity, however, is not supported under either the Minnesota statute or the relevant judicial decisions.

Respondent has the ability to contribute to her own self-support through appropriate full-time employment. She has a bachelor's degree in special education which she received following the parties' marriage and she taught for approximately four years prior to the birth of the parties' older daughter. She has not maintained that she lacks an interest in teaching, or that teaching currently is not an appropriate vocation for her, and the part time activities she has participated in throughout the marriage clearly indicate her continued enjoyment of teaching.

Respondent had worked as a special education teacher for 5 years after the parties married, but had not worked full-time since shortly before the birth of their first child in 1985. Memo at 2. She asserted that there was never an expectation that she would return to work. Id. at 3. Appellant in contrast, asserted that he expected Respondent to return to work once the children were out of the house and that this expectation had been discussed by the parties. Id. The Court stated that it could not find that the parties had agreed that Respondent would continue to stay out of the workforce after their children were grown. Id.

at 15. Appellate courts defer to a district court's determination of witness credibility. Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999).

The Court found that Respondent could reactivate her teaching license with 125 "clock hours" of continuing education. Memo at 3. The Court further found that these hours could be satisfied with eight semester hours of classroom education, which could be completed in less than one year. Id. Experts for both parties testified that there is a demand for special education teachers and that Respondent could reasonably be expected to obtain a full-time special education teaching position after reactivating her license. Id. The Court found that a reasonable starting salary for Respondent would be approximately \$36,000 per year. Id. Although Appellant believes that this number in actuality is on the low side of Respondent's earning capacity, he has deferred to the Court's discretion as to this finding and has not raised this as an issue on appeal.

Currently Respondent works at LifeTime Fitness, earning a purported net monthly income of \$286. She also teaches fitness classes and for the past several years has volunteered at West Lutheran High School where she coaches cheerleading, dance, and girls tennis. She has also choreographed a dance fashion show and helped develop fitness programs for the physical education department.

As the district court noted, "[Respondent] is a healthy, intelligent, and active member of society." Memo at 14. (A - 116) Furthermore, although the parties agreed that [Respondent] would principally be a homemaker while the children were in the home, they did not agree that [Respondent] would continue to stay out of the workforce after the children

were grown. Memo at 15. (A - 117) As the Court recognized, [Respondent] “could reactivate her professional teaching license with less than a year’s course work and return to teaching.” Memo at 15. In such a situation, it is perfectly acceptable for the Court to make a assessment of Respondent’s earning capacity when determining the amount and duration of maintenance she is to receive. Indeed, such an assessment is required by statute. Minn. Stat. § 518.552, subd. 2.

In that Respondent has not noticed review of the factual findings and conclusions of the trial court that Respondent has the ability to retrain and return to the work force by June, 2011, earning \$36,000 per year, these are the facts which must be assumed by this Court in considering the legal issue submitted.

The district court’s failure to consider Respondent’s ability to meet her needs independently, in reliance Carrick and Maurer, is reversible error. In both of these cases, the court explicitly prohibited the *retroactive* imputation of income to a homemaker at the time of dissolution, while simultaneously recognizing that determining earning capacity for the purpose assessing *future* ability to be self-supporting is appropriate. See Carrick, 560 N.W.2d at 410-11; Maurer, 607 N.W.2d at 180-81.

Assessing Respondent’s future ability to contribute to her own self support, as required by statute and this Court, see Schallinger, Rauenhorst and Radio, supra, is precisely what Appellant asked the district court to do in this case, and was a factor which should have been applied by the trial court⁹ Because the district court misapplied the law by

⁹ And what the court articulated it wanted to do if it did not feel it was precluded from doing as a result of its’ misinterpretation of the law. Memo at pp. 17-18 (A- 119-20)

finding that its ability to make such an assessment was proscribed by Carrick and Maurer, its determination regarding the amount and duration of maintenance must be reverse and remanded for reduction in Appellant's monthly spousal maintenance obligation in the amount of \$3,000.

II. THE COURT ERRED AND ABUSED ITS DISCRETION IN ITS TREATMENT OF THE GRANDEZZA GOLF MEMBERSHIP, ASCRIBING A VALUE TO THE MEMBERSHIP WHEN SUCH VALUATION WAS SPECULATIVE.

