

NO. A06-0799

State of Minnesota
In Court of Appeals

In Re the Marriage of:

CATHERINE M. KAMPF,

Respondent,

vs.

MARK N. KAMPF,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Whether the trial court abused its wide discretion by making an allocation for savings and retirement in a spousal maintenance award where general savings and retirement investment have been integral parts of the marital standard of living.

The trial court held: In the negative.

- II. Whether the trial court abused its wide discretion by calculating the tax that Respondent would have to pay on the spousal maintenance award based on federal and state withholding tax tables instead of itemized deductions.

The trial court held: In the negative.

- III. Whether the trial court erred in failing to adjust Appellant's proposed spousal maintenance obligation to take into effect Respondent's increased mortgage payment.

The trial court held: In the negative.

- IV. Whether the trial court erred in failing to require Appellant to maintain life insurance as security for his permanent spousal maintenance obligation.

The trial court held: In the negative.

STATEMENT OF THE CASE¹

This case was tried before the Honorable Robert F. Carolan, Dakota County District Court Judge, on August 3, 4, 8, 9, and 10, 2005. The original Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree was entered on December 13, 2005. (App. Apx. 001-029.)

Appellant filed a Notice of Motion and Motion for Amended Findings and Judgment and/or New Trial accompanied by a Memorandum of Law on January 13, 2006. (App. Apx. 030-085.) In Appellant's motion documents, Appellant requested that the trial court issue an amended order which would divide a retirement account as of the valuation date (March 3, 2005), reduce the amount of spousal maintenance awarded to

¹The following are explanations of the abbreviations used in Respondent's Brief:

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|--------------------------------------|---|
| "App. Apx." | Appellant's Appendix with numbers referring to the numbered pages in the Appendix. |
| "Resp. Apx." | Respondent's Appendix with numbers referring to the numbered pages in the Appendix. |
| "Tr." | Trial Transcript. |
| "Tr. Exh." | Trial Exhibit. |
| "Judgment and Decree" | Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree was entered December 13, 2005. |
| "Amended Judgment and Decree" | Findings of Fact, Conclusions of Law, and Order to Amend Judgment and Decree entered February 23, 2006. |

Respondent, value the parties' checking accounts based on the parties' self-generated Quicken records as opposed to the actual bank statements, amend its findings relating to Respondent's dissipation claim and adjust the attorneys fees and costs award accordingly, and defer the commencement date of when Appellant was to begin making payment towards Respondent's attorneys fees and costs.

That same day Respondent filed her own Notice of Motion and Motion for Amended Findings and/or New Trial accompanied by a Memorandum of Law. (Resp. Apx. 1-13.) In Respondent's motion documents, she requested that the trial court issue an amended order which would require Appellant to maintain life insurance as security for his spousal maintenance obligation and require Appellant to name Respondent as beneficiary of Appellant's Kraus-Anderson Insurance Agency Deferred Commission Plan -- an asset whose valuation and division was reserved until payout of the benefit.

Each party filed memorandums in opposition to the other party's requests. In Respondent's Memorandum of Law in Opposition to Respondent's Motion for Amended Findings and Judgment and/or New Trial, Respondent requested that the amount of spousal maintenance awarded to Respondent be adjusted to reflect that Respondent's mortgage payment had increased due to an error that the mortgage company had made when initially calculating Respondent's mortgage payment. (Resp. Apx. 14-31.)

These motions were heard by the Honorable Robert F. Carolan on January 27, 2006. On February 23, 2006, the trial court issued a Findings of Fact, Conclusions of Law, and Order to Amend Judgment and Decree. (App. Apx. 086-097.) The trial court

denied each of the parties' respective motions with the exception of dividing a retirement account as of March 3, 2005 and allowing a different payment schedule for the attorneys fees and costs that Appellant was to pay on Respondent's behalf. (Id.)

