

STATE OF MINNESOTA
IN COURT OF APPEALS

210 1151

Jeffery Robert Passolt,

Appellant,

v.

Lisa Jean Passolt,

Respondent.

RESPONDENT'S 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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LEGAL ISSUES

1. **Whether the trial court abused its discretion by refusing to impute income to Respondent (“Ms. Passolt”) when calculating the amount of permanent spousal maintenance.**

How issue was raised in the trial court:

This issue was raised during trial with each party’s exhibits, expert testimony, the parties’ testimony, and the submission of pretrial memoranda and proposed findings. *Petitioner’s Pretrial Memorandum of Law (R. App. 1-25) and Petitioner’s Proposed Findings of Fact, Conclusion of Law, Order for Judgment and Judgment and Decree, both dated October 14, 2009 (R. App. 26-56).*

Trial court decision:

The trial court found that Ms. Passolt was not intentionally self-limiting her income and therefore, it could not impute income to Ms. Passolt when calculating the amount of permanent spousal maintenance needed to meet her reasonable living expenses.

How issue was preserved on appeal:

This issue was preserved for appeal through Appellant’s post-trial motion for amended findings. *Respondent’s Notice of Motion and Motion for Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree or in the Alternative a New Trial, March 11, 2010 (R. App. 54-61).*

Most Apposite Authority:

Minn. Stat. §518.552, subs. 1 and 2.

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

Maurer v. Maurer, 607 N.W.2d 176 (Minn. Ct. App. 2000), *rev’d on other grounds*.

2. **Whether the trial court abused its discretion when valuing the parties’ golf club membership and awarding it to Appellant (“Mr. Passolt”).**

How issue was raised in the trial court:

This issue was raised during trial through each party’s exhibits, the parties’ testimony, and the submission of pretrial memoranda and proposed findings. *Petitioner’s Pretrial Memorandum of Law (R. App. 1-25) and Petitioner’s Proposed Findings of Fact, Conclusion of Law, Order for Judgment and Judgment and Decree, both dated October 14, 2009 (R. App. 26-56).*

Trial court decision:

The trial court properly considered all of the evidence when it determined the fair market value of the parties' golf membership was \$17,000, which is the amount a third party must pay to purchase a non-equity golf membership.

How issue was preserved on appeal:

This issue was preserved for appeal through Appellant's post-trial motion for amended findings. *Respondent's Notice of Motion and Motion for Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree or in the Alternative a New Trial, March 11, 2010 (R. App. 54-61).*

Most Apposite Authority:

Maranda v. Maranda, 449 N.W.2d 158 (Minn. 1989).

Servin v. Servin, 345 N.W.2d 754 (Minn. 1984).

STATEMENT OF THE CASE AND THE FACTS

The parties had a trial before the Honorable Susan M. Robiner, Judge of Hennepin County Family Court, on October 21 and November 16, 2009. Before trial, the parties stipulated to the value and division of many of their assets, leaving only the following contested issues: (1) spousal maintenance; (2) the value and division of several specific assets, and (3) attorney's fees. *Petitioner's Pretrial Memorandum of Law, October 14, 2009* (R. App. 1-25). After considering the evidence admitted at trial, the parties' respective pretrial memoranda and each party's proposed findings, the trial court issued its decision. The trial court awarded Ms. Passolt permanent spousal maintenance and did not impute income to her from full-time employment. The spousal maintenance left Ms. Passolt with a \$500 shortage toward her reasonable monthly living expenses, whereas Mr. Passolt had \$2,711 surplus above and beyond his reasonable monthly living expenses. (A. App. 55) After consideration of Mr. Passolt's motion for amended findings, the trial court amended several of its findings, but did not substantively alter its decision on spousal maintenance. (A. App. 103-122)

The trial court's findings are uncontested¹ and provide that:

- (1) The parties were married for 30 years;
- (2) In 1985, during her pregnancy with the parties' first child, Ms. Passolt stopped working outside the home as a special education teacher and has never returned to full-time work;

¹ Mr. Passolt did not appeal any of the findings on spousal maintenance. Accordingly, they have become the law of the case.