The parties owned an equity membership to Grandezza Country Club in Florida, which they purchased during the marriage. The record indicated that the membership is currently listed for sale for \$17,000. The record also revealed that based on the current economy such memberships are almost impossible to sell, and the current ascribed value is less than half of what was paid for the membership only a few years prior to the commencement of the proceedings. Unrebutted trial testimony established that there are currently 83 people on the waiting list to sell equity memberships ahead of Appellant. Testimony also established that the person who is currently 4th on the list to sell his membership was 7th on the same list six years ago. Accordingly, Appellant testified as to his expectancy that it might be twenty years or more before he could sell the membership.

Because of this, Appellant proposed awarding each party half of the sale proceeds when and if sold; with the parties' interest going to their children if unsold at the time of their death. Despite the uncertainty of the value, or whether this value would ever be realized during the parties' lifetimes, the court awarded the Grandezza membership to Respondent and valued it at \$17,000, the cost of a new non-equity membership to the country club.

A district court has broad discretion in its division of marital property. Antone v. Antone, 645 N.W.2d 96, 100 (Minn. 2002). Likewise, the appellate court will set aside a district court's valuation of an asset only if the valuation is clearly erroneous. Burwell v. Burwell, 438 N.W.2d 433, 435 (Minn. App. 1989).

Here, the court clearly erred in awarding the Grandezza membership to Appellant at a value of \$17,000. Because of the extensive waiting list of memberships for sale, the parties' membership is essentially an unmarketable asset with little or no resale value. The court based its valuation on the cost of a new non-equity membership, but there is no evidence that parties' equity membership could be sold for the same amount or that Appellant could "jump the line" to sell the membership in the foreseeable future, regardless of price.

Because the parties' Grandezza membership is unlikely to be able to be sold for many years, if ever, it is not susceptible to valuation – any value ascribed to the membership by the court is simply too speculative. As such, an analogy may be drawn to a pension, the value of which is not readily ascertainable by the court. *See McGowan v. McGowan*, 532 N.W.2d 258, 260 (Minn. App.1995) (stating that "when ... evidence of the present pension value is too speculative, the trial court may reserve jurisdiction for a distribution when the pension payments begin"). Accordingly, rather than valuing the membership, the trial court should have provided that the proceeds of the membership should be divided equally if and when it is sold. This would require a slight modification of the remaining property settlement, to equalize each parties' property award.

It is respectfully submitted that the courts of this state need to recognize the economic realities of the depressed real estate market, especially in Florida. When as is here, it is mere speculation and conjecture as to when the Grandezza membership can be sold, the lower court erred and abused its discretion in valuing an asset not readily subject to value or liquidity, and awarding it to one party, rather than dividing the future value of the asset if and when sold.

CONCLUSION

The Court erred as a matter of law in failing to consider Respondent's ability to earn \$36,000 per year as of June of 2011, in setting the amount of Appellant's future spousal maintenance award. The Court also erred in valuing the Grandezza club membership; awarding it to Appellant at a set value, when its value was uncertain and its future sale doubtful. The matter should be remanded with instructions to reduce Appellant's monthly spousal maintenance award to \$13,740 effective June 1, 2011, to award each party one half of the Grandezza club proceeds upon sale, and to adjust the property settlement accordingly.

Dated: April 7, 2011

KATZ, MANKA, TEPLINSKY,
GRAVES & SOBOL, LTD.

By 
Brian L. Sobol, #140673
Corwin R. Kruse, #334418
225 South Sixth Street
Suite 4150
Minneapolis, Minnesota 55402
Telephone: (612) 333-1671
Attorneys for Appellant

STATE OF MINNESOTA
IN COURT OF APPEALS

Lisa Jean Passolt,

Respondent,

and

**CERTIFICATE OF
BRIEF LENGTH**

Jeffrey Robert Passolt,

Case No. A10-1151

Appellant.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,516 words, including footnotes and quotes, and the font size is 13 point. The brief was prepared using Corel Word Perfect.

KATZ, MANKA, TEPLINSKY,
GRAVES & SOBOL, LTD.

Date: April 7, 2011

By: 

Brian L. Sobol, #140673
Corwin R. Kruse, #334418
Attorneys for Respondent
225 South Sixth Street
Suite 4150
Minneapolis, MN 55402
Telephone: 612-333-1671