

File No. A10-1151

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State of Minnesota  
**In Court of Appeals**

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In Re the Marriage of

Lisa Jean Passolt,

*Petitioner,*

*Respondent,*

and

Jeffrey Robert Passolt,

*Appellant.*

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**APPELLANT'S REPLY BRIEF AND APPENDIX**

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

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## ARGUMENT

### **I. THIS COURT REVIEWS QUESTIONS OF LAW RELATED TO SPOUSAL MAINTENANCE DE NOVO**

Respondent erroneously argues that the standard of review in this matter is abuse of discretion, not *de novo* review. While generally the standard of review in spousal maintenance cases is whether the trial court abused its discretion by improperly applying the law or making facts unsupported by the evidence, this Court reviews questions of law related to spousal maintenance *de novo*. Melius v. Melius, 765 N.W.2d 411, 414 (Minn. App. 2009), citing, Van de Loo v. Van de Loo, 346 N.W. 2d 173,175 (Minn. App. 1984) (The appellate courts need not, however, defer to the trial court in reviewing questions of law).

The sole issue submitted for review as to the issue of spousal maintenance is a legal one - whether the trial court in considering an initial determination of maintenance must, as a matter of law, consider an obligee's future income in determining her future need for maintenance. The scope of review as to this legal issue is *de novo*, not abuse of discretion.

### **II. THE SAND ANALYSIS IS INAPPOSITE TO THE PRESENT CASE BECAUSE SAND DOES NOT ADDRESS THE PROPRIETY OF AN INITIAL MAINTENANCE AWARD.**

In the present case, the District Court considered Respondent's ability to return to teaching and expressed a desire to consider her earning capacity in setting the amount of maintenance. Respondent argues that considering such earning capacity is inappropriate because doing so would improperly impose on her a duty to rehabilitate. In support of this contention, she cites Sand v. Sand, 379 N.W.2d 119, 124 (Minn. App. 1985), *review denied*

(Minn. Jan. 31, 1986) (stating that a party awarded permanent maintenance has no duty to increase her earning power). Sand, however, is readily distinguishable; it is a *modification* case and thus not applicable to an initial award of maintenance.

In Sand, the parties entered into a stipulation under which the wife was to be awarded permanent maintenance of \$1,800 per month for ten years and reducing to \$1,500 per month after that. Id. at 120. Shortly after the reduction took effect, the wife sought a modification so as to eliminate the reduction or, in the alternative, increase maintenance, alleging “considerably changed circumstances.” Id. The District Court denied the motion, stating that “although the maintenance award was permanent, [Wife] had an obligation to retrain or rehabilitate herself so as to increase her earning power[.]” Id. at 121. This Court found this to be in error, noting that because the maintenance award was permanent, the wife had no obligation to rehabilitate so as to relieve the husband of his obligation.<sup>1</sup> Id. at 124. In so doing, the court distinguished between “rehabilitative” maintenance, which contemplates future self-sufficiency, and permanent maintenance, which does not. Id.

In Sand, it is clear, that the court was considering whether a duty to rehabilitate exists *after* an award of permanent maintenance. The decision does not serve to prohibit a court from considering, in the process of determining maintenance, a party’s ability to “becom[e] fully or partially self-supporting.” Minn. Stat. § 518.552, subd. 2(b) (2009). In fact, such

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<sup>1</sup>The court nonetheless affirmed because the wife had not met her burden of proving a substantial change in circumstances. Sand, 379 N.W.2d at 124. To the extent not necessary to the holding, the court’s discussion regarding the wife’s lack of a duty to rehabilitate is dicta.

a consideration is required by the statute.

Furthermore, Respondent's argument is premised on a false dichotomy; one is either fully self-supporting or one is not self-supporting at all. *See* Resp. Brief at 12 (distinguishing being capable of self support from being incapable of self support). The statute, however, explicitly points to a third option: being partially self-supporting. Minn. Stat. § 518.552, subd. 2(b). This is precisely what the District Court in the instant matter wanted to conclude in this case. The District Court noted that Respondent could restore her teaching credentials with minimal effort and return to the classroom with an earning capacity of \$36,000 per year. Appellant's Appendix ("A.A.") at 49. Although this would not be enough for Respondent to be fully self-supporting, it would allow her to be partially self-supporting. Accordingly, the District Court expressed a desire to consider this future earning capacity, allow Respondent time to engage in rehabilitative education, and then reduce her maintenance to correspond to her ability to partially support herself.<sup>2</sup> A.A. at 64.

In essence, the spousal maintenance award desired by the District Court would have been an accepted step reduction in maintenance: the first step during the period of time Respondent reactivated her license and a second step once she was able to return to work after June 2011. To expect Respondent to rehabilitate prior to the step reduction is perfectly in line with Minnesota law. *See Sand*, 379 N.W.2d at 124 (stating that "rehabilitative

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<sup>2</sup>As previously argued, although the court wished to consider Respondent's earning capacity, it erroneously believed that it was prohibited as a matter of law from doing so.

maintenance contemplates future self sufficiency of the spouse receiving the award after a period of retraining”).

Mans v. Mans, 1996 WL 495054 (Minn. App. Sept. 3, 1996),<sup>3</sup> an unpublished case, is also instructive. In Mans, the parties divorced after a 14-year marriage. Id. at \*1. The court awarded the wife permanent maintenance, however the amount declined over time based on her ability to provide additional self-support.<sup>4</sup> Id. at \*2. The wife appealed, arguing that the court erred by granting the step reductions. This court disagreed and affirmed, noting that the trial court has broad discretion in determining the amount and duration of maintenance, including the use of step reductions. Id. at \*4. The court further stated that “[g]iven appellant’s good health, reduced child care responsibilities in the future, and potential employability, the trial court was justified in using step reductions as ‘an appropriate means of providing employment incentives.’” Id. at \*5, quoting Frederiksen v. Frederiksen, 368 N.W.2d 769, 776 (Minn. App.1985). The District Court’s preferred course of action was likewise appropriate in this case.

