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20120315

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Loren R. Woodward,	)	**Supreme Court No. 20120315**
	)	**(Burleigh County Case No. 08-2011-DM-00878)**
Appellant,	)	
	)	
vs.	)	
	)	
Rita Woodward,	)	
	)	
Appellee.	)	

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NOV 05 2012

STATE OF NORTH DAKOTA

BRIEF OF APPELLANT

APPEAL FROM THE JUNE 27, 2012 JUDGMENT
DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE GAIL HAGERTY, PRESIDING

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STATEMENT OF ISSUES

I. Whether Rita is entitled to permanent spousal support under the Fisher-Ruff Guidelines.

II. Whether lifetime spousal support should terminate upon Rita's cohabitable.

STATEMENT OF CASE

This is an appeal from a Judgment of Divorce dated June 27, 2012. A trial was held in the District Court of Burleigh County on March 12, 2012. Loren contends the trial court committed error in its spousal support award, and failure to provide for termination of the spousal support obligation upon cohabitation.

STATEMENT OF FACTS

The parties were married on December 21, 1991. App p. 5 At the time of trial on March 12, 2012 Loren was 45 years old and Rita was 44 years old. Tr. p. 2 ll 12 No children were born of the marriage and neither party has any other children. Tr. p. 3, ll. 7-12. This marriage was the first for both parties Tr. p. 3 l. 1-6.

Loren was on active duty in the Navy for ten year, with approximately five of those years occurring during the marriage Tr. p. 4, lines 10-15. Loren was employed by BNSF at the time of trial. He began his employment with BNSF in 2001 Tr. p. 5. Loren begin with the company as a brakeman and worked his way up to an engineer. At the time of trial Loren grossed approximately $78,000 annually at BNSF. This was his only source of income. Loren has only a high school education and his earning capacity with BNSF is pretty much maxed out. Tr. p. 7 ll. 14-17, p. 21 ll. 4-8. Loren's job has kept him from home between 90-100 hours each week. Tr. p. 56 ll. 24-25. Loren only started earning more than $30,000 annually around six (6) years prior to the trial Tr. p 78 ll 6-9.

Rita worked full time during the course of the marriage and did not forego any employment opportunities as a result of the marriage. The evidence does not support an argument that the moves diminished Ms. Woodward's employability or job prospects. App. p 20. Rita has two (2) four-year college degrees and a minor. For a period during the marriage Rita was a Certified Nursing Assistant. Rita's students loans were paid off during the marriage. Tr. p. 57 ll. 19. Rita was employed at Wagner Chiropractic at the time of trial. Rita indicated her net monthly wages were $1600. Tr. p. 116 ll. 14-15.

Rita accused Loren of being verbal abusive during arguments but admitted that she did the same. Tr. p. 12 ll. 13-25 Rita makes no allegation that Loren was physically abusive. Loren was hit many times and kicked in the face by Rita causing Loren to have dental issues. Tr. p. 12 ll. 13-25.

Loren admitted to drinking too much late in the marriage. It appears that the drinking was a result of the breakdown of the marriage opposed to a cause of the breakdown of the marriage. Tr. p. 23. Loren provided a large amount of financial support to Rita after the parties separated without any Court involvement. Despite Rita being in a relationship with another individual for nearly a year, Loren made sure that all the marital bills were paid. No Interim Order was entered mandating that Loren make the payments that he did. Tr. p. 47 ll. 11 - p. 48 ll. 14.

Both parties admitted that they had sexual relations with other individuals near the end of the marriage. Tr p. 94-95 At the time of trial both parties had been with their current significant others for around a year. Tr. p. 16 ll 13-23 and Tr. p. 84 ll. 17-22.

Rita has a retirement account through her employment, a separate IRA, and a vested interest in the "Divorced Spouse" benefits through BNSF. App. p. 15. Loren anticipates receiving retirement benefits through BNSF, but the amount is subject to many factors outside his control. Neither party has any unusual circumstances or needs.

Generally, both parties are in good health. Thankfully, Rita is in remission from her cancer and is nearly at the 5 year mark with a clean bill of health. Tr. p. 99 ll. 13-15. By all indications there are no ongoing health problems with either party.

Rita confirms that she is coming out of this divorce in a better financial position because of Loren. Tr. p. 139 ll. 10-12. Rita lives with her significant other and confirms that her household income with her significant other is "approximately" the same as her household income with Loren, and she has no plans to move out in the future Tr. p. 144, ll 9-19.

