

NO. A04-2387

State of Minnesota
In Court of Appeals

Stanley R. McConnell, Jr.,

Appellant,

vs.

Beverly J. McConnell,

Respondent.

**APPELLANT STANLEY MCCONNELL, JR.'S
BRIEF AND APPENDIX**

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TABLE OF CONTENTS

Table of Authorities.....	2
Legal Issues.....	4
Statement of the Case.....	5
Statement of Facts.....	6
Standard of Review.....	10
Argument.....	11
I. Whether a 55 year old Black man on social security disability since 1993 and who has: (1) juvenile onset diabetes; (2) both legs amputated just below the knee; (3) amputation of several fingers; (4) coronary artery disease with myocardial infarctions at ages 38 to 41 and another pre-attack in 2000; (5) a kidney transplant; (6) end stage renal disease; (7) high blood pressure; (8) congestive heart failure; (9) cataracts; and (10) complete dentures and who has tried but has not been able to earn any income since before being awarded social security disability is entitled to an award of permanent maintenance.....	11
A. The trial court made findings of fact not supported by the record.....	11
B. It was an abuse of discretion and contrary to law to not award Stanley McConnell, Jr. permanent maintenance in this case.....	14
Conclusion.....	21
Certification of Brief Length	22
Appendix and its Index.....	23

TABLE OF AUTHORITIES

Statutes

Minn.Stat. § 518.552, subd. 1.....	4, 15
Minn. Stat. §518.552, subd. 2.....	4, 15
Minn. Stat. §518.552, subd. 3.....	4, 15, 16, 17
42 U.S.C.A. §1382c(a).....	6

Cases

<u>Bolitho v. Bolitho</u> , 422 N.W.2d 29 (Minn. App. 1988).....	16, 17, 18, 19
<u>Cich v. Cich</u> , 428 N.W.2d 446 (Minn. App. 1988).....	4, 19
<u>Dobrin v. Dobrin</u> , 569 N.W.2d 199 (Minn.1997).....	10
<u>Doherty v. Doherty</u> , 388 N.W. 2d 1 (Minn. App. 1986).....	14, 19
<u>Duffey v. Duffey</u> , 416 N.W.2d 830 (Minn.App.1987), review denied (Minn. Feb. 24, 1988).....	15, 18, 19
<u>Lynch v. Lynch</u> , 411 N.W.2d 263 (Minn. App. 1987), review denied (October 30, 1987).....	19
<u>Maurer v. Maurer</u> , App.2000, 607 N.W.2d 176 (Minn. App. 2000), reversed on other grounds 623 N.W.2d 604 (Minn. 2001).....	16
<u>Musielewicz v. Musielewicz</u> , 400 N.W.2d 100 (Minn.App.1987), review denied (Minn. Mar. 25, 1987).....	4, 15, 20
<u>Nardini v. Nardini</u> , 414 N.W.2d 184 (Minn.1987).....	4, 19, 20
<u>Reif v. Reif</u> , 426 N.W.2d 227 (Minn. App. 1988).....	4, 17, 19, 20
<u>Rutten v. Rutten</u> , 347 N.W.2d 47 (Minn.1984).....	10

Safford v. Safford, 391 N.W.2d 548 (Minn. App. 1986).....19
Sefkow v. Sefkow, 427 N.W.2d 203 (Minn.1988).....10

LEGAL ISSUES

- I. **Is a 55 year old Black man on social security disability since 1993 and who has: (1) juvenile onset diabetes; (2) both legs amputated just below the knee; (3) amputation of several fingers; (4) coronary artery disease with myocardial infarctions at ages 38 to 41 and a pre-attack in 2000; (5) a kidney transplant; (6) end stage renal disease; (7) high blood pressure; (8) congestive heart failure; (9) cataracts; and (10) complete dentures and who has tried but has not been able to earn any income since he was awarded social security disability entitled to an award of permanent maintenance?**

The trial court held: In the negative.

Most apposite cases:

Cich v. Cich, 428 N.W.2d 446 (Minn. App. 1988).

Musielewicz v. Musielewicz, 400 N.W.2d 100 (Minn.App.1987), review denied (Minn. Mar. 25, 1987).

Nardini v. Nardini, 414 N.W.2d 184 (Minn.1987).

Reif v. Reif, 426 N.W.2d 227 (Minn. App. 1988).