**III. RESPONDENT’S POSITION MUST BE REJECTED BECAUSE IT VIOLATES THE CANONS OF STATUTORY CONSTRUCTION.**

To adopt Respondent’s logic would violate the canons of statutory construction. If

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<sup>3</sup>Unpublished opinion attached hereto in compliance with Minn. Stat. § 480A.08(3).

<sup>4</sup>The wife was awarded \$600 per month until the parties’ youngest children reached the age of attending school full time, \$500 per month for the next two years, \$400 per month for two years after that, and \$300 per month from then on. Mans, 1996 WL 495054 at \*2.

possible, laws are to be construed to give effect to all their provisions. Minn. Stat. § 645.16 (2009). “[W]henver possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412, 419 (Minn. 2005) (citation omitted).

The maintenance statute provides, in part:

**Amount; duration.** The maintenance order shall be in amounts and for periods of time, either temporary or permanent, as the court deems just, without regard to marital misconduct, and after considering all relevant factors including

...

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting.

Minn. Stat. § 518.552, subd. 2. Respondent’s position necessarily implies that whenever a party is incapable of full self-support, permanent maintenance is to be awarded with no consideration of the ability of the party to become partially self-supporting in the future. Such a reading would render superfluous the portion of the maintenance statute that *requires* the court to consider the time necessary to acquire education or training and find employment which would allow that party to become partially self-supporting.

The statute thus envisions a scenario in which the maintenance award comprises two parts: a temporary component based on the time necessary for the party to become partially self-supporting and earning capacity of that party as well as a permanent component based on the remaining shortfall. This is exactly the approach that the District Court wished to take in this case. Respondent’s argument is thus without merit.

**IV. RESPONDENT ATTEMPTS TO REFRAME THE ISSUE BY MISSTATING BOTH APPELLANT'S POSITION AND MINNESOTA LAW.**

After failing to seriously address Appellant's arguments, Respondent attempts to reframe the issue by misstating Appellant's position. Respondent notes that there are no cases requiring a court to impute income to a recipient of permanent spousal maintenance and then disingenuously suggests that this is what Appellant has argued. This is, of course, not what has been argued by Appellant, and highlights Respondent's failure to grasp or address in any meaningful way in her brief the current state of the law. Her argument, essentially is circular. She refuses to accept or grasp the difference between imputation and the separate concept of consideration of future ability to contribute to self support after retraining, and accordingly, the difference between *Carrick* and *Schallinger*.

It is also submitted that there are no cases framed in the manner Respondent attempts to reframe the issue (ie: no cases where ".....the trial court has refused to impute income to a permanent spousal maintenance recipient, and this Court reversed because imputation was required"), as she is perhaps the first to convince a lower Court that future earning capacity and ability to contribute to one's self support is imputation. It is not; rather, it is a consideration mandated by Minn. Stat. §518.552, subd. 2.

The fact that Appellant has found multiple cases in which future earning capacity has been considered again illustrates that this is not an imputation issue, but rather a proper consideration of a spouses future ability to contribute to their reasonable needs after retraining in determining an appropriate amount of future maintenance, and why, as a matter

of practice, trial courts routinely craft maintenance awards with decreasing amounts over time based on the expectation that the maintenance recipient will retrain and reenter the job market.

Respondent's assertions notwithstanding, it is adoption of her position that would amount to a change in existing law. Courts regularly consider earning capacity and ability to meet needs independently. The unpublished cases cited by Respondent are readily distinguishable, reflecting either modification motions, not initial determinations of maintenance, or reflect cases where after considering the spouses ability to retrain, the court found the lack of ability to contribute to future self support. In fact, one of the unpublished cases cited by Respondent specifically notes that the district court considered the wife's ability to meet her needs independently and awarded permanent maintenance after finding that she lacked the financial resources to do so. Iskierka v. Iskierka, 2011 WL 781050, \*3 (Minn. App. March 8, 2011). The foregoing supports Appellant's true argument, that the Court is required to consider the future ability to contribute to self support.

Moreover, Respondent's argument implies that rehabilitation is an all-or-nothing proposition; if you cannot fully rehabilitate, you have no duty to partially rehabilitate. Once again, Respondent's position is at odds with the statutory requirement that the court consider whether a party can become partially self-supporting.

The facts of this matter are unique, and compel the conclusion that the lower court erred as a matter of law. Amazingly, in this case the trial court correctly considered Respondent's ability to retrain to contribute to her future support, made detailed findings

that Respondent in fact had the ability with little retraining to reenter the job market and contribute \$3,000 a month towards her reasonable needs, found that it wanted to apply a step reduction in maintenance, but then erroneously concluded that notwithstanding these findings it was precluded as a matter of law in making this adjustment; erroneously accepting Respondent's misinterpretation that this was imputation, which it is not.

### CONCLUSION

Respondent in her brief fails to address the primary legal argument raised in Appellant's brief - that this is not an imputation case, but rather, the Court must, in determining future need for maintenance consider an obligee's future ability to become partially self supporting. Minnesota law requires this consideration. The lower court misapplied the law in holding that it was precluded from considering Respondents' ability to become partially self supporting in only a year, in determining an appropriate level of future spousal maintenance.

Respectfully submitted,

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