- (3) Ms. Passolt's teaching license expired in 1987 and she must take eight semester hours of classroom education to reactivate her license;
- (4) Ms. Passolt currently works outside the home on a part-time basis and in 2008 earned a gross annual income of \$3,090;
- (5) Ms. Passolt has no desire to return to full-time employment;
- (6) Ms. Passolt had not intentionally self-limited her income;
- (7) Mr. Passolt earned income totaling \$515,615 at the time of trial, which was scheduled to increase through his contract with KMSP-TV to \$545,615 as of May 1, 2011; and
- (8) Commencing July of 2010, after paying court ordered spousal maintenance of \$16,740 per month, Mr. Passolt would have excess cash flow after meeting all of his reasonable monthly needs of \$2,711 per month, while Ms. Passolt would have a budget shortfall of \$498 per month. (A. App. 111)

Based on these uncontested findings, the factors in Minn. Stat. §518.552, and its careful review of over three decades of Minnesota case law on spousal maintenance, the trial court, in a very detailed twenty page memorandum, explained why it would not impute income to Ms. Passolt. (A. App. 103-122) A reversal of the trial court's decision would overturn years of spousal maintenance jurisprudence and create a presumption, where previously none existed, that some amount of income should always be imputed to every spousal maintenance recipient. Creation of a potential income presumption is

inconsistent with the clear language of Minn. Stat. §518.552 and beyond the jurisdiction of this Court.

ARGUMENT

I. THE STANDARD OF REVIEW FOR SPOUSAL MAINTENANCE IS AN ABUSE OF DISCRETION, NOT A *DE NOVO* REVIEW.

Mr. Passolt claims the spousal maintenance issue before this Court is a question of law, and should be reviewed *de novo*. (Appellant's Brief, p. 10) He is wrong; the issue is factual. "The standard of review for an appeal from a maintenance award is whether the trial court abused its discretion." *Carrick v. Carrick*, 560 N.W.2d 407, 409-410 (Minn. Ct. App. 1997), citing *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). This Court may not find an abuse of discretion unless the district court decision is "against logic and the facts on the record." *Rutten v. Rutten* 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion when it makes findings unsupported by the evidence or when it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n. 3 (Minn. 1997). "When determining whether findings are clearly erroneous, the appellate court views the record in the light most favorable to the [district] court's findings." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. Ct. App. 2000). "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Id.* at 474. The trial court did not abuse its discretion when calculating the amount of spousal maintenance in this case.

II. THE TRIAL COURT CONSIDERED MS. PASSOLT'S EARNING CAPACITY WHEN DETERMINING THE AMOUNT OF SPOUSAL MAINTENANCE.

Ms. Passolt agrees that Minn. Stat. §518.552 requires the Court to consider a spousal maintenance recipient's earning capacity as one of several factors in determining the appropriate amount of spousal maintenance. Contrary to Mr. Passolt's claim, the trial court properly considered Ms. Passolt's capacity to earn income both now and in the future.

The trial court issued a twenty page memorandum of law solely on the issue of spousal maintenance. The Court made detailed findings on Ms. Passolt's earning history and income potential (A. App. 49-50). Both parties introduced expert testimony about whether Ms. Passolt should or could return to teaching. Ms. Passolt testified that she did not have a current teaching license and was not interested in becoming a special education teacher after a 25 year absence from the profession. (T. Vol. II at 50-51) The Court determined that Ms. Passolt had not intentionally self-limited her income based upon her long absence from the workplace during the parties' marriage (A. App. 50). These finding are supported by the evidence, have not been appealed by Mr. Passolt, and are the law of the case. Based on these findings, the trial court correctly determined that it could not impute any earning capacity to Ms. Passolt now or in the future.

A. The Trial Court Correctly Characterized Mr. Passolt's Request For Future Imputation of Income to Ms. Passolt.

Mr. Passolt contends that he did not ask the trial court to impute income to Ms. Passolt at the present time. Rather, he claims to have asked the trial court to reduce the amount of spousal maintenance awarded to Ms. Passolt based on her capacity to earn income at some point in the future. The trial court considered Mr. Passolt's argument and correctly determined that no matter how Mr. Passolt couched his request, he was asking the trial court to impute income to Ms. Passolt.