On April 25, 2006, Appellant served and filed a Notice of Appeal to the Court of Appeals appealing the trial court's award of spousal maintenance awarded to Respondent. On May 5, 2006, Respondent served and filed a Notice of Review appealing the trial court's failure to require Appellant to maintain life insurance as security for his permanent spousal maintenance obligation. (Resp. Apx. 32-33.)

STATEMENT OF THE FACTS

The parties were married on September 17, 1976. (Tr. 203: 9-10.) At the time of the marriage, Respondent was twenty (20) years old. (Tr. 203: 11-12.) The parties are the parents of two children – both of whom are adults: Melissa, who at the time of trial was twenty-three (23) years old; and Matthew, who at the time of trial was twenty (20) years old and a college student. (Tr. 204: 10-25; 205: 1.)

The parties separated in January 2004. Respondent commenced the dissolution action in July 2004. (Tr. 203: 15-17.) Following a five (5) day trial before the Honorable Robert F. Carolan, the parties were divorced on December 13, 2005. (App. Apx. 001.)

Appellant's Employment, Income and Monthly Living Expenses

Throughout the majority of the parties' marriage and continuing through this post-decree matter, Appellant has been employed by Kraus-Anderson Insurance Agency. (Finding of Fact 32 of Judgment and Decree - App. Apx. 006.) At the time of trial,

Appellant was employed as a Vice-President. (Id.) For the years 2002 – 2003, Appellant’s gross income from Kraus-Anderson as well as from self-employment was as follows:

2004	\$646,013.00
2003	\$593,274.00
2002	\$729,333.00

(Finding of Fact 32 of Judgment and Decree – App. Apx. 006.) For these three (3) years, Appellant’s average gross annual income was \$656,207.00 or \$54,683.92 per month. (Id.)

Appellant did not submit any evidence as to his monthly living expenses at the time of trial. (Finding of Fact 33 of Judgment and Decree – App. Apx. 006-007.) Instead, he conceded that his income was sufficient to meet his monthly living expenses even if he were required to pay to Respondent \$18,000.00 per month in spousal maintenance. (Id.)

Respondent’s Employment, Income and Monthly Living Expenses

Throughout the parties’ twenty-nine (29) year marriage, Respondent was primarily a stay-at-home mom whose responsibilities included providing for the daily care of the children, taking care of the home and paying the parties’ bills. (Tr. 205: 20-23.) Respondent has not worked outside of the home since 1983 which was shortly after the birth of the parties’ eldest child, Melissa. (Tr. 205: 5-19.)

Respondent has a general equivalency diploma. (Tr. 205: 24-25.) She has not taken any college classes or participated in any specialized training. (Tr. 206: 1-4.)

Prior to the parties' marriage, Respondent was employed in various positions as a bank teller, receptionist and secretary. (Finding of Fact 18 of Judgment and Decree – App. Apx. 003.) For the years 1972 through 1983 when Respondent stopped working altogether, Respondent's average yearly income was approximately \$6,209.00. (Id.; Tr. Exh. 8.) The most money that Respondent ever earned in one year was in 1981 when Respondent earned a gross income of \$12,493.00. (Id.)

During the dissolution proceeding, Respondent participated in an employment assessment. The employment assessor found that Respondent displayed low scores with respect to immediate memory and manual dexterity, has poor visual motor speed and eye-hand coordination, a weakness in arithmetic, low scores on the ability to reorder and repeat series of letters and numbers, and a low average to average ability to perform basic office and secretarial skills. (Tr. Exh. 30; Finding of Fact 19 of Judgment and Decree – App. Apx. 003-004.)

Based on the evidence presented, the trial court determined that Respondent has a limited ability to work full-time in certain employment positions, such as receptionist or secretary. (Finding of Fact 20 of Judgment and Decree – App. Apx. 004.) However, the trial court also recognized that prior to beginning any employment, Respondent will have to participate in remedial computer software training. (Id.) The trial court found that once Respondent has completed the training, she will earn a gross income of at least \$14,872 per year. (Finding of Fact 21 of Judgment and Decree – App. Apx. 004.)