Most apposite statutory provisions:

Minn.Stat. § 518.552, subd. 1

Minn. Stat. §518.552, subd. 2

Minn. Stat. §518.552, subd. 3

STATEMENT OF THE CASE

This case is venued in Hennepin County. The marital dissolution action was tried before the Honorable Jeannice Reding, Special Referee of District Court. One of the issues at trial was whether Stanley McConnell, Jr. was entitled to permanent maintenance. After hearing, the court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree dated April 20, 2004 ("Decree"). In it, the trial court ruled that Mr. McConnell was only entitled to four years of temporary maintenance. Mr. McConnell filed a timely motion for amended findings and new trial. After hearing, Referee Reding issued an Order dated October 18, 2004 ("Order") that amended the Decree. That Order amended certain findings of fact, but kept the four year temporary maintenance provision.

Mr. McConnell now appeals the award of temporary maintenance for four years, alleging that he is entitled to permanent maintenance. The only issues on appeal are the trial court's findings of fact relating to Stanley McConnell, Jr.'s medical status and his ability to work and whether he is entitled to permanent, as opposed to temporary, maintenance.

STATEMENT OF FACTS

Undisputed Facts

Mr. and Ms. McConnell were ages 55 and 42 respectively at the time of trial. (T. 53, 155; Decree, A. 14). This is a long-term 17 year marriage. The McConnells were married on September 26, 1987. (A. 14). They lived together for seven years prior to their marriage. (T. 172). Mr. McConnell worked 25 years for the Minneapolis Public Housing Authority as a Service Worker 2 doing various maintenance tasks as cutting the grass, snow plowing, and cleaning and making repairs to the apartments before numerous medical problems forced him to stop working. (T. 53, 175).

Mr. McConnell then applied for and was awarded social security disability starting in September 1993 for numerous medical problems. (Decree, A. 17; Trial Exhibit 52, A. 81; T. 12, 156). Social security disability is awarded under federal law on the basis of inability to engage in substantial gainful work which exists in the national economy. 42 U.S.C.A. § 1382c(a). (A. 49). Mr. McConnell's medical problems have become worse since he was first awarded social security disability in 1993. At the time of his social security disability determination, he only had one leg below the knee amputated and had had several heart attacks. (T. 157-158, 176-177).

Mr. McConnell's medical conditions include:

**both legs amputated just below the knee
amputations of several fingers
diabetes (juvenile onset)
coronary artery disease with myocardial infarctions at ages of 38 and 39
kidney transplant
end stage renal disease**

**high blood pressure
complete dentures
congestive heart failure
pre-heart attack event in 2000
cataracts**

(Decree A. 17; Trial Exhibit 51; T. 12, 65,155-158, 161, 169, 203).

Mr. McConnell takes ten daily medications for his heart, including anti-rejection for his kidney, blood pressure, insulin, blood thinner, and aspirin, among others. (T. 158).

His only source of income is his social security disability payment of \$1,225 per month, from which \$59 is deducted for supplemental Medicare. (Decree, A. 17; T. 160-161).

From 1993 until she filed for divorce, Ms. McConnell never told Mr. McConnell that she though he was able to work or asked him to apply for any work. (T. 160).

Mr. McConnell has balance problems, falls 3-4 times per year, and at his most fit, could walk ten blocks every other day, taking rest stops for 20 minutes or so every four blocks. (T. 64, 95, 166, 184).

The trial court found that Mr. McConnell's earning capacity has been permanently diminished by his medical condition and resulting physical disability. (Decree, A. 20). Since 1991, Mr. McConnell has earned virtually no income. (T. 12, 190; Trial Exhibits 55 – 61). For unidentified periods of time on unidentified dates, the parties jointly have tried selling Amway, real estate foreclosures, coupon books, jewelry sales, long distance phone cards, and running Snoodles restaurant with 50 other people, yet neither party has *ever* been able to earn *any* income from these joint attempts. (T. 54-61, 159-160, 180-

182). Mr. McConnell tried selling prepaid legal services five or six years ago by calling and talking to people, but he only made a total of \$448 to \$512. (T. 190). Mr. McConnell looked at a Wal-Mart job and saw that he physically could not do some of the duties. (T. 61, 206).

