

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Therese Joan Lucier,	)	
	)	
Plaintiff/Appellant,	)	
	)	Supreme Court No. 20060060
	)	Civil No. 05-C-00395
	)	
v.	)	
	)	
Lewis Joseph Lucier,	)	
	)	
Defendant/Appellee.	)	

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**APPEAL FROM THE FEBRUARY 7, 2006  
MEMORANDUM DECISION AND ORDER  
AND SUBSEQUENTLY ENTERED JUDGMENT  
BY THE DISTRICT COURT  
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT,  
THE HONORABLE LAWRENCE E. JAHNKE**

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. A statement of the issues presented for review as required by Rule 28(a)(3) of the North Dakota Rules of Appellate Procedure are:

I. Whether the Trial Court erred in modifying spousal support by failing to give adequate consideration to the parties' stipulated divorce agreement.

II. Whether the Trial Court erred in modifying spousal support by considering changes in circumstances that were contemplated by the parties at the time of their stipulated divorce.

III. Whether the Trial Court erred in finding that modification of spousal support was warranted by Therese's decreased need for child support when her need had already been established by the parties' stipulated divorce agreement that was reduced to judgment.

IV. Whether the Trial Court erred by finding that modification of spousal support was warranted by Lewis's decreased ability to pay because it based this finding on speculative evidence about Lewis's future earnings.

V. Whether the trial court erred by failing to provide any explanation for the reduced amount of spousal support it ordered.

## STATEMENT OF THE CASE

2. This is an appeal by Plaintiff Therese Joan Lucier (hereinafter Therese) of a Memorandum Decision and Order reducing the spousal support obligation of Defendant Lewis Joseph Lucier (hereinafter "Lewis").

3. Therese commenced an action for divorce against Lewis by summons and complaint served September 27, 2004. An Interim Order incorporating a stipulation of the parties was signed on July 8, 2005 and filed in the Office of the Clerk of District Court on August 3, 2005. On August 2, 2005, the parties presented a signed Marital Termination Agreement (hereinafter "MTA") at a hearing held before the Honorable Joel D. Medd, Judge of the District Court, Northeast Central Judicial District, Grand Forks, North Dakota. This MTA was filed in the office of the Clerk of District Court on August 3, 2005. Findings of Fact, Conclusions of Law, and Order for Entry of Judgment incorporating the MTA were signed by the court on August 9, 2005 and filed in the office of the Clerk of District Court on August 10, 2005. Judgment and Decree incorporating the MTA was filed in the office of the Clerk of District Court on August 10, 2005. Notice of Entry of Judgment and Decree was served on August 25, 2005.

4. On November 28, 2005, Lewis served a motion to amend the divorce judgment and decree to reduce spousal support. On December 8, 2005, Therese served an affidavit in response to Lewis's motion and on December 19, 2005, she served a brief in opposition to Lewis's motion. On December 20, 2005, Lewis served a reply brief and affidavit. A hearing on Lewis's motion to reduce spousal support was held before the Honorable Lawrence E. Jahnke on January 17, 2006.

5. On February 7, 2006, Judge Jahnke signed a Memorandum Decision and Order granting Lewis's motion and reducing Lewis's spousal support obligation retroactive to February 1, 2006, from \$2400 monthly to \$1,000 monthly. In addition, effective August 1, 2006, if the parties' Washington property has not sold and until it is sold, Lewis's spousal support is further reduced to \$700 monthly. This Memorandum Decision and Order was filed in the office of the Clerk of District Court on February 8, 2006. An Amended Judgment and Decree was filed in the office of the Clerk of District court on March 17, 2006.

6. In its Memorandum Decision and Order reducing Lewis's child support obligation, the Trial Court found that Lewis had met his burden of proving that there has been a material change of circumstances since the divorce. The Trial Court found the following material changes in circumstances: the failure of the Washington home to sell as both parties hoped and anticipated; the exhaustion of the home equity loan proceeds which the parties had earlier agreed would meet Lewis's continuing obligation to pay spousal support; and the reduction of Therese's current living expenses. The Trial Court further found that a reduction in Lewis's spousal support was warranted because Lewis had a substantially reduced ability to continue to pay \$2,400 in spousal support and because Therese's financial needs had decreased since she sold the parties' former marital home in Grand Forks.

7. Therese commenced this appeal by filing a Notice of Appeal from the Memorandum Decision and Order with the Clerk of the District Court on February 28, 2006. An Amended Judgment and Decree was subsequently filed in the office of the Clerk of District court on March 17, 2006.