Mr. Passolt's argument is based on a painstaking interpretation of the *Carrick* decision. 560 N.W.2d 407 (Minn. Ct. App. 1997). Mr. Passolt admits that *Carrick* expressly prohibits the imputation of income to a long-time homemaker spouse at the time of the marriage dissolution. Nevertheless, Mr. Passolt argues that *Carrick* does not prohibit what effectively amounts to imputation of income to the same long-time homemaker spouse in the future. He attempts to differentiate his argument under the pretext that it is not really imputation of income, but rather an analysis of the homemaker's future capacity to earn income. (Appellant's Brief, p. 16) There is no language in the *Carrick* decision suggesting the Court intended to make such a distinction. *Id.*

In *Carrick*, this Court held that a trial court may only "*impute a party's income to be her earning capacity* for the purposes of setting maintenance, if it first finds that the party was underemployed in bad faith." *Id.* at 410, (*emphasis added*). There is no language in *Carrick* distinguishing the concept of earning capacity from

imputation of income – in fact, the two concepts are expressly intertwined into the Court’s holding.

Carrick also does not state that a different standard applies if the trial court is considering the imputation of income at the time of the marriage dissolution versus some time in the future. Mr. Passolt’s argument on this issue amounts to a distinction without a difference and defies logic. In fact, the imputation of income to a spouse in the future is especially problematic. Imputation of income in the future is by its nature speculative. Speculation by the trial court in the context of a marriage dissolution is not allowed. *See e.g., Nardini v. Nardini*, 414 N.W.2d 184, 197 (Minn. 1987) (speculating regarding wife’s future earning ability was error); *O’Brien v. O’Brien*, 343 N.W.2d 850, 854 (Minn. 1984) (speculating is prohibited when calculating taxes); *Aaron v. Aaron*, 281 N.W.2d 150 (Minn. 1979) (speculating regarding what spouses will do with assets after they are awarded is not required); *Fastner v. Fastner*, 427 N.W.2d 691, 697 (Minn. Ct. App. 1988) (speculating when awarding marital property is not permitted). Here, while the trial court found that Ms. Passolt could earn \$36,000 in the future if she went back to school, that finding is speculative in nature. As such, that finding is not a proper basis for a future spousal maintenance award. *Nardini*, 414 N.W.2d at 197.

Mr. Passolt’s reliance on dicta in the *Carrick* decision regarding Mrs. Carrick’s ability to rehabilitate does not apply to this case. In *Carrick* the trial court awarded temporary spousal maintenance. Therefore, consideration of Mrs. Carrick’s ability to rehabilitate was proper. *Hecker v. Hecker*, 568 N.W.2d 705, 710 n.4 (Minn.

1997) (holding that when there is an award of temporary maintenance, there is a duty to try to rehabilitate). Here, the trial court awarded Ms. Passolt permanent spousal maintenance and Mr. Passolt did not appeal the permanency of the award. The case law is clear on this issue; a permanent spousal maintenance recipient has no duty to rehabilitate. *Sand v. Sand*, 379 N.W.2d 119, 124 (Minn. Ct. App. 1985) (rev. denied). Thus, the dicta in the *Carrick* decision on the issue of rehabilitation does not apply to these facts. Mr. Passolt also cites unpublished decisions addressing the issue of earning capacity where the court either awarded no spousal maintenance or temporary spousal maintenance. Since this is a permanent spousal maintenance case, those unpublished cases also do not apply to this case.

B. Well Settled Minnesota Law Interpreting Minn. Stat. §518.552 Prohibits the Imputation of Income in this Case.

The trial court correctly applied the case law interpreting Minn. Stat. §518.552 when concluding that it was prohibited from imputing income to Ms. Passolt. As the trial court explained in its twenty page memorandum, Minnesota jurisprudence on this issue started with *Nardini*. In *Nardini*, the couple was married for 31 years; the wife was 53 years old, but intelligent and in good physical health; and the parties' children were grown. *Nardini*, 414 N.W.2d at 185. The trial court awarded Mrs. Nardini temporary spousal maintenance concluding that she would be able to find employment outside the home. *Id.* The Minnesota Supreme Court reversed the trial court's decision, because the wife's ability to earn income in the future was speculative and uncertain. *Id.* at 197.