Evidence Supporting a Finding of Temporary Maintenance

For the approximately two years from 1996 to 1998 that the McConnells and about 50 other people owned the restaurant known as Snoodles, Mr. McConnell would be there from about 6:00 a.m. until around noon and would then hang around there for the rest of the afternoon (per Mr. McConnell) and until 3:00 to 4:00 (per Ms. McConnell) on Monday through Friday. (T. 60, 91, 127, 182). Ms. McConnell's sister, Evelyn Rhines, saw him greeting customers, sometimes serving food, working at the register, and getting groceries when the restaurant ran out of food. (T. 80-82). Ms. McConnell's brother, Anthony Rhines, testified that Mr. McConnell helped him unload coffee he delivered to the restaurant and that he saw Mr. McConnell walking around, hosting, greeting customers, putting stuff away, doing product orders, and bringing out meals the about six times he ate there. (T. 107-108, 114, 116).

Ms. McConnell's sister, Evelyn Rhines, is 33 years old with a B.S. degree in business administration from Mankato State and works as an independent contractor financial advisor. (T. 78). She has seen people with handicaps working at Wal-Mart, Target, and other stores. (T. 89-90). On one occasion, on an unidentified date, she saw Mr. McConnell with others washing cars at a fundraiser car wash. (T. 86, 102). She

thinks “there is tons of jobs available [for someone with Stan’s handicaps]. I mean you can go to Wal-Mart.” (T. 89). She has also has seen older people, people with limps, people in wheelchairs, and opportunity workshop people working at Wal-Mart, Target, Herberger’s, Marshall Field’s, kiosks at the mall, and Old Navy. (T. 89-90).

Mr. McConnell’s brother, Anthony Rhines, has a wife who has diabetes. (T. 111). Mr. Rhines believes that “jobs might be available to handicapped.” (T. 113). He has seen plenty of handicapped people that have jobs working as a greeter or cashier in stores like Target and Wal-Mart. (T. 113). A number of years ago, Mr. Rhines saw Mr. McConnell pick up and carry his then three or four year old nephew. (T. 109).

Ms. McConnell testified her husband’s physical limitations do not prevent him from exercising in the same way she does. (T. 142). Mr. McConnell has done yard work that he could do, sometimes mowing and shoveling and with another person blew out a sink trip and did some work on his plumbing at home. (T. 62-63). He does a little bit and then sits down and rests. (T. 166).

When asked what his hobbies are, Mr. McConnell said that he would like to try golfing if he could do it and that he was going to talk to somebody about golf. (T. 219).

STANDARD OF REVIEW

Appellate courts review a trial court's maintenance award under an abuse of discretion standard. Dobrin v. Dobrin, 569 N.W.2d 199, 202 (Minn.1997). A court abuses discretion regarding maintenance if the findings of fact are unsupported by the record or if the court improperly applies the law. Id. n. 3 (citing Sefkow v. Sefkow, 427 N.W. 2d 203, 210 (Minn.1988)). An abuse of discretion occurs if the district court resolves the matter in a manner that is "against logic and the facts on record." Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn.1984).

ARGUMENT

I. A 55 year old Black man on social security disability since 1993 and who has: (1) juvenile onset diabetes; (2) both legs amputated at just below the knee; (3) amputation of several fingers; (4) coronary artery disease with myocardial infarctions at ages 38 -41 and a pre-heart attack in 2000; (5) a kidney transplant; (6) end stage renal disease; (7) high blood pressure; (8) cataracts; (9) complete dentures; and (10) congestive heart failure and who has tried but has not been able to earn any income since he was awarded social security disability is entitled to an award of permanent maintenance.

A. The trial court made findings of fact not supported by the record.

The trial court made a number of findings of fact that are not supported by the record.

1. The trial court erroneously made as a finding of fact that past home based schemes such as Amway and Snoodles with his wife that did not make any money proves for certain that Mr. McConnell can become fully self supporting and work full time.

(Decree, A. 19). Ms. McConnell never once expressed the opinion that her husband could work until she filed for divorce and did not want to have to pay maintenance. Even then, she only produced her brother and sister as witnesses to give that opinion. In response to Mr. McConnell's motion for a new trial and amended findings the trial court stated that its "determination that Respondent can work is not conjectural; it is based on evidence in the record regarding tasks and work he has done in the last several years.

(Order, A. 37). The trial court stated Mr. McConnell's home based schemes with his wife such as Amway and long distance phone card sales show "that he is capable of working." (Order, A. 38). In Paragraph 17 of its October 18, 2004 Order, the trial court

states that based upon Respondent's home based schemes with his wife and the two year ownership of Snoodles with 50 other people, Mr. McConnell could work. (Order, A. 38).