At trial, Respondent submitted an exhibit claiming that her monthly living expenses were approximately \$12,677 per month. (Tr. Exh. 18.) Attached to the detailed summary of monthly living expenses were 155 pages of supporting documentation (receipts, invoices, monthly bank and credit card statements) with highlighting which indicated how Respondent calculated her monthly living expenses. (Id.) Respondent testified extensively, on direct and cross examination, regarding her monthly living expenses as well as the parties' marital standard of living. (Tr. 247-282; 454-475; 762-771.)

Assets and Standard of Living

During the parties' marriage, the parties were able to accumulate over \$1.5 million in assets, including \$833,915 in savings, retirement and investments. (Tr. Exh. 29; Appendix C of Judgment and Decree – App. Apx. 027.)

Based on the evidence presented, the trial court specifically found that:

“[t]he parties enjoyed an upper-class lifestyle during the marriage. The marital home sold for over \$800,000. Both parties purchased replacement residences priced between \$485,000 [Respondent] to \$1,038,000 [Appellant]. The parties employed third parties to clean and perform maintenance in and around the home. The parties dined out several times a week. The parties vacationed and traveled both as a couple and as a family, sometimes combining these trips with the respondent's [Appellant's] business trips. The parties belonged to a country club during most of the marriage. The parties drive late model luxury vehicles and have provided their children with vehicles.”

(Finding of Fact 22 of Judgment and Decree – App. Apx. 004.)

Award of Spousal Maintenance

While both parties agreed that (1) Respondent did not have the ability to be self-supporting and (2) that it was appropriate that Respondent receive an award of permanent spousal maintenance, the parties disagreed on the amount of spousal maintenance that should be awarded to Respondent.

Respondent, through her expert, submitted a cash flow analysis which indicated that Respondent would need \$18,000 per month to meet her monthly living expenses and to pay taxes on the spousal maintenance that she received at the rate of approximately 29.1% (\$61,709 tax liability/ \$212,000 taxable income). (Tr. Exh. 7 – App. Apx. 101-108.) Respondent's expert's analysis was based on Respondent itemizing deductions on her tax returns.

Appellant, on the other hand, submitted a budget for Respondent totaling approximately \$6,583 per month. (Tr. Exh. 48.) Appellant, through his expert, submitted a cash flow analysis which indicated that Respondent would need only \$8,000 per month in spousal maintenance to meet her monthly living expenses as well as pay taxes on the spousal maintenance that Respondent received after factoring in Respondent's additional annual gross income of \$8,697 per year. (Tr. Exh. 34 – App. Apx. 109-110.) Appellant's expert opined that the tax rate was approximately 25.7% (\$19,666 tax liability/ \$76,437 taxable income). (Id.) Similar to Respondent's expert, Appellant's expert's analysis was also based on Respondent itemizing deductions on her tax returns.

However, each of the parties' experts' assumptions regarding the itemized deductions were not the same.

After "exhaustive review and consideration of the testimony and exhibits submitted in support of both parties' arguments with respect to [Respondent's] monthly living expenses," the trial court found that Respondent's reasonable monthly living expenses were approximately \$9,005 per month. (Finding of Fact 31 of Judgment and Decree – App. Apx. 006; Appendix B of Judgment and Decree – App. Apx. 026.) The trial court included in Respondent's living expenses \$360 per month for savings and \$333 per month in retirement savings. (Appendix B of Judgment and Decree – App. Apx. 026.) The trial court supported its findings to include savings and retirement categories in Respondent's budget with the following finding:

"Savings and retirement planning have been an integral part of the marital standard of living."

(Finding of Fact 26 of Judgment and Decree – App. Apx. 005.)