8. The Trial Court's findings are clearly erroneous because they are unsupported by the evidence and induced by an erroneous view of the law.

## STATEMENT OF FACTS

9. Therese and Lewis were married on September 2, 1994 and separated on October 1, 1999. (Appendix, p. 22). One child was born during the marriage, Beau Gerhard Lucier, DOB: 5-16-95. (Appendix, p. 22).

10. Before she married Lewis, Therese lived in Erskine, Minnesota and operated a beauty salon. (Appendix, p. 41). Therese owned a salon and a small building in Erskine and Therese and Lewis mutually owned a home in Erskine. (Trans., 31:19-24). After Therese and Lewis were married, Therese sold her business and moved to Washington where she raised their son Beau for the next ten years. (Appendix, p. 41). The home in Erskine produced rental income and was eventually sold during the marriage. (Trans. 31:25-32:7). Money from the sale of these Erskine properties was used only for family necessities. (Trans., 32:11-15). At the time of the divorce Therese had no interest in any businesses or any income-producing property in the state of Minnesota. (Trans., 32: 16-19). While the parties lived in Washington state, Therese was licensed and operated a salon out of their home in Sammamish. (Trans., 32:8-10).

11. In January 1984, Lewis started working full time for Zetek Inc., a nondestructive testing company specializing in eddy current testing. (Trans., 5: 13-21). He quit Zetek in 2001 and went back to school in computer training, worked temporarily for another company, then went back to Zetek in August, 2004, working as a part-time level 3 current technician, where he is paid a retainer of \$2,000 a month and overtime based on his travel hours, of which he is guaranteed a minimum of 1000 per year. (Trans., 5:21-6:1; 14:16-19; 37:11-38:2). In 2005, Lewis earned a gross income of \$62,000 working at Zetek. (Trans., 38:3-8).

12. Pursuant to a Marital Termination Agreement (hereinafter MTA), Therese and Lewis agreed that they would share legal custody of their child Beau, that Therese would be awarded physical custody of Beau, and that Lewis would be awarded reasonable and liberal visitation. (Appendix, pp. 12-14). They further stipulated that Lewis would pay child support to Therese in the sum of \$700 per month based on an average gross yearly income of \$62,000. (Appendix, p. 15).

13. Therese and Lewis agreed that Therese would be awarded the Grand Forks Home subject to any liens, mortgages, and encumbrances thereon and that Lewis would execute a quit claim deed conveying his interest in the property to Therese. (Appendix, p. 17).

14. Therese and Lewis agreed that the Washington home would be sold and that the selling price of the Washington home would be reduced to \$1.6 Million if necessary to sell it. (Appendix, p. 16). They agreed that Lewis would have exclusive use and possession of the Washington property until it sold and be responsible for all costs associated with the home. Id. They agreed that when the Washington home sold, the mortgage and second mortgage, costs associated with the sale of the home, and the parties' income tax liability for the year 2004 would be paid from the sale proceeds; that Lewis would be awarded the next \$30,000 from the net proceeds for his share of the equity in the Grand Forks home; and that the balance of the proceeds would be divided equally between the parties. Id.

15. Therese and Lewis agreed to the division of their remaining marital party and debts, including time shares, vehicles, investments, household goods and furnishings, bank accounts, and credit card debt. (Appendix, pp. 17-18). They further agreed that Lewis would pay Therese \$2,400 per month in spousal support until the sale of the

Washington home and distribution of the proceeds had been accomplished. (Appendix, p. 18).

16. The terms of the MTA were approved by the court at a hearing held on August 2, 2005 before the Honorable Joel D. Medd, Judge of the District Court, Northeast Central Judicial District, Grand Forks, North Dakota, at which the parties and their counsel appeared. (Appendix, p. 21). The terms of the MTA were then incorporated into the Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment. (Appendix, pp. 21-28). In paragraph 10 of its Findings of Fact, the trial court found that Therese was disadvantaged as a result of her marriage and divorce and was entitled to spousal support. (Appendix, p. 22). Judgment was entered on August 10, 2005. (Appendix, p. 2; p. 29).

17. Lewis moved back to the Washington home in August 2005. (Trans., 4:14-24). Lewis has two housemates living in the Washington home who pay him rent. (Trans., 5:2-6). He receives \$400 from each of these housemates per month. (Trans., 21:11-12).

