STATE OF MINNESOTA

IN SUPREME COURT
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FILED
September 29, 2015
OFFICE OF APPELLATE COURTS

In Re the Marriage of: Christine J. Curtis, Petitioner, vs. Gregory M. Curtis, Respondent.	**Joint Petition to Appear as *Amicus Curiae* Submitted By the Family Law Section of the Minnesota State Bar Association and the Minnesota Chapter of the American Academy of Matrimonial Lawyers** Appellate Court Case No. A14-1841 Date of Filing of Unpublished Court of Appeals' Decision: June 22, 2015

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Family Law Section of the Minnesota State Bar Association (hereafter "Family Law Section") and the Minnesota Chapter of American Academy of Matrimonial Lawyers (hereafter "AAML") request the Supreme Court allow their participation in this pending petition for review as *amicus curiae* to the Supreme Court of the State of Minnesota in this matter.

The interest of both organizations in appearing as *amicus curiae* is public in nature. The Family Law Section is an organization of approximately one thousand and thirty-eight (1,038) attorneys practicing throughout the State of Minnesota. The Minnesota Chapter of the AAML is an organization of approximately forty-nine (49) attorneys. The members of both organizations have actively worked with the bench and bar to streamline family matters with rule-making, alternative dispute resolution processes, such as early neutral evaluations, and as *amicus curiae* to the courts on issues of importance to the practice of family law.

The MSBA Family Law Section and the Minnesota Chapter of the AAML believe that the issues in this case are important ones upon which this Court should rule as resolution of these issues will have statewide impact in the establishment of spousal maintenance and property division. The issues that these organizations would address in an *amicus* brief would be as follows:

> It was error for the trial court to deny an award of spousal maintenance to a 48 year-old homemaker spouse because the court found she could liquidate a growth-oriented investment account awarded to her by stipulation and reinvest the account to generate a higher income than the account was earning during the marriage.
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> It was error for the trial court not to reserve jurisdiction over maintenance as prudently directed in Lyons v. Lyons because of the uncertainty of future investment returns. Should the investment income fail to meet the 7% projection, Mrs. Curtis is left without a remedy. The trial court would lack jurisdiction to respond to economic changes that could alter the income assumptions upon which it based its order.
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> It was error for the trial court to ignore the tax consequences of its own creation and fail to adjust for the resulting reduction in the value of the property awarded to Mrs. Curtis.
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> It was error for the Court of Appeals to presume that since Mrs. Curtis was awarded 57% of the marital assets, she could use income from investments to meet her monthly needs instead of an award of spousal maintenance, and thereby justify the liquidating and reinvesting of assets to maximize income. The parties stipulated and the trial court found the division of marital property was "fair and equitable." Certain assets were not valued or included in the valuation of Husband's dental practice. The Court of Appeals notes that "the parties' stipulation did not confer a right to keep investments as they were at the time of the dissolution," yet nothing in the parties' stipulated division of property suggests otherwise or that the property division was influenced by spousal maintenance considerations.

If granted *amicus curiae* status, the MSBA Family Law Section and Minnesota Chapter of the AAML would submit a joint *amicus* brief. The members of these organizations believe the issues in the Curtis v. Curtis decision must be addressed by the Minnesota Supreme Court, particularly given the conflict between unpublished decisions in the Minnesota Court of Appeals that impair a family law attorney's ability to provide guidance to their clients and achieve negotiated settlements. Family law practices are being inundated with increasing numbers of "grey" divorces as baby boomers who have accumulated retirement assets and investment portfolios end long term marriages. As recognized by this Court in Nardini, 414 N.W.2d 184, 197 (Minn. 1987),

there is an inherent conflict between the right of a potential maintenance recipient to receive an award of spousal maintenance to meet demonstrated needs, versus being forced to live off her property awards.

The interplay between a property award and an award of spousal maintenance and resulting tax consequences is highlighted in the Curtis decision by the extinction of any right for Ms. Curtis to ever receive spousal maintenance. The Curtis case contemplates a forced liquidation of investment accounts equitably allocated between the parties through their stipulation. This left Ms. Curtis vulnerable to the trial court's ultimate denial of her receipt of spousal maintenance by ascribing to her assumed income through the forced liquidation of her portfolio account. Equally troubling is that both the trial court and the Court of Appeals' panel ignored the adverse tax consequences imposed on Ms. Curtis by a forced liquidation of funds awarded to her. Despite the marital decision to invest in a growth-oriented portfolio, by judicial fiat, she was expected to reinvest in a high-yield portfolio, with an assumed but certainly not guaranteed 7% rate of return. Consequently, Ms. Curtis not only had her property award reduced by the resulting taxes; she would continue to incur capital gains taxes as she drew upon the funds in the investment portfolio to meet her ongoing monthly needs. The failure of the trial court to consider the impact of capital gain taxes upon Ms. Curtis' withdrawals for application to her living expenses was similarly ignored by the Court of Appeals. In Nardini, *supra*, at 197, this Court recognized that despite Marguerite Nardini's augmented share of the marital property, more would be required to provide for her reasonable needs, especially when the marital standard of living was taken into consideration.