In fact, except for the Snoodles restaurant and even that was six to eight years before trial, there was no evidence of any recent activities, nor was there any evidence of ability to do these activities for any length of time. The facts of record do not and cannot support a finding that for certain Mr. McConnell is capable of working full time and supporting himself.

The trial court speculated, but made it as a finding of fact, based upon this past activity that produced no income that Mr. McConnell "could work at employment such as a greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant." (Order, A. 38). In fact, there was no evidence of: (1) any actual job openings for these jobs at any employer; (2) the physical requirements of these jobs; and (3) whether Mr. McConnell could actually physically do any of these jobs with his myriad of significant permanent medical conditions. The only testimony was that Ms. McConnell's brother and sister have seen handicapped people working. Mr. McConnell testified that he could not do the physical requirements for a past greeter job opening at Wal-Mart. Social security has determined that as of 1993, McConnell is disabled from employment, and it made that determination when his disabilities were less severe than they are today.

2. The trial court erroneously made as a finding of fact that all income Mr. McConnell might earn in the future would be from part time (Decree) and then full time

(Order) employment and that he would additionally receive his currently paid social security disability payment. (Decree, A. 19. Order, A. 39). After Mr. McConnell's motion for amended findings and new trial, the trial court then assumed full time employment at an imputed wage and found as fact that if "Respondent earns the minimum wage and work full time, he will earn net monthly income of \$756, which is sufficient to meet his reasonable and necessary living expenses when combined with his social security benefits." (Order, A. 39).

The trial court also found again that "[t]here is no uncertainty regarding Respondent's ability to become self-supporting. With his ability to work earning at least the minimum wage and his disability income, Respondent has the ability to earn sufficient income to be self-supporting, as stated in the Findings." (Order, A. 39). There are no facts of record that: (1) Mr. McConnell is able to be employed; (2) if so, whether full or part time; (3) wages he would make; and (4) whether his social security disability payment would still be made.

3. The trial court erroneously made as a finding of fact that no medical records or disability documentation was presented by either party. In Paragraphs 19 and 21 of the October 18, 2004 Order, the court found that "no medical records or disability documentation were presented by either party. There was no evidence in the record regarding specific limits on Respondent's ability to work" and that the social security determination of disability was not in evidence. (Order, A. 39).

This finding is plain error for two reasons. First, this finding ignores Exhibit 51, which is Mr. McConnell's medical records and Exhibit 52, which is the Social Security Administration record of his monthly disability benefit, the date of his application, the date his disability began for their purposes, his eligibility date, and that the benefits are paid based upon a determination of disability. (A. 54-81; T. 12). The parties stipulated to all facts contained in those documents and the trial court asked the parties not to repeat stipulated facts. (T. 12). Medical records documenting Mr. McConnell's disabilities are proper evidence of the disability. Doherty v. Doherty, 388 N.W.2d 1 (Minn. App. 1986). Secondly, this finding also ignores Mr. McConnell's extensive testimony about his physical problems and limitations.

4. The trial court's finding that Mr. McConnell did not often make money on his home based schemes is in error. There is no evidence of record or otherwise that would support the finding that he *often* did not make money at the parties' home based income "schemes." (Order, A. 38). In fact, the only evidence from both of the parties was that they *never* made money from their schemes. Mr. McConnell's only earnings since the social security disability determination over twelve years ago were the approximate \$500 he made trying to sell prepaid legal services over the telephone.

B. It is an abuse of discretion not to award Stanley McConnell, Jr. permanent maintenance in this case.

Mr. McConnell is entitled to an award of permanent maintenance. The trial court's award of only four years of temporary maintenance is contrary to the statute and case law and as such, is an abuse of discretion. The findings of fact are unsupported by the record.

Spousal maintenance is awarded if a spouse lacks sufficient property to provide for reasonable needs or is incapable of self-support through appropriate employment. Minn.Stat. § 518.552, subd. 1 (2002). (A. 47). The factors to be considered when awarding maintenance include, among other things: (1) the financial resources of the party seeking maintenance; (2) the time necessary to acquire sufficient education and training and the probability that the party seeking maintenance will become self-supporting; (3) the standard of living established during the marriage; (4) the extent to which any employment experience has become outmoded; (5) the age and physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the payor spouse to contribute maintenance payments. *Id.* subd. 2 (2002). (A. 47). The statute states: "Where there is *some uncertainty* as to the necessity of a permanent award, the court *shall* order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3. (emphasis added). (A. 48).