18. At the time of the divorce, there was an offer for the purchase of the parties' home in Sammamish, Washington, for 1.75 million dollars. (Trans., 12:4-10). The purchase offer was conditioned upon the county approving building permits for the property on which the home was located and contained a contingency clause allowing the buyer to back out of the agreement based upon a feasibility study and moratorium results. (Trans., 30:2-16; Appendix, p. 40). Lewis was aware of this contingency clause and of the fact that there could be a moratorium on the building permit issue. (Trans., 13:11-14; 30:2-16; Appendix, pp. 36, 40). On August 15, 2005, the City of Sammamish, Washington passed a resolution that no new building permits could be issued until August, 2007. (Appendix, p. 36; Trans., 13:11-14). The offer to purchase the Washington home was rescinded on

August 31, 2005. (Trans., 12:11-12; Trans. Ex. 2; Appendix, p. 36). At the time of the hearing, the asking price for the home had been reduced to \$1.3 million. Lewis is optimistic that it will sell. (Trans. p. 31)

19. After the parties were divorced, Therese sold her house in Grand Forks and moved to Erskine, Minnesota, where she is currently renting an apartment with a one year lease and in the process of looking for a home for Beau and herself. (Trans. 12:16-17; Trans., 36:22-24; Appendix, p. 41). Once the Washington property sells, if it sells for a reasonable price, Therese plans to use her portion of the proceeds to start up a new business. (Appendix, p. 41). At the time of the hearing, Therese did not yet have a cosmetology license in the State of Minnesota. (Appendix, p. 41). She was working on recertification of her cosmetology license but that would require some additional education. (Appendix, p. 41).

20. According to Lewis, as reflected in the mediation agreement negotiated by Carole Johnson, originally he and Therese had planned to sell the Grand Forks home and had agreed that he would pay no spousal support to Therese if the Grand Forks home sold. (Trans., 15:25-16:1; Trans., Ex. 1). Lewis agrees that subsequent to the mediation, at the time he entered into the MTA on August 2, 2005, he agreed to pay Therese spousal support in the amount of \$2,400 a month. (Trans., 7:3-15).

21. Lewis admits that he was represented by counsel when he entered into the MTA and that he took part in negotiations and mediations regarding the spousal support issue. (Trans., 29:2-15). Lewis admits that there is no provision in the MTA incorporating his understanding that he was awarded the equity in the Grand Forks house to help make spousal support payments until the sale of the house. (Trans., 34:1-6). Lewis admits that a

lot of considerations went into the MTA, including debt allocation, property allocation, spousal support, and child support. (Trans., 34:13-35:6). Lewis admits that all of these considerations through counsel were reduced to a single writing which he signed out of his own free will and that no one coerced or forced him to sign it and that this writing was reduced to judgment. (Trans., 35: 7-18). Lewis admits that “apparently” he did agree in the MTA to pay an indefinite period of spousal support until the home sold. (Trans., 36: 9-12. Lewis testified that “we did have an agreement and unfortunately it’s not in there [the MTA] and that is my fault.” (Trans., 36:14-15).

22. Lewis testified that although in spring 2005 he had a “perhaps a little bit above average . . . spring” for his travel earnings at Zertec, that for the upcoming spring he has *very little travel and estimates that he will show a \$16,000 shortfall* compared to the same period the previous year. (Trans., 14: 20-25). Lewis also testified that working maximum twelve hour shifts he projects that his travel money income will be \$14,602 less for the time period for January through June 2006 than it was for the time period January through June 2005. (Trans. Ex. 3, received over the objection of Therese’s counsel; Trans., 16: 2-5).

23. In September 2005 Lewis’s payment on the main mortgage on the Washington home went from \$700 to \$937. (Trans., 22:24-25). On March 1, 2006, the payment on the main loan on the Washington home went up to \$1,015.77 per month. (Trans., Ex 7; Trans., 23:10-25). This loan has an ARM which has gone up as it follows the interest in the prime lending rate. (Trans. 23: 2-4). The interest rate on the home equity loan has gone up from 5¼% to 7%. (Trans. 23:5-24:5). Lewis admits that with an ARM the rates may go up and they may go down. (Trans. 32: 32:20-24). Lewis also admits that when he

entered into the MTA he was aware that the mortgage on the Washington home was an adjustable rate mortgage. (Trans., 32:25-33:3).