The Curtis decision ignored the caution expressed in this court's holding in Lyon v. Lyon, 439 N.W.2d 18 (Minn. 1989), which required a reservation of jurisdiction over maintenance in a

case with similar speculation about future income. This concern has certainly been validated by recent stock market downturns. As directed in Lyon supra, at the very least, a reservation of jurisdiction over maintenance would be appropriate under the facts of the Curtis case.

In his dissent, Judge Kirk points out that the Curtis majority decision is directly contrary to holdings in other unpublished cases, citing to Schneider v. Nicholls, No. C5-91- 832, 1991 WL 245229, at *3 (Minn. App. Nov. 26, 1991), which held

> A court cannot order a spouse to invade her assets to meet her needs, . . . neither can it require [wife] to change the nature of these assets in order to produce income to meet her needs.
>
> Curtis, at D-2.

In his footnote 5, Judge Kirk characterized Schneider as "persuasive." In footnote 10 of the Curtis dissent, Judge Kirk also cited to another unpublished case, Levinson v. Levinson, No. C5-99-1772, 2000 WL 890443 (Minn. App. 2000) to highlight the conflict between Curtis and other unpublished decisions of the Court of Appeals.

While we fully recognize that unpublished decisions lack precedential value, they are nevertheless persuasive, instructive, and read by lawyers practicing family law. The fact that the Curtis and Schneider cases are unpublished provides little comfort. Family law decisions of the Court of Appeals are closely watched by the family law bar and by trial court judges for signs of jurisprudential trends. It is noteworthy that there has been only one published opinion of the Court of Appeals issued within the past five years, involving the establishment of an initial spousal maintenance award. See: Passolt v. Passolt, 804 N.W. 2d 18 (Minn. App. 2011), *review denied* Nov. 15, 2011. The fact that the Curtis decision endorsed a denial of an initial award of maintenance as a matter of law due to an assumed availability of a forced transfer into a high yield portfolio leaves Mrs. Curtis with no access for judicial relief, despite the established marital standard of living. The trial court and the Court of Appeals totally discounted Ms. Curtis'

contribution to the marital partnership and ignored the marital standard of living, by focusing upon the reduced standard of living forced upon Mrs. Curtis during the pendency of the divorce rather than throughout the marriage. The suggestion that a minimum wage job could or would be available to Ms. Curtis in Sleepy Eye ignores the distinction drawn by this Court in Nardini at 197 that "being capable of employment and being appropriately employed are not synonymous."

Judge Kirk accurately predicts the reluctance of attorneys, if not outright resistance, to achieve settlements that partially "resolve" financial issues in order to avoid unforeseen consequences to other contested financial issues in the case, including the very real potential for attorney malpractice. There would be very little incentive to negotiate property settlements which could result in unintended disastrous tax consequences or outright denials or reduction of legitimate maintenance claims for a financially disadvantaged spouse.

Counsel for the parties are:

Attorney for Petitioner
Andrew M.Tatge (#349148)
Matthew C. Berger (#387666)
GISLASON & HUNTER LLP
124 East Walnut Street, Suite 200
P.O. Box 1268
Mankato, MN 56001-1269
Telephone# 507-387-1115

Attorney for Respondent
Roger H. Hippert (#45391)
NIERENGARTEN & HIPPERT, LTD.
P.O. Box 214
New Ulm, MN 56073-0214
Telephone# 507-359-2991

Respectfully Submitted:

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FAMILY LAW SECTION, MINNESOTA STATE BAR ASSOCIATION AND THE MINNESOTA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

Jill Kneip Mayer (#0386822)
Chair, Family Law Section of the Minnesota State Bar Association
CAPISTRANT LAW, P.A.
3009 Holmes Avenue South
Minneapolis, MN 55408
Telephone: (612) 827-6300
jill@capistrantlaw.com

Mary Catherine Lauhead (#61086)
Co-Chair, *Amicus Curiae* Committee of the Family Law Section of the Minnesota State Bar Association
LAW OFFICES OF MARY CATHERINE LAUHEAD
3985 Clover Avenue
St. Paul, MN 55127-7015
Telephone: (651) 426-0870
mary@lauheadlaw.com

Michael D. Dittberner (#158288)
Co-Chair, *Amicus Curiae* Committee of the Family Law Section of the Minnesota State Bar Association
LINDER, DITTBERNER, BRYANT, & WINTER, LTD.
3205 West 76th Street
Edina, MN 55435-5244
Telephone: (952) 896-1099
mdittberner@mnfamilylawadvocates.com

Anne M. Honsa (#0193641)
President, Minnesota Chapter of American Academy of Matrimonial Lawyers
HONSA & ASSOCIATES, P.A.
Accenture Tower
333 South Seventh Street, Suite 2360
Minneapolis, MN 55402
Telephone: (612) 767-7300
anne@honsalaw.com

David L. Olson (#008184x)
Chair, *Amicus Curiae* Committee of the Minnesota Chapter of the American Academy of Matrimonial Lawyers
One Corporate Plaza
7400 Metro Boulevard, Suite 420
Edina, MN 55439
Telephone: (952) 831-4200
olson199@umn.edu