Ultimately based on the factors delineated in Minn. Stat. § 518.552, the trial court ordered the Appellant to pay Respondent \$14,240 per month in spousal maintenance so that Respondent could meet her reasonable living expenses of \$9,005 per month and pay the taxes on the spousal maintenance that she receives. (Conclusion of Law 2 of Judgment and Decree – App. Apx. 16.) The trial court also ordered that once Respondent obtains remedial computer training necessary to obtain satisfactory employment allowing her to earn \$14,872 per year, Appellant's spousal maintenance obligation will be reduced to \$13,000 per month. (Id.)

STANDARD OF REVIEW

The standard of review from a trial court's determination of a spousal maintenance award is whether the trial court abused its "wide discretion." Erlandson v. Erlandson, 318 N.W.2d 36, 38 (Minn. 1982). The Appellate Court will not find that there has been an abuse of discretion unless the trial court has made "a clearly erroneous conclusion that is against logic and the facts on the record." Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984). When determining whether findings are "clearly erroneous", the appellate court views the record in the light most favorable to the trial court's findings, and due regard is given to the trial court's opportunity to judge the credibility of any witnesses. Vangsness v. Vangsness, 607 N.W.2d 468, 472 (Minn. Ct. App. 2000). Notwithstanding, a trial court's finding of fact is clearly erroneous and should be reversed if, upon review of the evidence, a reviewing court is left with the definite and firm conviction that a mistake has been made. Vangsness, 607 N.W.2d at 472.

LEGAL ARGUMENT

I. **THE TRIAL COURT DID NOT ABUSE ITS WIDE DISCRETION BY MAKING AN ALLOCATION FOR SAVINGS AND RETIREMENT IN A SPOUSAL MAINTENANCE AWARD WHERE GENERAL SAVINGS AND RETIREMENT INVESTMENT HAVE BEEN INTEGRAL PARTS OF THE MARITAL STANDARD OF LIVING.**

Spousal maintenance is an "award ... of payments from the future income or earnings of one spouse for the support and maintenance of the other." Minn. Stat. §518.54, subd. 3 (2005). The trial court may grant maintenance if the spouse seeking maintenance demonstrates that he or she:

- “(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 ...”

Minn. Stat. § 518.552, subd. 1 (2005) (bold added for emphasis.) In determining the amount and duration of the maintenance, the trial court must consider all relevant factors including but not limited to “the standard of living established during the marriage.” Minn. Stat. § 518.552, subd. 2 (2005).

While examining the parties’ standard of living is not the only factor the trial court must look at in determining the appropriate amount of spousal maintenance, it is an important factor. (See Chamberlain v. Chamberlain, 615 N.W.2d 405 (Minn. Ct.App. 2000) *review denied* (October 20, 2000) for a discussion regarding the “standard of living” factor.)

Although a trial court should base a spousal maintenance award on needs, there is no requirement that the amount of maintenance be limited to bare necessities. Bollenbach v. Bollenbach, 175 N.W.2d 148, 155 (Minn. 1970). A spousal maintenance award should be “large enough to permit the obligee to enjoy the station in life of the parties prior to the divorce, commensurate with the husband’s earning capacity and property holdings.” Bollenbach, 175 N.W.2d at 155. In the context of standard of living, “needs” are measured as much by an internal as by an external, objective standard. By the

way they live, through the things they value, the parties define their "needs." Rodeghier v. Rodeghier, No. C3-98-481, 1998 WL 727751 (Minn. Ct. App. Oct. 20, 1998). (This unpublished opinion is hereto attached in accordance with Minn. Stat. § 480A.08, subd. 3 (2005)). Lifestyle needs, as well as basic survival needs, are proper components of a maintenance award. Minn. Stat. § 518.552, subd. 2 (c) (standard of living is to be considered in maintenance award).

In Rodeghier, the Minnesota Court of Appeals held that since the accumulation of general savings was a shared value and an integral part of the parties' standard of living and because there is no issue as to the obligor's ability to pay maintenance that includes general savings, it was not clearly erroneous for the trial court to factor general savings into the obligee's standard of living needs. See Rosenberg v. Rosenberg, 379 N.W.2d 580, 586 (Minn. Ct. App. 1985) (holding spouse who enjoyed "an affluent lifestyle during her marriage, cannot now be forced to subsist at a survival level"), *review denied* (Minn. Feb. 19, 1986).