24. Lewis admits, however, that his gross income from his job for the year 2005 was approximately \$62,000 and that his child support calculation was based on this amount. (Trans., 25:3-19). He admits that he contemplated a gross income of approximately \$62,000 a year when he entered into the Marital Termination Agreement and that in 2005 no changes in his income occurred that modified that amount. (Trans., 25:19-25). In addition to his Zetec earnings for 2005, Lewis also had rental income from his two boarders of \$800 a month or \$9,600 a year. (Trans., 40:19-23).

25. Lewis admits that the number of hours that he works and his income vary from month to month, that there are some months where he does not work much at all and other months where he works a great deal, that spring and fall are his busy time periods, and that this was true prior to the time that he entered into the MTA. (Trans., 27:21-28:4). Lewis testified that it is hard to judge how much he will make in a full year. (Trans., 38:8-10).

## LAW AND ARGUMENT

### **I. LEGAL STANDARD FOR MODIFICATION OF SPOUSAL SUPPORT**

26. “Taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for any period of time. The court may modify its spousal support orders.” N.D.C.C. § 14-05-24.1 “When there has been an initial award of spousal support, the trial court retains jurisdiction and may modify the award at least as long as support continues.” Meyer v. Meyer, 2004 ND 89, ¶ 5, 679 N.W.2d 273, *citing* Bellefeuille v. Bellefeuille, 2001 ND 192, ¶ 19, 636 N.W.2d 195. A

stipulated spousal support award should be modified only with “great reluctance by the trial court.” Toni v. Toni, 2001 ND 193, ¶ 11, 636 N.W.2d 396. “The party seeking modification of spousal support bears the burden of showing a material change in circumstances warrants modification.” *Id.*, citing Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360. “A ‘material change’ is something which substantially affects a party’s financial ability or needs, and the reason for changes in income must be examined as well as the extent the changes were originally contemplated by the parties.” Pearson v. Pearson, 2000 ND 20, ¶ 12, 606 N.W.2d 128. “A contemplated change is one taken into consideration by the district court in fashioning its original decree.” Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360, citing Schmitz v. Schmitz, 1998 ND 203, ¶12, 586 N.W.2d 490.

## **II. STANDARD OF REVIEW**

27. “The trial court’s determination regarding a material change in circumstances warranting a modification of spousal support is a finding of fact and will not be reversed on appeal unless it is clearly erroneous.” Myer, 2004 ND 89, ¶ 5, 679 N.W.2d 273, citing Lohstreter v. Lohstreter, 2001 ND 45, ¶ 10, 623 N.W.2d 350. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence we are left with a definite and firm conviction that a mistake has been made. *Id.*, citing Lohstreter, at ¶ 10, 623 N.W.2d 350.

### III. THE TRIAL COURT ERRED IN MODIFYING SPOUSAL SUPPORT BY FAILING TO GIVE ADEQUATE CONSIDERATION TO THE PARTIES' STIPULATED DIVORCE AGREEMENT

28. This court has recognized “that a spousal support award based upon a stipulation by the parties can be modified upon a showing of a material change in circumstances,” Myer, 2004 ND 89, ¶ 8, 679 N.W.2d 273, *citing* Toni, 2001 ND 193, ¶ 11, 636 N.W.2d 396, Wheeler v. Wheeler, 419 N.W.2d 923, 925 (N.D. 1988) (“Wheeler II”). This court has also stated, however, that “it encourages spousal support awards based upon agreements between the divorcing parties and has recognized *changing a stipulated support amount should only be done ‘with great reluctance by the trial court.’*” Myer, 2004 ND 89, ¶ 8, 636 N.W.2d 396, *quoting* Toni, 2001 ND 193, ¶ 11, 636 N.W.2d 396. *Emphasis added.* This court has also recognized that reluctance to modify a spousal support award based on the parties’ agreement is one protection against “the potential inequity resulting when a material change in circumstances could cause a reduction in the monthly payments upon which the party relied on in agreeing to the property distribution although property distribution is not modifiable.” Pearson v Pearson, 2000 ND 20, ¶ 20, *citing* Eberhart v. Eberhart, 301 N.W.2d 137, 143 (N.D. 1981).

29. In this case the Trial Court erred by failing to give adequate consideration to the agreement between Lewis and Therese that he would pay her \$2400 a month in spousal support until the Washington house sold. Specifically, the Trial Court failed to adequately consider that Lewis entered into the MTA of his own free will and that the agreement was approved by the trial court and reduced to judgment. Since the agreement was not ambiguous, the trial court erred in considering evidence of Lewis’s testimony as to his intent at the time of the agreement and his “verbal agreements” with Therese. In

addition, the Trial Court erred by failing to give adequate consideration to the fact that the parties' agreement as to spousal support was intertwined with their agreement as to property and debt distribution, which were relied upon by Therese when she entered into the terms of the MTA regarding spousal support.

