STATE OF MINNESOTA

IN SUPREME COURT

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In Re the Marriage of: Kerry S. Spolum, Appellant, vs. Michael J. D'Amato, 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Chapter of the American Academy of Matrimonial Lawyers** Appellate Court Case No. A14-1335, A14-1720 Date of Filing of Unpublished Court of Appeals' Decision: August 17, 2015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 to 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. These organizations 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 addressing the appropriate scope of appellate review of trial court determinations of spousal maintenance courts and in assessing the standards that trial courts are to employ in determining the amount and duration of spousal maintenance in marriages of short-term and intermediate length.

If granted *amicus curiae* status, the MSBA Family Law Section and the Minnesota Chapter of the AAML would submit a joint *amicus* brief. The members of these organizations believe that Spolum v. D'Amato, 2015 WL 4877577 (Minn. Ct. App. 2015) (hereinafter referred to as Spolum) should be reversed with the following questions addressed by this Court:

> Whether the Court of Appeals improperly reweighed the evidence and substituted its own judgment for that of the trier of fact by determining that an award of rehabilitative (temporary) spousal maintenance should have granted instead of an award of permanent maintenance?
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> To what extent should the duration of the parties' marriage impact on the statutory presumption in favor of the permanency of a maintenance award where there is uncertainty a spouse will be able to meet her reasonable needs at a level commensurate with the marital standard of living?
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> To what extent should the duration of the parties' marriage diminish the significance of the marital standard of living in determining the reasonableness of the needs of a spouse seeking spousal maintenance?
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> To what extent should the duration of a marriage for purposes of assessing the marital standard of living be measured by the period of time the parties lived in the same household as opposed to the period of time between the date of the parties' marriage and the date of their divorce?

In Spolum, the parties: (1) were married on September 15, 2001; (2) had one child, a son, born on July 6, 2003; (3) separated in July 2010; (4) subsequently placed their family court proceeding on inactive status; (5) placed their family court proceeding on active status in January 2012; (6) tried the issue of spousal maintenance in August 2013; and (6) were subsequently divorced. See Addendum to Petitioner's Petition for Review (hereinafter referred to as ADD) at 020, 023-24. The trial court awarded Petitioner permanent spousal maintenance of $14,072 per month and child support of $1,325 per month. See ADD.051. The trial court made the following findings with respect to the parties' income and expenses: (1) Respondent had gross monthly income of $79,211(about $950,000 per year) and reasonably monthly expenses for himself and the minor child of $17,812; and (2) Petitioner had potential monthly income of $1,885 (which would increase to $4,000 by 2021) and reasonable monthly expenses for herself and the minor child of $13,064. See ADD.028, 31-31, 34. In its findings addressing the eight statutory factors of Minn. Stat. §. 518.552, Subd. 2 for the amount and duration of spousal maintenance, the trial court found the following: (1) Wife was receiving $1.2 million in marital assets as part of the property award; (2) Wife, a former flight attendant, had not worked full-time since September 2011; (3) the parties and their son had

enjoyed a high, lavish standard of living during the marriage; (4) the parties had been married for 12 years; (5) Wife would receive $1 million in retirement, real estate and investment assets in the property settlement but had minimal retirement assets in her own name; (6) Wife was 49 years-old and in good health; (7) Husband agreed he had the ability to pay spousal maintenance to Wife; and (8) Wife's efforts were pivotal to Husband's obtaining his current position of employment after he had been fired by a prior employer in 2006. See ADD.037-41. The trial court also rejected Husband's claim that Wife had dissipated $125,000 in marital assets as an advance against her share of the marital estate on account of her use of funds to open a business and her payments to charities on which she served as a board member. See ADD.050.

The Court of Appeals held that the trial court "abused its discretion in awarding [Petitioner] permanent spousal maintenance." See ADD.015. The Court of Appeals opined that "[t]he trial court's findings support an order for rehabilitative maintenance, not permanent maintenance." See ADD.010. Among other things, the Court of Appeals concluded that: (1) the parties' standard of living was excessive; (2) Wife did not contribute to the parties' combined wealth through her own career; (3) the parties had been married for only nine years as of Wife's petition for legal separation in October 2010; (4) Wife was 49 years-old and enjoyed good health; (5) Wife's efforts to assist Husband obtain new employment after he was fired in 2006 were only for the purpose of keeping the family in Minnesota; (6) it seemed that Husband would have been amenable to relocating to another state, had the efforts at securing him a new Minnesota position of employment proved unsuccessful; (7) the trial court should have given Husband credit for maintaining his employment at his new job (i.e., not getting fired); and (8) the trial court should have deemed Wife to have engaged in "dubious use" of $125,000 in marital funds and that the trial court should have considered transfer of these funds into her own account in determining the maintenance award. See ADD.011-14.

The MSBA Family Law Section and the AAML believe that the Minnesota Court of Appeals' decision in Spolum should be reversed because the Court of Appeals improperly reweighed the evidence in determining that an award of permanent spousal maintenance was unjustified. We respectfully disagree with the Court of Appeals, and submit that the trial court's award of permanent spousal maintenance to

Petitioner falls within the broad discretion of a trial court, and is in accord with the maintenance statute and this court's relevant jurisprudence.