In *Carrick*, the Minnesota Court of Appeals took *Nardini* one step further. In

Carrick, the marriage lasted 21 years and the wife was 49 years old. *Carrick*, 560 N.W.2d at 411. The wife stayed at home for the first 10 years of the marriage and then started working part-time outside of the home. *Id.* The trial court determined the wife was underemployed and could work full-time. *Id.* Thus, the trial court imputed income to Mrs. Carrick when calculating her need for spousal maintenance. *Id.* The Minnesota Court of Appeals reversed the trial court, holding:

[A]s 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.

Id. at 410.

In *Maurer v. Maurer*, 607 N.W.2d 176 (Minn. Ct. App. 2000), this Court again expanded the law. In *Maurer* the wife worked at a full-time or at a nearly full-time capacity for roughly one-half of the parties' 28 year marriage. *Id.* at 179. Based on the wife's work history, the trial court imputed income to her when calculating her need for spousal maintenance. *Id.* at 180. In *Maurer*, this Court relied on its decision in *Carrick* and held the imputation of income was improper since the wife did not intentionally self-limit her income. *Id.* at 181.

Here, the Passolt's marriage lasted 30 years and Ms. Passolt did not work more than limited part-time hours outside the home for the last 25 years. Ms. Passolt was 52 years old and there was no evidence that she intentionally self-limited her income for purposes of obtaining spousal maintenance. Under the circumstances, the

Nardini, Carrick and *Maurer* line of cases control and prohibit the trial court from imputing income to Ms. Passolt.

C. The Cases Cited by Mr. Passolt Regarding Earning Capacity Have Very Different Facts from this Case.

Mr. Passolt relies on *Schallinger v. Schallinger*, 699 N.W.2d 15 (Minn. Ct. App. 2005) to support his argument that the trial court should have considered Ms. Passolt's earning capacity to impute income to her in the future. The trial court correctly concluded that the facts in *Schallinger* are very different from the facts of this case and therefore, the holding of *Schallinger* does not control.

The marriage in *Schallinger* lasted only 12 years, compared to the 30 year marriage in this case. *Id.* at 18. The wife in *Schallinger* also worked in her chosen profession throughout the parties' entire marriage, where in this case Ms. Passolt has not worked as a special education teacher for the past 25 years. *Id.*

More significantly, the husband in *Schallinger* did not have any excess income to pay the wife spousal maintenance. *Id.* at 22. The Court of Appeals considered the lack of excess income significant by concluding:

[b]alancing the financial needs of appellant and her ability to meet those needs against the financial condition of respondent, the district court did not abuse its discretion in denying spousal maintenance.

Id.

Mr. Passolt earns more than \$515,000 per year. After paying spousal maintenance to Ms. Passolt, he has \$2,711 per month excess cash flow. (A. App. 111) Mr. Passolt's claim that he is living "paycheck to paycheck" is contrary to the undisputed facts in this

case. (Appellant's Brief, p. 9) The parties' expressly stipulated that any expenses associated with the Florida real estate awarded to Mr. Passolt would not and could not be considered when determining spousal maintenance. *Id.*

This Court stated "[t]he purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances." *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. Ct. App. 2004). Here, there is no equitable reason, such as the cash flow shortage experienced by the parties in the *Schallinger* case, to require Ms. Passolt, at the age of 52, to go back to school and obtain a full-time job as a special education teacher, when she testified she had absolutely no desire to do so. (T. Vol. II at 50-51) That the trial court apparently felt Ms. Passolt's volunteer activities during the marriage were somewhat similar to teaching does not change the requirements of the law. There is a significant difference between coaching a high school cheerleading squad and working full-time teaching special needs children.

The Court in *Schallinger* also concluded the wife was capable of self-support and therefore, had no need for any spousal maintenance. *Schallinger*, 699 N.W.2d at 22. Conversely, the trial court in this case found that Ms. Passolt was incapable of self-support and in need of permanent spousal maintenance. The trial court must analyze a party's ability to rehabilitate when no spousal maintenance awarded, while the analysis is not needed when permanent spousal maintenance is awarded. When a party is awarded permanent spousal maintenance, they have no duty to rehabilitate at all. *See e.g., Sand*, 379 N.W.2d at 124.

