IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Marriage of:

Alan Welch,

Petitioner,

and

Mary M. Welch,

Respondent.

File No. 590-07

MEMORANDUM DECISION

The parties in this litigation agree that some spousal maintenance should be paid by the Petitioner, who is a member of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), to the Respondent, who is not. But the parties disagree with respect to the duration of the maintenance award: the Respondent contends that maintenance should be permanent, and the Petitioner disagrees, suggesting that it continue only for six years, when the parties' son will have graduated from high school, and also suggesting that the Domestic Relations Code of the Community ("the Domestic Relations Code") may not authorize a permanent award. The Respondent also seeks an award of her attorneys fees, which the Petitioner resists.

In Findings of Fact and Conclusions of Law filed today, I set forth what I believe to be the salient aspects of the parties' history and present circumstances; I award the Respondent maintenance in an amount that will be reduced but that will not be eliminated when the parties' child graduates from high school; and I deny the Respondent's request

for an attorneys fee award. In this Memorandum, I will set forth the analysis underlying those decisions.

The Court clearly has been given the authority to award spousal maintenance. Chapter III, section 6 of the Domestic Relations Code expressly authorizes such an award, and sets forth explicitly the standards that the Court is to apply when considering an application for such an award:

> ***Maintenance.***
>
> **a. When awarded.**
>
> If no valid antenuptial contract or settlement stipulation to the contrary exists between the spouses, maintenance may be awarded in cases the Tribal Court deems appropriate. The Tribal Court shall consider the length of the marriage, contributions, financial and non-financial, of both spouses; the standard of living to which each spouse has become accustomed; the financial needs of both spouses; and any other factor the Court finds appropriate. The Tribal Court shall not consider misconduct of either spouse when making its determination.

On the face of this, there is no limitation with respect to the duration of an award: absent an agreement of the parties to the contrary, "maintenance may be awarded in cases the Tribal Court deems appropriate." But the Petitioner suggests that ambiguity, with respect to the Court's authority, may derive from the provisions of Chapter III, section 5 of the Domestic Relations Code, governing the division of property in marriage dissolution proceedings.

Chapter III, section 5 begins with language virtually identical to that in Chapter III, section 6:

> ***Division of property upon divorce.***
>
> **a. Marital property.**

> If no valid antenuptial contract to the contrary exists between the spouses, the marital property of the spouses is to be divided equitably upon divorce. The Tribal Court shall consider the length of the marriage; the contributions, financial and nonfinancial of both spouses; the standard of living to which each spouse has become accustomed; the financial needs of each spouse; and any other factor the Court finds appropriate. The Tribal Court shall not consider the misconduct of either spouse when making its determination.

But Chapter III, section 5 goes on, in a series of subsections, to deal with particular forms of property – it discusses the "separate property" of the spouses, in subsection b; "untraceable property", in subsection c.; "professional degrees", in subsection d.; "pensions", in subsection f.; and – central to the Petitioner's argument here, "per capita payments", in subsection e.:

> **Per capita payments to tribal members.**
>
> Per capita payments from the Shakopee Mdewakanton Sioux (Dakota) Community to its eligible members are the separate property of the person to whom they are issued. Per capita payments shall not be awarded pursuant to the hardship exception of subsection (b) of this Section (5).

The parties here agree that Petitioner's sole source of income is, and for the duration of the parties' marriage was, his per capita payments from the Community. Given that fact, the Petitioner suggests that an award of permanent spousal maintenance here could be regarded as, in effect, creating a property transfer of his per capita payments – a transfer that is inconsistent with the just-quoted language of Chapter III, section 5.e.