In 1985, the Minnesota Legislature added a new subdivision 3 to Section 518.552, which provides that the maintenance statute should not be "construed to favor a temporary award of maintenance over a permanent award" and 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." 1985 Minn. Laws Ch. 266, § 2. An award of temporary spousal maintenance is based on the assumption that the party receiving the award will become self-supporting. Nardini v. Nardini, 414 N.W. 2d 184, 198 (Minn. 1987). District courts in setting spousal maintenance are to consider whether the spouse seeking maintenance is able to "to provide adequate self-support, after considering the standard of living during the marriage and all relevant circumstances, through appropriate employment." Id. at 197 (quoting Minn. Stat. § 518.552, Subd. 1(b). "Being capable of employment and being appropriately employed are not synonymous." Id. The reasonable needs of a spouse seeking spousal maintenance vary from case to case and depend on "the standard of living established during the marriage." Lee v. Lee, 775 N.W. 2d 631, 642 (Minn. 2009). Minnesota caselaw across the years has consistently held that a maintenance obligee be able to expect an award that will keep "'with the circumstances and living standards of the parties at the time of the divorce.'" (citing Botkin v. Botkin, 247 Minn. 25, 29, 77 N.W. 2d 172, 175 (1956).

In Sefkow v. Sefkow, 427 N.W. 2d 203, 210 (Minn. 1988), this Court observed: "We have criticized before the Court of Appeals' misapplication of the scope of review when it has usurped the role of the trial court by reweighing the evidence and finding its own facts. Appellate review of custody determinations is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." (citations omitted). In Dobrin v. Dobrin, 569 N.W. 2d 199, 202 (Minn. 1997), this Court cited this passage from Sefkow with approval in admonishing the Court of Appeals for mandating an award of permanent maintenance on appeal from the trial court's denial of any award. The principle enunciated in Sefkow and reaffirmed in Dobrin apply with equal force to appropriate scope of the Court of Appeals' review of a trial court's award of permanent maintenance.

The MSBA Family Law Section and the Minnesota Chapter of the Academy do not believe that the parties' marriage in this case was so short so as to prevent the trial court from awarding permanent spousal maintenance or in the trial court's assessment of Petitioner's reasonable needs in line with the marital standard of living at the time of the divorce. We cannot recall the last time the Court of Appeals rejected the trial court's decision of the permanency of an award as a matter of law in initially setting spousal maintenance. We are especially concerned about the Court of Appeals' minimizing of Petitioner' contribution to Respondent's career. Not only did Petitioner contribute to Respondent obtaining his lucrative position of employment in 2009, but the maintenance statute specifically values the noneconomic contributions of homemakers. See Minn. Stat. § 518.552, Subd. 2(h) (court must consider "contribution of a spouse as a homemaker"). This Court has noted that a maintenance obligor's career and earnings are not divisible as an asset upon divorce. Nardini at 197. This creates the anomalous circumstance whereby an obligor's career is left "intact and undisturbed" while retaining the vehicle for future enhancement of earning power, whereas the obligee-homemaker is supposed to abandon her role "and embark on some undefined new career." Id. at 198.

In addressing the definition of marital property acquired during a marriage, in Rohling v. Rohling, 379 N.W.2d 519 (Minn. 1986), the Supreme Court of Minnesota held that notwithstanding an eight-year separation of the parties preceding the entry of the dissolution decree, retirement funds received by the Husband during the separation of the parties constituted marital property for division between the parties. By analogy, the period of separation of Ms. Spolum and Dr. D'Amato, should not be counted against the length of the marriage of the parties of approximately twelve years and three months by a reduction to nine years as of their 2010 separation. During this three-year period of separation, the parties continued to work on the marriage, accumulate marital assets and meet family financial obligations.

We believe that the Spolum opinion will encourage spousal maintenance obligors to litigate rather than settle spousal maintenance disputes and to appeal spousal maintenance awards. This will have a highly negative impact on spouses seeking spousal maintenance who often, unlike Petitioner, lack access to financial resources with which to fund legal representation during the pendency of a divorce proceeding.

The fact that the Spolum opinion is unpublished is of little comfort. The Courts of Appeals unpublished maintenance opinions are closely watched by the family law bar and 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 Spolum opinion rejected a permanent award of maintenance as a matter of law enhances its significance, highlighting the conflict between applicable law and this Court of Appeals' decision.

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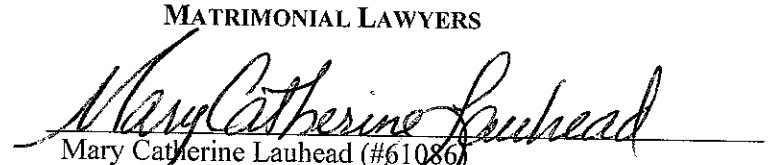
Respectfully Submitted:

Dated: September 29, 2015

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



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