"Standard of living" is not limited to money actually spent on the homestead and for living expenses, but that it also includes all income earned and invested. Flor v. Flor, No. C3-94-858, 1994 WL 586945 (Minn. Ct. App. Oct. 25, 1994) (This unpublished opinion is hereto attached in accordance with Minn. Stat. § 480A.08, subd. 3 (2005)).

Here, the parties have made saving an integral part of their lifestyle. Respondent testified under cross-examination by Appellant's attorney regarding the parties' ability to accumulate savings. (Tr. 475: 5-10.) During the marriage, Appellant divided the direct

deposit of his pay checks and commission checks between his checking and various savings accounts. The parties had cash on hand to make big ticket purchases which allowed them to limit the acquisition of marital debt. (Tr. 475: 5-7.) If Appellant is not allowed a savings expense, she will not have any money set aside for medical, dental and chiropractic emergencies – expenses that she did not include anywhere else in her budget. (Tr. Exh. 18; Tr. 276; 21 -281:13.)

Appellant cites to Sefkow v. Sefkow, 427 N.W.2d 203, 216 (Minn. 1988) as a basis for why the Appellate Court should disallow savings in an obligee's budget. The facts of Sefkow are distinguishable from the present case.

In Sefkow, the Appellate Court was dealing with the issue of retroactive maintenance for a two-year period of time. While the Appellate Court did disallow a savings category, there was no explanation as to why it was disallowed. Unlike the present case, there was no discussion of whether the parties had made saving an integral part of their life or whether there was a question of ability to pay on the part of the obligor.

In the present case, throughout the parties' lengthy marriage, they allocated a portion of their income towards a retirement savings account. As of the March 3, 2005 valuation date, Appellant's Schwab 401(k) account had a balance of \$416,227. (Tr. Exh. 29.) Respondent testified under cross-examination by Appellant's attorney regarding the parties' ability to accumulate investments and retirement all while living within their means. (Tr. 475: 11-16.) More specifically, Appellant established a 401(K) account

through Schwab which as of March 3, 2005 was valued at \$416,227. (Tr. Exh. 29.) For at least the past few years, Appellant contributed the maximum before-tax amount to this 401(K). As reflected on Appellant's 2004 W-2, Appellant contributed \$13,000 (the maximum before-tax amount allowed by law) to his 401(K) account. Based on a review of Appellant's expert's cash flow analysis, it appears that Appellant intends on continuing to contribute the maximum before-tax amount allowed by law which in 2005 was \$14,000. (Tr. Exh. 34: line item 3 – App. Apx. 109-110.)

Consistent with the marital standard of living established during the parties' marriage, Respondent submitted a budget to the trial court with a \$333.00 per month expenditure for retirement savings which is the maximum before-tax amount she could contribute to an IRA.

While Respondent received 50% of the Schwab 401(K) account as of March 3, 2005 (\$208,113.50) plus any earnings or losses after March 3, 2005, this asset will be inadequate to maintain Respondent's marital standard of living throughout Respondent's retirement. As such, it was appropriate that the trial court allowed a retirement savings expense in Respondent's budget.

Appellant cites to Kemp v. Kemp, 608 N.W.2d 203 (Minn. Ct. App. 1988) as a basis for why the Appellate Court should disallow a retirement savings category in obligee's budget. Kemp deals with a margin account loan which the Appellate Court considered temporary in the nature of an investment, not a retirement account.

It is unclear whether this type of investment had been a part of the Kemps' marital standard of living. Finally, in Kemp, unlike the present case, there was a question as to the obligor's ability to pay.

Under the circumstances of this case, it was not an abuse of the trial court's wide discretion to include a \$360.00 per month savings category and a \$333.00 per month retirement savings category in Respondent's budget.