30. Lewis admits that the issues of his divorce--including spousal support--were reduced to a single writing, the MTA, which he signed out of his own free will, and he admits that no one coerced or forced him to sign the MTA and that the MTA was reduced to judgment. (Trans., 35: 7-18). Lewis admits that he did "apparently" agree in the MTA to pay an indefinite period of spousal support until the home sold. (Trans., 36:9-12). Lewis also admits that there is no provision in the MTA incorporating his understanding that he was awarded the equity in the Grand Forks house to help make spousal support payments until the sale of the house. (Trans., 34:1-6). This court has noted that "a spousal support agreement 'serves primarily to determine the interest of the contracting parties themselves.'" Toni, 2001 ND 193, ¶ 18, 636 N.W.2d 396, quoting Tiokasin v. Haas, 370 N.W.2d 559, 562 (N.D. 1985). "Put simply, the parties to a [spousal support] agreement are both grown-ups, free to bargain with their own legal right." *Id.*, ¶ 18, quoting Voight v. Voight, 670 N.E.2d, 1271, 1280 (Ind. 1996).

31. In addition, the MTA Lewis and Therese entered into of their own free will was adopted by the trial court and reduced to judgment. This court has noted that the trial court has:

the authority to refuse to accept the terms of the stipulation in part or *in toto*. The trial court stands in place and on behalf of the citizens of the state as a third party to dissolution actions. It has a duty to protect the interest of both parties and all the citizens of the state to ensure that the stipulation is fair and reasonable to all. The court did so here and approved the stipulation and incorporated the terms therein in its decree.

Toni, 2001 ND 193, ¶ 16, 636 N.W.2d 396, *quoting* Karon v. Karon, 435 N.W.2d , 501, 503 (Minn. 1989).

32. Since there was no ambiguity in the terms of the Judgment incorporating the parties' MTA, the court should not have considered Lewis's testimony about his understanding of the MTA at the time they entered into the MTA. In Gustafson v. Gustafson, 287 N.W.2d 700, 703 (N.D. 1980), this court considered a property settlement agreement incorporated in a judgment of divorce that provided that "said alimony payments (were) to terminate upon the remarriage or death of the Plaintiff." In reversing the trial court's judgment and holding that the wife's right to receive alimony did not terminate with the death of her former husband, this court stated that:

[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter.

The district court did not ascertain the parties' intent from the writing itself, but allowed testimony as to the parties' understanding of the language. We hold this to be error. Testimony on the parties' intent should have been considered only if the language of the agreement was ambiguous and unclear so that the intent could not be ascertained from the instrument.

Gustafson, 287 N.W.2d 700, 703, *quoting* N.D.C.C. § 9-07-04. *But see* Eberhart, 301 N.W.2d 137, 141, FN5, distinguishing Gustafson (in Gustafson "this court relied upon the rules of contract to interpret a property-settlement agreement entered into by the parties and incorporated into a divorce decree. That case involved no motion for modification of a judgment but rather an interpretation of the agreement as contained in the judgment").

33. In addition, if Lewis had wanted the substance of his understanding of the MTA included in the Judgment, he could have insisted that it be included in the MTA, and he did not. If Lewis thought the Judgment entered on August 10, 2005 did not accurately reflect his understanding of the MTA, he could have moved to reopen the judgment, and he did not. *See Pearson v. Pearson*, 2000 ND 20, ¶¶ 2-6, 606 N.W.2d 128 (rejecting husband's argument that dialogue between the attorneys at the divorce hearing about the terms of the judgment constituted an agreement to include remarriage as a condition for terminating spousal support, declining to import a term not provided in the judgment, and noting that had husband believed the judgment did not reflect the agreement, his recourse was to seek to have the judgment amended.)

34. Finally, Lewis admits that a lot of considerations went into the MTA, including debt allocation, property allocation, spousal support, and child support. (Trans., 34:13-35:6). Therese relied on the parties' agreements as to these considerations when she agreed that Lewis would pay her \$2,400 a month in spousal support until the Washington home sold and the proceeds were distributed, at which time she would have the funds to start a salon business and become self supporting. (Appendix, p. 41). The trial court's failure to consider evidence of Therese's reliance on the unmodifiable property and debt provisions of the MTA when agreeing to the spousal support provision was clearly erroneous. *See Peterson*, 2000 ND 20, ¶ 20 (inequity may result when monthly spousal payments are reduced on which a party relied in agreeing to the property distribution which is not modifiable).

