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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2432**

In re the Marriage of:
Giuseppina Biocca, petitioner,
Appellant,

vs.

Vincenzo Cistera,
Respondent.

**Filed December 16, 2008
Affirmed
Ross, Judge**

Dakota County District Court
File No. 19-F6-06-012714

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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Giuseppina (Josephine) Biocca appeals from the district court's judgment and
decree dissolving her marriage with Vincenzo Cistera. She challenges the district court's

decision to award temporary rather than permanent spousal maintenance, its failure to require that Cistera secure the award with life insurance, and its calculation of the award. Because the district court's treatment of spousal maintenance does not constitute an abuse of discretion, we affirm.

FACTS

Josephine Biocca and Vincenzo Cistera married in Montreal in 1983, and relocated to Minnesota in 1995. In 2006, Biocca filed a petition to dissolve the marriage. They have two children—one minor (M.C., age 13), and one adult.

After earning a bachelor's degree and working briefly as an accountant, Biocca remained out of the workforce for 13 years while tending to duties related to the home and family. She returned to the workforce in 2005 and works part time. Her net monthly income is \$555.89.

In its judgment and decree dissolving the marriage, the district court granted Biocca \$1,750 per month in spousal maintenance, to continue until July 31, 2013, as well as \$1,840 in monthly child support. The district court found that Biocca could earn \$40,000 annually after “a few years” of workforce rehabilitation. Until Cistera is relieved of his child-support obligation, the decree requires him to maintain a life insurance policy for at least \$150,000 naming Biocca as the beneficiary, but it does not have a similar security obligation regarding spousal maintenance. Biocca appeals from the judgment and decree.

DECISION

Biocca challenges the district court's award of spousal maintenance in three ways. She argues that the district court erred when it awarded her temporary rather than

permanent maintenance; she asserts that Cistera should have been required to guarantee the maintenance with life insurance; and she argues that the court did not properly calculate the maintenance award. At oral argument, Biocca waived a fourth argument, concerning allocation of M.C.'s unreimbursed medical expenses, so we do not consider it. An order granting spousal maintenance will be upheld unless the district court abused its discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). We review the underlying factual findings for clear error. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). A clearly erroneous factual finding is one unsupported by the record or “manifestly contrary to the weight of the evidence.” *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

Biocca accurately highlights the statutory provision that “[w]here 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 (2006). She argues that her successful rehabilitation is uncertain because her education is obsolete, because she has been long absent from the labor market, because of the length and traditional nature of her marriage, and because she has been granted physical custody of the minor child. But the district court found that Biocca would, after a period of rehabilitation, “be successful in the job market,” and it impliedly concluded that after the period set for temporary maintenance she would be self-supporting.

The district court’s findings are buttressed by the record. Biocca holds a 26-year-old bachelor’s degree. Even if, as she contends, the degree is obsolete, that she earned the degree supports the district court’s conclusion that she is capable of rehabilitation.

(And the district court did not find that the degree is “obsolete.”) A vocational assessment concluded that Biocca functions “in the high average to above average range of vocational development” and that entry-level accountants can earn \$40,000 annually. The district court acknowledged that Biocca had custody of M.C. but concluded that because of the child’s age he would not require substantial child care. Biocca points to nothing in the record that controverts the district court’s findings or the evidence underlying them. The district court did not find uncertainty about Biocca’s ability to become self-supporting within the time in which she would receive temporary maintenance, and it impliedly found that she could support herself. Because evidence supports that finding, we will not disturb it.

At oral argument, Biocca’s counsel asserted that *Nardini v. Nardini* compels the district court to award permanent maintenance. 414 N.W.2d 184 (Minn. 1987). The supreme court in *Nardini* remanded a district court’s temporary maintenance award after concluding that failure to award permanent maintenance was an abuse of discretion. *Id.* at 195, 199. Because the recipient spouse’s prospect of ever becoming self-supporting was uncertain, the supreme court instructed the district court to enter an award of permanent maintenance. *Id.* at 198–99. The factual posture here, while loosely similar to *Nardini*, is distinguished.

The recipient spouse in *Nardini* was 56; her traditional marriage lasted 31 years, she had been out of the labor market for 29 years, she had only a high school education, and she was “without special employment skills of any kind.” *Id.* at 185, 197. Whether she could obtain employment of any kind was uncertain, as was her earning capacity. *Id.*

at 197. Biocca is 50 and her 24-year traditional marriage has been dissolved, but the similarities with *Nardini* end there. Biocca has a bachelor's degree and has worked in a professional field. She was out of the workforce for less than half the time of the challenger in *Nardini*, and she is presently employed. The partial similarity between Biocca's and *Nardini*'s situation does not establish that the district court clearly erred when it found no uncertainty in Biocca's ability to become self-supporting.

Moreover, the supreme court in *Nardini* noted that the district court had not given "any consideration" to the factors relevant to duration of spousal maintenance. *Id.* at 197. A district court must "consider[] all relevant factors" when awarding spousal maintenance. Minn. Stat. § 518.552, subd. 2 (2006). Factors relevant to an award of spousal maintenance include the marital standard of living, the parties' relative expenses and incomes, the paying spouse's ability to meet the reasonable needs of the recipient spouse, the age, physical and emotional condition of the recipient spouse, and the duration of the marriage. *Id.* Here, the district court made express findings based on the evidence concerning each of the relevant factors.