II. THE TRIAL COURT DID NOT ABUSE ITS WIDE DISCRETION BY CALCULATING THE TAX THAT RESPONDENT WOULD HAVE TO PAY ON THE SPOUSAL MAINTENANCE AWARD BASED ON FEDERAL AND STATE WITHHOLDING TAX TABLES INSTEAD OF ITEMIZED DEDUCTIONS.

A. The trial court correctly calculated the tax effect of the spousal maintenance award.

At trial, Respondent submitted a detailed budget with supporting documentation which verified that her monthly living expenses were approximately \$12,677 per month. (Tr. Exh. 18.) Respondent, through her expert, submitted a cash flow analysis which indicated that Respondent would need \$18,000 per month to meet her monthly living expenses as well as pay taxes at the rate of approximately 29.1% (\$61,709 tax liability/\$212,000 taxable income) on the spousal maintenance that Respondent received. (Tr. Exh. 7 – App. Apx. 101-108.)

Appellant, on the other hand, submitted a budget for Respondent totaling approximately \$6,583 per month. (Tr. Exh. 48.) Appellant, through his expert, submitted a cash flow analysis which indicated that Respondent would need \$8,000 per month in spousal maintenance to meet her monthly living expenses as well as pay taxes on the

spousal maintenance that Respondent received as well as additional yearly income of \$8,697 per year. (Tr. Exh. 34 – App. Apx. 109-110.) Appellant’s expert opined that the tax rate was approximately 25.7% (\$19,666 tax liability/ \$76,437 taxable income). (Id.)

While both parties’ experts’ cash flow analyses were based on Respondent itemizing her tax returns, the assumptions that each expert made about the itemizations were not consistent with one another. While the mortgage interest and real estate deductions were approximately the same, other assumptions (filing status, etc.) were not the same.

Ultimately, the trial court rejected both parties’ proposed budgets for Respondent and both parties’ cash flow analyses. Determining that Respondent’s reasonable monthly living expenses were \$9,005 per month, the trial court found that Respondent would need \$14,240 per month to meet her monthly living expenses as well as pay taxes at the rate of approximately 36.7% ($\$14,240 - 9,005 / \$14,240$) on the spousal maintenance that Respondent received. (Finding of Fact 31 of Judgment and Decree – App. Apx. 006; Conclusion of Law 2 of Judgment and Decree – App. Apx. 016-017.)

Appellant argues in his brief that the trial court erred by failing to calculate the taxes that Respondent would pay on the spousal maintenance award based on the fact that Respondent itemizes deductions on her tax returns. Appellant cites Kemp v. Kemp, 608 N.W.2d 916, 922 (Minn. Ct. App. 2000) as standing for the principle that concluding that a finding of net income that fails to take into account itemized deductions where the party itemizes deductions is clearly erroneous. Appellant’s reliance in Kemp is misplaced. In

Kemp, one of the problems was that the court had “rejected, without comment,” the obligor’s calculation of net income for the obligee which was based on itemized deductions. Kemp, 608 N.W.2d at 922.

In the present case, the trial court did explain why they rejected Appellant’s calculation of the tax Respondent would have to pay on the spousal maintenance that she received.

While it is correct that the trial court did not include any findings regarding how it calculated the tax consequences of the spousal maintenance award in its original Judgment and Decree, when the trial court issued the Order amending the Judgment and Decree, the trial court included two (2) findings which explained how the trial court calculated the tax consequences and why the court did not take into account itemized deductions when calculating the tax consequences. More specifically, Finding of Fact 6 reads as follows:

“6. The court considered federal and state income tax withholding when determining the appropriate amount of spousal maintenance.” (Amended Judgment and Decree – App. Apx. 087)

and Conclusion of Law 2 reads as follows:

“2. Calculating the petitioner’s [Respondent’s] net income assuming a head of household filing status, adult dependants and itemized deductions is speculative as these assumptions change from year to year.” (Amended Judgment and Decree – App. Apx. 088).