**IV. THE TRIAL COURT ERRED IN MODIFYING SPOUSAL SUPPORT BY CONSIDERING CHANGES IN CIRCUMSTANCES THAT WERE CONTEMPLATED BY THE PARTIES AT THE TIME OF THEIR STIPULATED DIVORCE AGREEMENT**

35. A material change of circumstances is “something which substantially affects a party’s financial ability and needs *and which is not originally contemplated by the parties.*” Toni v. Toni, 2001 ND ¶ 193, ¶8, *citing* Lohstreter v. Lohstreter, 2001 ND 45, ¶ 13, 623 N.W.2d 350. *Emphasis added. See also* Wheeler v. Wheeler, 548 N.W.2d 27, 31 (N.D. 1996) (“Wheeler II”) (changes in the parties’ financial circumstances which were contemplated or foreseen at the time of the initial divorce judgment or subsequent modification do not constitute a material change in circumstances warranting modification). This court has stated that in a stipulated divorce

[b]ecause the decree is based upon a stipulated agreement of the parties, rather than upon the court’s original findings, and because the parties are in a better position to understand their circumstances than is the trial court, *we view the issue of whether the change in circumstances was contemplated with greater scrutiny.*

“Wheeler II,” 548 N.W.2d at 30, *citing* Huffman v. Huffman, 477 N.W.2d 594, 597 (N.D. 1991).

36. The Trial Court found the following material changes in circumstances: the failure of the Washington home to sell as both parties hoped and anticipated; the exhaustion of the home equity loan proceeds which the parties had earlier agreed would meet Lewis’s continuing obligation to pay spousal support; and the reduction of Therese’s current living expenses. These findings are clearly erroneous because the evidence shows that these changes were clearly contemplated or foreseeable at the time of the parties’ MTA.

37. The evidence shows that when Lewis and Therese entered into the MTA, it was clearly foreseeable that the Washington home might not sell right away: an offer to purchase the Washington home was conditioned on the county approving building permits for the property, Lewis was aware of this condition and of the fact that there was going to be a moratorium on the building permit issue, and, after a resolution was passed on August 15, 2005 prohibiting new building permits until August 2007, the purchaser rescinded the offer on August 31, 2005. (Trans., 12:4-10, 11-12; 13:11-14; 30:2-16; Appendix, pp. 36, 40). Lewis cannot now claim, with the benefit of hindsight, that he did not anticipate that the Washington home might not sell by January 2006. *See Quamme v. Bellino*, 2002 ND 159, ¶ 14, 652 N.W.2d 360, citing *Schmitz v. Schmitz*, 1998 ND 203, ¶12, 586 N.W.2d 490 (“A change which can now be called foreseeable with the benefit of hindsight is not necessarily a change contemplated by the district court at the time of the original divorce decree”).

38. Since it was foreseeable that the Washington home might not sell right away, it was also foreseeable that Lewis might exhaust the proceeds of the home equity loan if the house did not sell. At the time that Lewis entered into the Marital Termination Agreement, Lewis knew that he would be responsible for making the mortgage payment on the Washington home as well as the support obligations he agreed to. (Appendix, p. 40).

39. It was also foreseeable and contemplated by the parties that if Therese sold the Grand Forks home and no longer had to pay the \$2,150.78 monthly mortgage, her living expenses might decrease at least temporarily. The Trial Court correctly found that the evidence showed that “it was the intent of the parties at time of divorce, despite a

different earlier agreement between them at a pre-divorce mediation, that all interest in the Grand Forks property would be transferred to the Plaintiff subject to its existing indebtedness, and further that she would be free to sell that property without restriction.” (Appendix, p. 60). Moreover, although the sale of the Grand Forks home has resulted in a temporary decrease in Therese’s monthly living expenses, since she is looking for a home to buy, this decrease is temporary, and her income has decreased since she is not currently accruing equity by purchasing a home.

40. Since the evidence shows that the changes cited by the Trial Court were clearly foreseeable by the parties at the time they entered into their MTA, it was clearly erroneous for the Trial Court to find that these were “material” changes in circumstances.