The facts in *Rauenhorst v. Rauenhorst*, 724 N.W.2d 541 (Minn. Ct. App. 2006), are similarly distinguished from the facts in this case. The *Rauenhorst* marriage lasted only seven years and like Ms. Schallinger, Ms. Rauenhorst worked outside the home for most of her life and throughout the majority of the marriage. *Id.* at 542, 544. Based on these facts, the *Rauenhorst* trial court concluded the wife was capable of self-support and did not award her any spousal maintenance. *Id.* at 545. Here, Ms. Passolt has not worked as a special education teacher for 25 years. Her need for permanent spousal maintenance is the law of the case, and has not been appealed. Ms. Passolt has no duty to rehabilitate because she was awarded permanent spousal maintenance. *Sand*, 379 N.W.2d at 124.

D. The Trial Court Properly Considered All of the Factors in Minn. Stat. §518.552 When Awarding Ms. Passolt Spousal Maintenance.

Mr. Passolt mistakenly asks the Court to rely solely upon Ms. Passolt's future earning capacity to the exclusion of all of the other factors contained in Minn. Stat. §518.552. The law is clear that no single factor is dispositive and the district court must weigh all of the facts of the case when it issues a spousal maintenance award. *Kampf v. Kampf*, 732 N.W.2d 630, 634 (Minn. Ct. App. 2007). Every case Mr. Passolt relied on is distinguishable from this case on some ground by 1) the length of the marriage; 2) the age of the spousal maintenance recipient; 3) the spousal maintenance recipient's work experience; 4) the spousal maintenance recipient's stated desire to return

to work; or 5) the spousal maintenance obligor's means². The important point is:

each marital dissolution is unique and centers on the individualized facts and circumstances of the parties and . . . accordingly, it is unwise to view any marital dissolution decision as enunciating an immutable rule of law applicable in any other proceedings.

Chamberlain v. Chamberlain, 615 N.W.2d 405, 411 (Minn. Ct. App. 2000).

Here, the trial court properly weighed all of the factors contained in Minn. Stat. §518.552, including the length of the marriage, Ms. Passolt's age, Ms. Passolt's work experience, the standard of living during the marriage and Mr. Passolt's significant excess income when deciding the amount and duration of spousal maintenance.

E. There Are No Minnesota Cases Holding That the Court *Must* Impute Income Ms. Passolt.

Mr. Passolt relied on cases where the trial court imputed income to a spouse or otherwise considered that spouse's earning capacity to determine a *reduced need* for spousal maintenance. In the cases Mr. Passolt cites, this Court held that the trial court acted within its discretion, based on consideration of all of the factors in Minn. Stat. §518.552, and affirmed the trial court award. However, none of the cases involve the opposite situation – where the trial court refused to impute income to a permanent

² Mr. Passolt also referenced and relied upon numerous unpublished decisions in his brief. The background and fact descriptions contained within many of these decisions lack significant detail. Accordingly, it is impossible to ascertain what facts or circumstances may have existed in those cases that persuaded those courts. Presumably, this is one reason such cases lack precedential value and are not to be relied upon by the courts.

spousal maintenance recipient, and this Court reversed the award because imputation of income was *required*³ – as Mr. Passolt argues here.

The reason Mr. Passolt was unable to find any cases is two-fold. First, the standard of review weighs against reversal of the trial court. Second, and more important, reversal of the trial court's decision in this case would change existing law. Reversal of the trial court would create a presumption that every spousal maintenance award should include a future off-set, based on consideration of the spousal maintenance recipient's earning capacity *in the future*. This presumption would be rebuttable, since there would be some cases where the spousal maintenance recipient truly could not work. However, in the vast majority of cases, no matter the length of the marriage, no matter the financial circumstances of the parties, no matter the age of the recipient spouse, the trial court would be required to impute income to the spousal maintenance recipient based on her earning capacity in the future.

It is clear from the trial court's memorandum that the Judge wanted to impute income to Ms. Passolt based on the possibility that she could earn income from full-time employment in the future, but the Judge did not do so because that is not the law. The

³ Ms. Passolt found several unpublished Minnesota Court of Appeals decisions where the trial court refused to impute income to a spouse and this Court affirmed that decision. *See e.g., Iskierka v. Iskierka*, 2011 WL 781050 (Minn. Ct. App. March 8, 2011) (refusing to apply *Schallinger* case and impute income to wife after a 20 year marriage where wife had limited education and work experience); *Glen v. Glen*, 2008 WL 5215965 (Minn. Ct. App. Dec. 16, 2008) (refusing to require wife to contribute to her self support after 12 year marriage given wife's age, lack of training and experience and years spent as a homemaker and mother) *Higgins v. Higgins*, 2008 WL 2731088 (Minn. Ct. App. July 15, 2008) (refusing to impute full-time income to Wife after 20+ year marriage where wife did not act in bad faith in limiting her employment to part-time).