The language in the trial court’s Conclusion of Law 2 of the Amended Judgment and Decree recognizes the problems that would result if the trial court were to use the itemized deductions and filing status (head of household with one adult dependant)

proposed by Appellant. More specifically, adopting Appellant's approach does the following:

1. It assumes that Respondent will always file with a tax status of head of household and claim one of the parties' adult children as a dependant. Respondent cannot claim the parties' daughter, Melissa as a dependant because she is 23 years old and married. While Respondent may be able to claim the parties' son, Matthew as a dependant, she will only be able to claim him as a dependant for a short time as Matthew is 20 years old and has a child of his own.
2. It assumes that Respondent's mortgage interest deductions will always remain the same. Respondent's mortgage is a traditional mortgage with a fixed rate. At the beginning of the loan period, the majority of her payment goes towards interest with a small portion of the payment going towards principal. As the loan period progresses, more of her payment will go towards principal and less will go towards interest. In other words, each year she has the loan, she will pay less and less interest and in turn each year will have a smaller mortgage interest deduction.

The trial court's reliance on federal and state income tax withholding is consistent with Minn. Stat. §518.551, subd. 5(b) which has a notation that when calculating federal

and state income tax, “[s]tandard [d]eductions apply – use of tax tables recommended.”
Minn. Stat. §518.551, subd. 5(b) (2005).

The trial court’s decision to use federal and state income tax withholding instead of itemized deductions as its basis for its calculation of the tax Respondent would have to pay on the amount of spousal maintenance awarded to her was not an abuse of its wide discretion which was clearly erroneous and “against logic and the facts on the record.”

B. If the Appellate Court deems it appropriate to use Appellant’s itemized deduction assumptions, then the trial court should adjust Appellant’s proposed spousal maintenance obligation to take into effect Respondent’s increased mortgage payment.

At the time of trial, Respondent’s mortgage payment, including principal, interest, real estate taxes and insurance was approximately \$1,813.49 per month. Following the trial, Respondent was informed that that there was an escrow shortage in the amount of \$6,568.69 due to the mortgage company failing to amortize the mortgage correctly. (Resp. Apx. 27.) This was material evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial. Minn. R. Civ. P. 59.01. Respondent paid the escrow shortage; nevertheless due to the error in the original amortization schedule her monthly mortgage payment increased to \$2,113.09 per month commencing November 1, 2005. (Resp. Apx. 28.)

This increases Respondent’s monthly expenses from \$9,005 to approximately \$9,305. In the event the Appellate Court deems it appropriate to use Appellant’s assumptions based on a budget of \$9,305 per month and with no employment income, Respondent would need approximately \$12,146 per month to meet her living expenses.

(Resp. Apx. 29.) When Respondent begins working and she receiving income in the amount of \$14,872 per year, she will need spousal maintenance in the amount of \$11,066 per month to meet her living expenses. (Resp. Apx. 29.)

III. THE TRIAL COURT ERRED IN FAILING TO REQUIRE APPELLANT TO MAINTAIN LIFE INSURANCE AS SECURITY FOR HIS PERMANENT SPOUSAL MAINTENANCE OBLIGATION.

The district court “has discretion to determine whether the circumstances justifying an award of maintenance also justify securing it with life insurance.” Laumann v. Laumann, 400 N.W.2d 355, 360 (Minn. Ct. App. 1987) *review denied* (Minn. Nov. 24, 1987).

In the present case, the trial court found that “Petitioner [Respondent] has not made a showing that there are **exceptional circumstances** which merit or justify having the Respondent [Appellant] provide life insurance to cover his spousal maintenance obligation in the event of his death.” (Bold for emphasis.) (Finding of Fact 30 of Judgment and Decree - App. Apx. 6).