If a court is uncertain as to a spouse's future earning potential, then it must award permanent maintenance. Duffey v. Duffey, 416 N.W.2d 830, 833 (Minn.App.1987), *review denied* (Minn. Feb. 24, 1988); Musielewicz v. Musielewicz, 400 N.W.2d 100, 104 (Minn.App.1987), *review denied* (Minn. Mar. 25, 1987). Where a district court is uncertain as to the need for permanent maintenance, there is a statutory preference for

permanent maintenance, leaving the order open for subsequent modification. Maurer v. Maurer, App.2000, 607 N.W.2d 176, 182, (Minn. App. 2000), reversed on other grounds 623 N.W.2d 604 (Minn. 2001). “Minn. Stat. § 518.552, subd. 3, leaves little room for the exercise of discretion where the need for maintenance is in question.” Bolitho v. Bolitho, 422 N.W.2d 29, 32 (Minn. App. 1988).

Mr. McConnell is a 56 year old Black man who has numerous permanent and substantial medical conditions. These medical conditions include diabetes, both legs amputated at the knee, amputations of several fingers, coronary artery disease with two heart attacks at ages 38 and 39, a pre-heart attack in 2000, end stage renal disease, a kidney transplant, congestive heart failure, high blood pressure, cataracts, and complete dentures. He has been receiving social security disability since September 1993. His medical problems have become worse since he first qualified for social security disability. Several years ago when he was really in shape, he could walk one mile, taking frequent rest stops. He falls 3-4 times per year.

Since 1993, his only income has been his social security disability payment, which is \$1,265 per month from which \$59 is deducted for supplemental Medicare. Even the trial court recognized that “[h]is capacity has been permanently diminished by his medical condition and resulting physical disability.”

On these facts, there is clearly some uncertainty as Mr. McConnell’s ability to earn income in the future within the meaning of Minn. Stat. § 518.552, subd. 3. The trial court believed that his home based schemes with his wife such as Amway were proof that

he is capable of being employed part time (Decree) or full time (Order) at minimum wage. To the contrary, they do not reflect Mr. McConnell's ability to work. They merely reflect that Mr. McConnell was able to even *try* them precisely because his wife was doing it jointly with him, helping with tasks that he was unable to do all by himself.

Over six years ago, the McConnells owned a restaurant named Snoodles with 50 other people. Mr. McConnell, on a part time basis, did several tasks such as helping with deliveries, seating people, and running the cash register. Neither of the McConnells made any money from the restaurant. This restaurant activity six to eight years ago does not establish an ability to work a job, whether full time or part time. At most, it *might* show a past ability to do certain limited tasks on a part time basis. It *might* show that he *might* qualify for some unidentified job somewhere, but it is by no means certain.

Uncertainty that he can become self-supporting mandates an award of permanent maintenance. "Minn. Stat. § 518.552, subd. 3, leaves little room for the exercise of discretion where the need for maintenance is in question." Bolitho, supra.

The courts have addressed the question of what "uncertainty" means. Future earnings can be uncertain even for a healthy spouse with a nursing degree. Where there is no evidence on the availability of a nursing position in the area or what she would earn if she obtained a position, the future earnings are uncertain. The maintenance award should be permanent, subject to future modification, when future earnings are uncertain. Reif v. Reif, 426 N.W.2d 227 (Minn. App. 1988). The Reif court did not say that the trial court could speculate based upon the wife's activities whether she would be able to

work, then speculate about what jobs she could do, and then impute an income, as the trial court did in our case. In our case, the trial court speculated as to possible employment such as a greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant, then speculated that *if* Mr. McConnell had a minimum wage job with *working full time and kept his entire social security disability monthly payment*, he would meet his reasonable monthly living expenses. (Order, A. 38, 39).

In another analogous case, Bolitho v. Bolitho, 422 N.W.2d 29 (Minn. App. 1988), the wife had a master's degree in elementary education and was employed part time as a substitute teacher and as a sales clerk. The appeals court held that she was still entitled to permanent maintenance since her future earnings were uncertain. Id. The appellate court did not hold that the trial court could speculate about jobs for which she might be qualified and then speculate as to what she might make on such jobs.

