

Is the Role of Non-Working Parents Undervalued by the Courts?

By Kathy Newman

Any family law attorney will tell you that spousal maintenance is one of the most contested issues in a divorce proceeding. Spousal maintenance, sometimes known as alimony, is governed by M.S.A. Sec. 518.552, which is interpreted by a variety of case law.

Generally speaking, spousal maintenance is awarded when the recipient, often the wife, does not have enough income to maintain a marital standard of living budget and the payor, usually the husband, has sufficient income to meet

his reasonable standard of living budget and contribute to the expenses of the wife. The *Passolt* case implies that the wife, if able to do so, must contribute to her own self-support through appropriate employment. *Passolt v. Passolt*, 804 N.W.2d 18, 25 (Minn. Ct. App. 2011). A person receiving spousal maintenance is not required to use marital assets to meet living expenses, however, income from the proper investment of her assets will be considered in determining the need for spousal support. Spousal maintenance can be temporary or permanent, but if there is any doubt about a recipient's ability to become self-supporting, the court should make the award permanent, leaving it open for later modification.

The length of the marriage, the age of the wife, the ability of the wife to contribute to her self-support through appropriate employment and what investment income should be considered have been questions attorneys and judges have struggled with for many years. A 20-year marriage is often considered a long-term marriage, making the wife eligible for permanent spousal maintenance.

But what if the wife married young and is only 40 at the time of the divorce? What if the marriage lasted only 10 years, but the marital standard of living was so high that the wife could never meet that standard of living through appropriate employment? What is appropriate employment?

Should someone who had an affluent lifestyle and never worked outside of the home be required to work retail, with its long hours and low pay? If the family had been accustomed to a stay at home parent, who is going to take over the responsibilities of after school activities, transportation, or after school supervision of teenagers? Or does the children's lifestyle have to suffer because mom now has to work at Target?

What if the marital lifestyle included a vacation home that is awarded to the wife? Can she keep it and include the cost of maintaining it in her budget? Or is she obligated to sell it and invest the proceeds into an asset that will produce income? If the marital assets include an investment portfolio designed for growth, is the wife obligated to take her share of the portfolio and restructure it for income production? If she does this, can the court consider any taxes incurred in restructuring the portfolio? What rate of return should the court assign to investments? A conservative rate or some other measure? Given the violent swings in the stock market over the past 10 years, how can the rate of return be set with any level of assurance?

Many of these issues are addressed by two recent appellate decisions. In *re Marriage of Curtis*, No. A14-1841, 2015 WL 3823156 (Minn. Ct. App. June 22, 2015), husband was a dentist and made a substantial income. It was uncontested that the parties agreed wife would be a

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homemaker and parent and that she met these responsibilities appropriately. This allowed husband to devote time and energy to his career. The children are now in college. The parties valued the dental practice and their other assets, and wife was awarded \$2,209,399 of investible assets. What rate of return should the court impute to wife on these assets? Wife suggested a conservative rate of return as the investments had been geared toward growth. Husband brought in a financial expert who testified that wife could restructure her portfolio to generate income, and opined that she could get a rate of return ranging from 6.98-7.13 percent. Using that expert's opinion, the trial court found that, once restructured, a reasonable rate of return for the investment portfolio would be 7 percent, that it would provide sufficient income to meet wife's budget, and then denied any award of spousal maintenance. The court did not take into consideration the tax costs of restructuring the portfolio.

Husband left the marriage with the business the parties had built up over 23 years and the substantial income of over \$600,000 per year it produces. Wife, on the other hand, must rely on the vagaries of the stock market to provide for her day-to-day living expenses. If the market goes down substantially, as it did shortly after the appellate decision was rendered, what is the safety net for this wife? The appellate court held that this was a fair and equitable decision and affirmed the trial court. However, in a blistering dissent, Judge Kirk noted "In a long-term, high-asset, high-cash flow marriage, where one of the parties stays home by agreement of the parties, the failure to fairly and equitably divide both the marital estate and the ongoing cash flow diminishes the value of the stay-at-home party's contribution to the

family partnership." *Id* at *4. Wife petitioned for Supreme Court review and the court recently accepted the case.

Curtis was followed by *Spolum v. D'Amato*, No. A14-1335, 2015 WL 4877577 (Minn. Ct. App. Aug. 17, 2015). In that case, the parties had been married nine years and wife was 49 years of age. Husband was a very successful physician, earning in excess of \$800,000 per year. The parties had one son and had agreed that wife would be a homemaker and mother. Despite husband's high income, the parties had only modest investment assets. They did have a vacation home in the Caribbean valued at over \$1 million and wife was awarded this home. She stayed at the home several months a year and received modest rental income.

The appellate court held that this was a fair and equitable decision and affirmed the trial court."

Wife did not have a college education. She had worked as a flight attendant prior to the parties' marriage and a return to that employment would now be difficult given her parenting responsibilities. Wife said her interest was in animal welfare and she wanted to find employment in that area. The trial court considered the very affluent marital standard of living, the husband's substantial income, the wife's inability to meet the marital standard of living even if employed, and the lack of financial resources that would provide investment income. The trial court awarded wife permanent spousal maintenance of \$14,072 per month.

The appellate court reversed and remanded, stating wife was only entitled to temporary spousal maintenance, discounting the contributions to the marriage that the wife had made as homemaker and mother, as well as her social activities that the trial court found enhanced her husband's career. The appellate court even pointed out that the trial court made an error in finding this was a 12-year marriage, noting that the parties had been separated for two years while they were trying to save the marriage. Finally, the appellate court pointed out that wife was not without investible assets, noting she had the \$1 million home in the Caribbean and implying that this asset should be sold to provide investment income. The appellate court also upheld the trial court's finding that wife could find immediate employment in

a retail position. Wife in this case is also seeking Supreme Court review.

It is clear that there has been a movement away from considering the responsibilities of homemaking and child rearing as being equal in importance to an income producing career. People who have devoted many years to a homemaking and parenting career are not being recognized for the work done in raising children and managing a household so that the other spouse could progress in his career and increase his earning potential. One hopes that the Supreme Court will provide guidance to the bench, attorneys, and couples on what attributes are valued in a marriage.