It appears that in making its decision, the trial court relied on the “exceptional case” test which was identified in Arundel v. Arundel, 281 N.W.2d 663, 667 (Minn. Ct. App. 1979) and O’Brien v. O’Brien, 343 N.W.2d 850, 853 (Minn. 1984) both of these cases were issued prior to the 1985 amendments to the spousal maintenance statute which no longer require the court to apply the “exceptional case” test to determine whether an award of permanent maintenance is necessary. See Chamberlain v. Chamberlain, 615 N.W.2d 405, 410-411 (Minn. Ct. App. 2000) (discussing the pre- and post-1985 tests)

review denied (Minn. Oct. 25, 2000). Likewise, it is no longer appropriate to apply the “exceptional case” test to determine whether an award of maintenance should be secured by life insurance. As identified in Maldar v. Maldar, 480 N.W.2d 677, 680 (Minn. Ct. App. 1992) review denied (Minn. Mar. 19, 1992), the appropriate factors to consider in determining whether an award of maintenance should be secured by life insurance include obligee’s employment prospects, age, education, and vocational experience.

In the present case, Respondent’s circumstances are as follows:

- The parties were married for almost 28 years before the dissolution was commenced.
- At the time of trial Respondent was 49 years old.
- Based on an analysis of the parties’ marital standard of living, the trial court determined that Respondent’s reasonable monthly living expenses are approximately \$9,005.00 per month.
- Respondent does not have any educational training beyond a general equivalency degree (GED).
- The trial court determined that while Respondent has the ability to work full-time in certain vocations such as receptionist and secretary, it is a limited ability. In addition, even before Respondent can pursue employment in these areas, it is necessary for Respondent to have remedial training with computer software prior to returning to work. Once Respondent does receive remedial training, the trial court determined that Respondent will earn gross income of \$14,872 per year or \$1,231.83 per month – an

amount grossly insufficient for Respondent to meet her monthly living expenses which are \$9,005 per month.

- Appellant has a term life insurance policy through his employer with a death benefit of \$250,000. (Tr. Exh. 52 – Resp. Apx. 40-41.) Appellant can maintain this policy through his employer at a minimal cost which is less than \$100.00 per year. (Id.)
- Appellant also has a whole life insurance policy through Great West Life with a death benefit of \$500,000. (Tr. Exh. 53 – Resp. Apx. 42.) Appellant can maintain this policy at a cost of approximately \$1,531.44 per year. (Id.) It may be possible for Appellant to convert this policy into a term policy with a lower premium.
- While Respondent received an equal division of the marital assets in the dissolution proceeding, the only liquid assets that Respondent received is the money from her checking account plus \$161,708 from the Edward Jones account. (Appendix C of Amended Judgment and Decree – App. Apx. 097.) Respondent will already have to spend down this money to pay the substantial taxes that she will owe on the \$96,000 in spousal maintenance that she received in 2005 because Respondent’s award of \$8,000 per month in temporary spousal maintenance was not grossed-up for taxes. (Tr. Exh. 11 - Order for Temporary Relief.)

Respondent’s circumstances clearly necessitate the requirement that Appellant maintain a life insurance policy in the amount of \$750,000.00 naming Respondent as the sole beneficiary thereon as security for Appellant’s spousal maintenance obligation. In the event that Appellant was not required to maintain life insurance and was to

predecease Respondent, the consequences would be financially devastating to Respondent.

CONCLUSION

Respondent respectfully requests the Appellate Court deny the relief requested in Appellant's Brief, or in the alternative, remand the matter to the trial court with the instruction that the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree be amended to increase Appellant's proposed spousal maintenance obligation to take into effect Respondent's increased mortgage payment. In either event, Respondent respectfully requests the Appellate Court to grant Respondent's request regarding requiring Appellant to maintain a life insurance policy in the amount of \$750,000.00 naming Respondent as the sole beneficiary thereon as security for Appellant's spousal maintenance obligation.

Respectfully submitted,

Dated: September 14, 2006

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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) (with amendments effective July 1, 2007).