But that argument ignores the clear differences between the circumstances that prompt property division and maintenance awards. Property division parses a thing to which both parties have obtained legal ownership. Spousal maintenance by definition involves a situation where one of the parties has no ownership of the thing being

transferred, and has resources generally insufficient to maintain the way of life that equity dictates is appropriate. Under Chapter III, section 5.e., the Court has no power whatever to ascertain the value of the future stream of the Petitioner's per capita payments and award one-half (or any other fixed fraction) of that amount to the Respondent. But the Court does have the power – and the duty – to consider the position that a marriage dissolution will leave the former partners, and to order that a fixed stream of payments be made to protect the more vulnerable party from an inequitable change in his or her life's circumstances. For that reason, the Domestic Relations Code deals with the two sorts of awards in two separate sections, and in so doing the Community clearly prohibited the award of per capita payments as part of a property distribution, but did not forbid consideration of the income represented by per capita payments when the Court makes a spousal maintenance award.[1]

The Petitioner also cautions the Court that any maintenance award must be approached carefully; and the Court agrees. When a marriage is dissolved, the former partners have a legal obligation to use their best efforts to support themselves; and an award of maintenance from one party to the other can be justified only if there will be a great disparity between the parties' post-dissolution income and there has been a stable relationship of considerable duration and there was a history of notable contributions to the relationship by the party seeking maintenance.

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[1] As is noted above, the Petitioner here has proposed an award of maintenance that would for six years. But if Chapter III, section 5.e. of the Domestic Relations Code eliminated the consideration of per capita payments when the Court awards maintenance, even such a "temporary" award would be impermissible where, as here, the Petitioner's sole source of income is per capita payments. The Court is convinced that such a result cannot be squared with the straightforward language of Chapter III, section 6.a..

Here, the Petitioner seeks to cast his relationship with the Respondent as of a "relatively short" duration. But the Findings of Fact, filed today, set forth in detail the unambiguous truths that, before their separation, the Respondent and the Petitioner cohabited for twenty years. The Respondent lived with the Petitioner for virtually her entire adult life. And, as the Findings of Fact detail, throughout the parties' time together, the Respondent accepted very considerable responsibilities – both parties testified that she had responsibility for the construction, remodeling, upgrading, and maintenance of the parties' residences, and also – for years before their marriage – had responsibility for the care and education not only of the parties' child, who was born two years before the marriage commenced, but also of the Petitioner's two children from a previous relationship.

Chapter III, section 6.a. of the Domestic Relations Code directs the Court, when considering an award of maintenance, to weigh the duration of the parties' marriage, their respective contributions thereto, the standard of living to which they have become accustomed, their financial needs, and "any other factor the Court finds appropriate." When, as here, parties were in a stable, committed, mutually contributing relationship for some eleven years before their marriage, the Court deems it appropriate to consider that relationship and those contributions as a factor in assessing an award of spousal maintenance.

To be clear, the Court does not suggest that pre-marital contributions should be considered in the dissolution of all – or even most – marital relationships. Such matters must be considered very carefully, on a case-by-case basis. But here, in their testimony, the parties fundamentally agreed that the caregiving and homemaking responsibilities of

the Respondent were extensive and continuous for a period that, in total, was more than twice as long as their marriage, and that, in the Court's view, deserves consideration under Chapter III, section 6.a.

So, too, does the fact that unless permanent maintenance is awarded there is not the smallest chance, not the least hope, that the Respondent could maintain anything like the standard of living she has enjoyed during her relationship with the Respondent. If the Petitioner's proposal for maintenance lasting six years were to be accepted, the Respondent, at the end of that six-year period, at the age of fifty, would find herself earning less than thirty thousand dollars per year, with only the most minimal Social Security payments available when she reached retirement age. The testimony of the Petitioner's vocational expert, detailed in the Findings of Fact, was compelling in this regard: given the Respondent's abilities, she qualifies only for "entry level" work, and going forward her possible advancement will be limited simply to a slightly higher pay grade in the same sort of work.

In the view of the Court, all of these factors taken together require that the Respondent receive a continuing stream of maintenance payments from the Petitioner, in the amounts discussed in the Findings of Fact. To hold otherwise would be to work injustice.

The Respondent also sought an award of her attorneys fees. This Court does have the power to render such an award in marriage dissolution proceedings and in other matters if a party has committed misconduct or behaved inappropriately. But throughout these proceedings the Petitioner has acted in a straightforward and honorable fashion; he participated fully in mediation proceedings that led to very constructive settlement

agreements relating to child custody and property division; and as a consequence of that property division, the Respondent will receive resources that will enable her to both discharge her debts and pay her attorneys fees. Hence, there is no justification here for making an attorneys fee award in any amount.

August 18, 2008

Judge John E. Jacobson