trial court correctly recognized it was limited by Minn. Stat. §518.552 and the long line of precedent interpreting the spousal maintenance statute. If Mr. Passolt wants to change the law, he needs to go to the legislature, not this Court. This is exactly what happened when the child support statute was amended to require the consideration of “potential income” in every child support award. Minn. Stat. §518A.32. However, there is no corresponding requirement in Minn. Stat. §518.552 and any decision creating a potential income requirement is beyond the jurisdiction of this Court.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN VALUING THE PARTIES’ GOLF CLUB MEMBERSHIP AND AWARDING THAT MEMBERSHIP TO MR. PASSOLT.

The trial court has wide discretion in valuing and dividing property in a marital dissolution action and will not be overturned except for an abuse of discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164 (Minn. 1989). The Minnesota Court of Appeals will affirm the trial court’s division of property as long as it had an acceptable basis in fact and principle even though it might have taken a different approach. *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984).

Here, the uncontested evidence is that this is an equity membership, purchased by the Passolts for \$40-\$45,000. (T. Vol II at 100, T. Vol. II at 151-152) Ms. Passolt testified that the current cost to purchase an equity membership is \$38,000 and the cost to purchase a non-equity membership is \$17,000. (T. Vol. II at 100) The difference in the equity and non-equity memberships was voting rights. Mr. Passolt testified that a membership is necessary to play golf at the property. (T. Vol. II at 185) The trial court found that Mr. Passolt currently receives value from the golf membership even though it

may not currently be saleable because he continues to use the membership to play golf that he would otherwise have to pay for. The trial court's \$17,000 value of the golf club membership had an acceptable basis in fact and should be affirmed by this Court.

Mr. Passolt argues that it might be many years before he is able to sell the membership. Accordingly, he claims that the actual value of the membership is "too speculative" and under *McGowan v. McGowan*, 532 N.W.2d 258 (Minn. Ct. App. 1995), the trial court should have provided that the proceeds of any sale of the membership be divided in the future, if and when the membership is sold. (Appellant's Brief, p. 28)

Mr. Passolt's argument is flawed for two reasons. First, this Court's direction in *McGowan* was permissive, not mandatory in nature. This Court concluded that when the value of an asset is speculative (such as the pension in that case), a trial court *may* reserve jurisdiction for the division of the asset in the future. *McGowan*, 532 N.W.2d at 260. This Court did not hold that a trial court *must* do so. Second, the uncontested evidence was that Mr. Passolt could and would continue to use the golf membership until such time as the membership was sold. (T. Vol II at 101) If the trial court had reserved jurisdiction to divide the membership under an "if and when" approach, Mr. Passolt would have received a windfall of having exclusive use of the membership for an indefinite term. Also, any incentive to sell the membership would vanish since he would continue to use the membership at no cost. Accordingly, the trial court's decision to use the non-equity membership price is reasonable and supported by the evidence. *Servin*, 345 N.W.2d at 758.

CONCLUSION

The trial court acted within the scope of discretion regarding the amount of Petitioner's spousal maintenance and valuation of marital property. This Court should affirm the trial court's decision in all respects.

Respectfully submitted,

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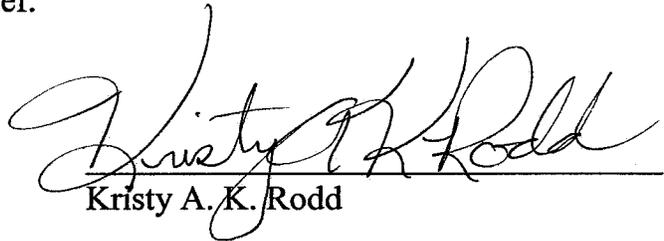
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**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that Respondent's Brief submitted herein contains 4,372 words, exclusive of the pages containing the table of contents and table of citations, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Office Professional Edition 2003, the word processing system used to prepare this Brief.


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