Biocca next asserts that the district court erred by not requiring that the maintenance be secured by a life insurance policy. Whether to secure an award of spousal maintenance with life insurance is subject to a district court's discretion. Minn. Stat. § 518A.71 (2006); *Laumann v. Laumann*, 400 N.W.2d 355, 360 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). Related factual findings are upheld unless clearly erroneous. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). A court's decision regarding security should be guided by the

recipient's age, education, and employment experience and prospects. *Id.* at 635. The duration of the marriage is also relevant, as is whether the maintenance is permanent. *See Arundel v. Arundel*, 281 N.W.2d 663, 667 (Minn. 1979) (stating supreme court's willingness to allow life insurance security for *permanent* maintenance awards).

Biocca cites a number of cases that support the general proposition that a district court may require spousal maintenance to be secured with a life insurance policy. But in every case cited by Biocca, the life insurance secured a grant of *permanent* maintenance. Biocca cites no authority that supports the proposition that such security is appropriate in situations involving temporary spousal maintenance. *Cf. Id.* (discussing factors that justify permanent maintenance in relation to securing award with life insurance). Although the factors justifying permanent maintenance have changed since *Arundel* was decided, the cases cited by Biocca reinforce the notion that a connection exists between the propriety of securing a maintenance award and the award's permanency. *See Kampf*, 732 N.W.2d at 635 (requiring security for permanent award on certain facts); *Walker v. Walker*, 553 N.W.2d 90, 96 (Minn. App. 1996) (upholding security requirement for permanent award); *Maeder v. Maeder*, 480 N.W.2d 677, 680 (Minn. App. 1992) (upholding security requirement for permanent award); *Head v. Metro. Life Ins. Co.*, 449 N.W.2d 449, 454–55 (Minn. App. 1989) (discussing security for permanent award), *review denied* (Minn. Feb. 21, 1990); *Laumann*, 400 N.W.2d at 306 (remanding for consideration of security issue after requiring a temporary award be replaced with a permanent one). And although Biocca cites to cases in which marriages of similar duration as hers included spousal maintenance awards that were secured by life

insurance, she provides no authority supporting the proposition that refusal to require security would constitute an abuse of discretion.

We conclude that the district court did not abuse its discretion by declining to require security here. The district court expressly considered Biocca's age, education and employment experience and prospects when it set the amount and duration of spousal maintenance. Biocca does not challenge the underlying factual findings. Evidence supporting the relevant findings appears in the record and Biocca points to no contrary evidence.

Biocca argues that the district court improperly calculated the award in light of the parties' incomes and expenses—specifically, the tax implications of the award of spousal maintenance.¹ The calculation of spousal maintenance is within the district court's discretion. *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). The underlying facts are subject to our review for clear error. *Id.*

The question of the tax implications of spousal maintenance was not presented to the district court. In a memorandum to the district court arguing the issue of spousal maintenance, dated June 26, 2007, Biocca identified the factors relevant to calculating the maintenance. She did not include among them the tax implications of the award itself.

¹ Biocca's calculations of the tax consequences of the award are speculative and unsupported by the evidence. Biocca refers in her brief to a financial plan that purportedly calculates the effect of income tax on both parties. This document was not submitted to the district court, and we will not consider it on appeal.

Nevertheless, there is evidence that the district court generally considered the tax implications for both parties. It awarded Biocca the right to claim M.C. as a dependant for state and federal income tax purposes, as well as the right to take home-mortgage related deductions for 2007. The district court classified the property allocation as a division of common ownership rather than a sale or disposition subject to taxation. And because the monthly child support and spousal maintenance amounts are substantially similar, the district court seems to have concluded that the net tax implications for both parties offset. *See* 26 U.S.C. § 71 (2000) (regarding child support taxable to payor and spousal maintenance taxable to payee). To the extent that the tax implications of the maintenance award were relevant, so too would be the tax implications of child support. Although the district court did not expressly state that it considered the tax implications of the spousal maintenance award, it seems that it did.

A list of factors relevant to calculating spousal maintenance appears in Minn. Stat. § 518.552, subd. 2. The statute does not identify the tax implications of an award as a factor, but the statutory list is nonexclusive and consideration of tax implications may be appropriate. *Napier v. Napier*, 374 N.W.2d 512, 515 (Minn. App. 1985). Express findings on every factor relevant to spousal maintenance are not required as long as we may reasonably conclude from the district court's express findings that it considered the relevant factors. *Peterka v. Peterka*, 675 N.W.2d 353, 360 (Minn. App. 2004).

The district court found that Biocca has a net monthly income of \$555.89 and reasonable monthly expenses of \$5,119.65. It found that Cistera has a net monthly income of \$7,889.63 and reasonable monthly expenses of \$4,300.00. The court awarded

Biocca \$1,750, plus \$105 in retirement benefits, in monthly spousal maintenance to continue until July 31, 2013, and \$1,840 in monthly child support. Considering only these figures, the awards leave Biocca \$868.76 deficient to meet her reasonable monthly expenses until the spousal maintenance expires, and Cistera \$105.37 deficient to meet his. But considering the relevant factors, including the age of the minor child, the district court found that nothing prevents Biocca from working full time now rather than the 10 to 15 hours per week that she currently works. The district court impliedly concluded that she could alleviate some or all of her deficiency by working regular hours. Additionally, the district court found that she will be capable of earning substantially more “after a few years of rehabilitation,” but she will continue receiving spousal support until 2013. This arrangement gives Biocca the benefit of the support and her rehabilitated earnings during some of the period. On balance, we see no abuse of discretion or relative detriment to Biocca in the arrangement.

Because the findings relevant to the calculation of spousal maintenance are not clearly erroneous, and because the district court considered the factors relevant to calculating spousal maintenance, we conclude that the district court did not abuse its discretion when it calculated the spousal maintenance award.

Affirmed.