Walker v. Walker, 2002 ND 187, ¶ 15, 653 N.W.2d 722.

**V. THE TRIAL COURT ERRED BY CONSIDERING THERESE’S NEED FOR SPOUSAL SUPPORT WHEN HER NEED WAS ALREADY ESTABLISHED BY THE STIPULATED DIVORCE AGREEMENT THAT WAS REDUCED TO JUDGMENT**

41. The Trial Court found that a reduction in Lewis’s spousal support was warranted in part because Therese’s financial needs had decreased since she sold the parties’ former marital home in Grand Forks. This finding is clearly erroneous because Therese’s need for rehabilitative spousal support had been previously established by the Trial Court at the time of the divorce by its finding that Therese was disadvantaged as a result of her marriage and divorce and was entitled to spousal support, a finding that was incorporated in the Judgment that was entered on August 10, 2005. (Appendix, pp. 22, 29).

42. “A disadvantaged spouse is one who has foregone opportunities or lost advantages as a consequence of the marriage and who has contributed during the marriage to the supporting spouse’s increased earning capacity.” Walker v. Walker, 2002

ND 187, ¶ 15, 653 N.W.2d 722, *citing Corbett v. Corbett*, 2001 ND 113, ¶ 19, 628 N.W.2d 312. After Therese and Lewis were married, Therese sold her salon business and moved to Washington with Lewis, where her primary responsibilities for the next ten years were to raise their son Beau. (Appendix, p. 41). This court has stated that “[a]ny spouse who remains at home, out of the workforce, in order to maintain a marital residence and act as a homemaker, any parent who remains out of the workforce if only to some degree in order to provide child care has foregone opportunities and has lost advantages that accrue from work experience and employment history.” *Id.*, *citing Weigel v. Weigel*, 2000 ND 16, ¶13, 604 N.W.2d 462.

43. “Rehabilitative spousal support is ordered to give a disadvantaged spouse an opportunity to become adequately self-supporting through additional training, education or experience.” *Peters-Riemers v. Riemers*, 2002 ND 72, ¶ 26, 644 N.W.2d 197. North Dakota has adopted the “equitable” as opposed to the “minimalist” doctrine of rehabilitative spousal support. *Riehl v. Riehl*, 1999 ND 107, ¶ 12, 595 N.W.2d 10, *citing Gierke v. Gierke*, 1998 ND 100, ¶ 22, 578 N.W.2d 522; *Van Klootwyk v. Van Klootwyk*, 1997 ND 88, ¶¶ 15, 24, 563 N.W.2d 377. “‘Equitable’ rehabilitative support goes further than minimal self-sufficiency; it aims to mitigate marital disadvantage caused by the impact at divorce of an economic role assumed during marriage.” *Id.*, ¶ 15, 595 N.W.2d 10. The parties agreed that Lewis would pay Therese rehabilitative spousal support of \$2,400 a month until the Washington house was sold and the proceeds distributed, at which time Therese planned to use her portion of the sale proceeds to start a new salon business and become self supporting.

44. Since Therese's need for rehabilitation was established by the parties' agreement and the Trial Court's findings at the time of the divorce and this agreement and finding was reduced to judgment, it was clearly erroneous for the Trial Court to based its finding that modification of Lewis's spousal support obligation was warranted on Therese's decreased need for rehabilitative spousal support.

**VI. THE TRIAL COURT ERRED IN FINDING THAT LEWIS HAD A DECREASED ABILITY TO PAY SPOUSAL SUPPORT WHEN THE ONLY EVIDENCE OF LEWIS'S DECREASED ABILITY TO PAY WAS SPECULATIVE EVIDENCE OF HIS FUTURE EARNINGS**

45. The Trial Court found that a reduction in Lewis's spousal support was warranted in part because Lewis had a substantially reduced ability to continue to pay \$2,400 in spousal support. (Appendix, p. 61). Yet the only evidence presented of Lewis' decreased ability to pay spousal support was speculative evidence about Lewis's future earnings, specifically, Lewis's testimony that for the upcoming spring he will show an income shortfall of \$16,000 compared to the same period the previous year, and that even if he worked twelve hour shifts his travel money income would be \$14,602 less for the time period for January through June 2006 than it was for the time period January through June 2005. (Trans., 14: 20-25; Trans., Ex. 3, received over the objection of Therese's counsel; Trans., 16: 2-5). Lewis admitted, however, that his average gross earnings for 2005 were \$62,000, that in 2005 no changes in his income occurred that modified that amount, that his earnings fluctuate with heavy and slow periods, that it is difficult to predict how much he could earn in any given year, and that in 2005 he had an additional \$800 a month or \$9,600 a year in rental income in addition to his work income. (Trans., 25:3-19; 25:19-25; 27:21-28:4; 40:19-23). This court has stated that earned income is not the sole consideration in determining a party's ability to pay support, and that the court

must consider a party's net worth, including the extent of his assets and his earning ability as demonstrated by past income. Hager v. Hager, 539 N.W.2d 204, 306 (N.D. 1995).