In yet another case, the appellate court has held that the trial court's award of temporary maintenance was a clear abuse of discretion where the wife was 41 years of age, in good health, and had not held full-time employment during marriage of about 20 years, although she was fully capable of working full time. The appellate court said that the best that could be said was that it was uncertain whether she could become self-supporting, although she might be capable of securing employment. Duffey v. Duffey, 416 N.W.2d 830, 833 (Minn. App. 1987), review denied (February 24, 1988).

Clearly, if a trained nurse, a woman with master's degree in elementary education, and a healthy 41 year old have uncertainty whether they could become self-supporting

and are entitled to permanent maintenance, then certainly Mr. McConnell's future earnings are uncertain and he is entitled to permanent maintenance as well.

The Reif, Bolitho, and Duffey cases involve a spouse who was in good health. Mr. McConnell's physical condition even by itself mandates an award of permanent maintenance. Where, as in our case, there is an older, unemployed spouse, with chronic and acute physical problems with no present prognosis for recovery, there is a need for permanent maintenance. Lynch v. Lynch, 411 N.W.2d 263, 265 (Minn. App. 1987), review denied (October 30, 1987). A spouse's poor health is a proper reason for awarding permanent maintenance. Safford v. Safford, 391 N.W.2d 548, 550 (Minn.App. 1986); Cich v. Cich, 428 N.W.2d 446 (Minn. App. 1988); Doherty v. Doherty, 388 N.W. 2d 1 (Minn. App. 1986).

Any uncertainty that Mr. McConnell can become self supporting *mandates* an award of permanent maintenance. That the trial court retains jurisdiction over a temporary award does not make temporary maintenance an acceptable alternative to an award of permanent maintenance when it is uncertain that the spouse seeking maintenance can ever become self-supporting. Nardini v. Nardini, 414 N.W.2d 184, 198 (Minn.1987).

With an older spouse like Stan McConnell (56) who is in poor health and has previously been determined by Social Security over ten years ago to be totally disabled when he had less severe disabilities than he has now, it is an abuse of discretion to award temporary maintenance. Permanent maintenance is required as a matter of law because

the trial cannot say with assurance that permanent award was unnecessary. Id. 198-199. When the need for permanent maintenance is uncertain, the trial court is required to make maintenance award permanent, leaving burden with the maintenance obligor to seek any future decrease or termination of maintenance justified by substantial change in circumstances of either party. Musielewicz v. Musielewicz, 400 N.W.2d 100 (Minn. App. 1987), review denied (March 25, 1987).

The trial court cannot take judicial notice that there may be some job somewhere that Mr. McConnell can do. *See* Reif v. Reif, 426 N.W.2d 227 (Minn. App. 1988) (wife was 43 and working toward completing a nursing degree. “Although she stated her intention to become self-supporting, there was no evidence of her ability to do so and we do not find the availability of nursing jobs an appropriate subject of judicial notice.”). Just as the appellate courts have made clear that the finder of fact cannot take judicial notice of the availability of nursing jobs, the trial court in our case cannot take judicial notice of the availability of jobs such as greeter, phone salesperson, customer service representative, cashier, or parking ramp attendant, much less impute the ability to work full time and at minimum wage. Not only was this a clear abuse of discretion, but the trial court then, without basis, assumed as a fact that if he were able to work full time at minimum wage, Mr. McConnell would continue to receive his full social security disability benefit that he currently receives.

CONCLUSION

Mr. McConnell is entitled to an award of permanent maintenance. Appellant respectfully requests that this court overturn the trial court's award of four years of temporary maintenance and award permanent maintenance.

Respectfully submitted,

CHADWICK AND MERTZ, P.S.C.

Dated: March 14, 2005



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STATE OF MINNESOTA
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Stanley R. McConnell, Jr.

Appellant,

CERTIFICATION OF BRIEF
LENGTH

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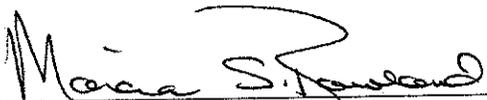
APPELLATE COURT CASE
NUMBER: A04-2387

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,831 words. This brief was prepared using Microsoft Word XP, version 10.0.

CHADWICK AND MERTZ, P.S.C.

Dated: March 14, 2005

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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).