46. The Trial Court's finding that modification of spousal support was warranted because Lewis had a substantially decreased ability to pay was clearly erroneous in that the evidence presented of Lewis's net worth, including his current earned income, rental income and his earning ability based on his earning history, did not demonstrate a substantially decreased ability to pay spousal support.

**VII. THE TRIAL COURT ERRED BY FAILING TO PROVIDE ANY EXPLANATION FOR THE REDUCED AMOUNT OF SPOUSAL SUPPORT IT ORDERED**

47. The Trial Court reduced Lewis's spousal support obligation retroactive to February 1, 2006, from \$2400 monthly to \$1,000 per monthly. (Appendix, p. 61). In addition, the Trial Court further reduced Lewis's spousal support obligation to \$700 monthly effective August 1, 2006, if the parties' Washington property has not sold and until it is sold. *Id.*

48. This court has stated that "[f]indings of fact should be stated in a manner reflecting the factual basis of the Trial Court's decision." Schmitz, 1998 ND 203, ¶ 6, 586 N.W.2d 490, *citing* "Wheeler II," 548 N.W.2d 27, 30 (N.D. 1996). This court has also stated that it "will rely on implied findings of fact when the record enables us to clearly understand the Trial Court's factual determinations, and the basis for its conclusions of law and judgment," and it "will not remand findings of fact for clarification when the Court is able to discern the Trial Court's rationale through inference or deduction." *Id.*, ¶ 6, 586 N.W.2d 490.

49. In this case, the Trial Court has provided no rationale for reducing Lewis's spousal support to \$1,000 monthly and then to \$700 monthly. Moreover, the Trial Court's rationale for selecting these particular amounts is not discernible through inference or deduction, and as such, is clearly erroneous. *See Myer*, 2004 ND 89, ¶ 9, 679 N.W.2d 273, citing "Wheeler II," 548 N.W.2d 27, 30 (reversing an amended judgment reducing the husband's spousal support obligation from \$800 to \$300 a month because of "the lack of any explanation regarding the amount of the reduction in support compared to the reduction in Timothy Meyer's income").

### CONCLUSION

50. For the above-stated reasons, Therese asks that the Trial Court's Order be reversed and that the Amended Judgment be vacated.

Respectfully submitted this 12<sup>th</sup> day of May, 2006.

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**CERTIFICATE OF COMPLIANCE**

51. The undersigned, as attorney for the Plaintiff/Appellant Therese Lucier in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 6,074.

Dated this 12<sup>th</sup> day of May, 2006.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Therese Joan Lucier, )  
)  
Plaintiff/Appellant, )

Supreme Court No. 20060060  
Civil No. 05-C-00395

v. )

**AFFIDAVIT OF SERVICE VIA E-MAIL**

Lewis Joseph Lucier, )  
)  
Defendant/Appellee. )

STATE OF NORTH DAKOTA )  
)ss  
COUNTY OF GRAND FORKS )

Norma O'Halloran, being first duly sworn on oath, deposes and says: That she is of legal age, a citizen of the United States, and is not a party to, nor has she an interest in the above-entitled action; that on May 12, 2006, she e-mailed, a true and correct copy of the following document filed in the above-entitled action:

**1. Brief of Appellant; and  
Appendix to Appellant Brief.**

That said e-mail was addressed as follows:

Matt Schimanek  
matt@hdalawyers.com

To the best of your affiant's knowledge, information, and belief, such address as given above with the actual post office address of the part intended to be so served.

That the above document duly mailed in accordance with the provisions of the *Rules of Civil Procedure*.

Norma O'Halloran  
Norma O'Halloran

Subscribed and sworn to before me on May 12, 2006.

Mary K. Bachmeier  
Notary Public

MARY K. BACHMEIER  
NOTARY PUBLIC  
STATE OF NORTH DAKOTA  
My Commission Expires: Sept. 23, 2006