Rita received a net distribution of $66,592.78 in the divorce and Loren took $42.465.20. Additionally, Loren was required to pay Rita's attorney's fees in the action. App p. 26.

LAW AND ARGUMENT

A court may award spousal support under N.D.C.C. § 14–05–24.1, which provides, "[T]aking 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." "An award of spousal support is a finding of fact that will not be set aside on appeal unless it is clearly erroneous." *Duff v. Duff Hearns*, 2010 ND 247, ¶ 13, 792 N.W.2d 916.

In the matter present before the Court, the trial Court held, " In the present case, spousal support is appropriate and necessary to ensure that Ms. Woodward isn't unfairly impacted by the reduction of her standard of living while Mr. Woodward's standard of living remains as it was or better than it was during the marriage." The Court goes on to hold, "Mr. Woodward will be required to pay $1,000 per month in spousal support ... Spousal support will be required until Ms. Woodward remarries or dies." App p. 23.

The words "disadvantaged spouse" may be a handy label but it is no longer a term of legal significance. *Sack v. Sack*, 2006 ND 57, ¶ 12, 711 N.W.2d 157. Rather, in deciding whether to award spousal support the court must consider the *Ruff–Fischer* guidelines:

"the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material."

Duff v. Duff-Hearns, 2010 ND 247, ¶ 14, 792 N.W.2d 916. The court also must consider the needs of the spouse seeking support and the ability of the other spouse to pay. *Duff*, at ¶ 14. The "court is not required to make a finding on each factor, but it must explain its rationale for its determination." *Paulson v. Paulson*, 2010 ND 100, ¶ 9, 783

N.W.2d 262.

The North Dakota Supreme Court, until recently, has used language that a spouse "disadvantaged by divorce" is entitled to spousal support. In Krueger v. Krueger, 2008 ND 90, 748 N.W.2d 671, the Court he that "Permanent spousal support is appropriate when an economically disadvantaged spouse cannot be equitably rehabilitated to make up for opportunities lost during the course of a marriage" It is the Appellant's contention that Ms. Woodward lost no "opportunities" as a result of the marriage and is not entitled to permanent spousal support. Additionally, Ms. Woodward states that she is better off financially as a result of the marriage to Mr. Woodward. Tr. p. 139 ll. 10-12.

In Cannaday v. Cannaday, 2003 ND 58, 659 N.W.2d 363, the Court held, under N.D.C.C. § 14-05-24.1, a court "may require one party to pay spousal support to the other party for any period of time." The Court went on to say that the Ruff-Fischer guidelines apply when determining whether spousal support should be awarded. It said spousal support is aimed at balancing the burdens and disadvantages created by the divorce.

Rehabilitative spousal support is not ordered in this case. Rehabilitative support is intended to give a disadvantaged spouse an opportunity to become adequately self-supporting through additional training, education or experience. The trial Court held that Ms. Woodward did not forgo employment opportunities as a result of the marriage.

Permanent spousal support is said to be appropriate when the disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities lost in the course of the marriage. Permanent spousal support may also be awarded when the marriage is of long duration and the dependent spouse has health problems or is of such an age that adequate rehabilitation is unlikely. Looking at these standards, if anything is to be awarded in this case it should be rehabilitative support, but if awarded it should be of a relatively short duration.

The Court in Cannaday states that 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. It said a spouse is disadvantaged who remains at home, out of the workforce, in order to maintain a marital residence and act as a homemaker. The Court said 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. Finally the Court said a valid consideration in determining whether a spouse is disadvantaged as a result of the divorce is whether there is a need to equitably balance the burdens created by the divorce where the parties cannot maintain the same standard of living apart as they enjoyed together, Cannaday, supra.

The only factor enumerated in Cannaday that is partially applicability to this case is that Mr. Woodward earns more than Ms. Woodward, but submit there is not a sufficient basis for an award of lifetime spousal support.

Rita is in her mid-forties and has at least 25 years of remaining work life. Rita is in good health. Rita has two four-year college degrees. Rita has a positive employment record. Rita has not been isolated from the workforce during the marriage. Rita is apparently well liked by her employers and appears to have performed well. There is no reason she could not work for another 25 years. It is important to note that Rita has no children to care for or support.

Rita received the majority of the net marital estate and was awarded no debt from the marriage. (App. 18) She has no obligations except to care for herself. She is young, healthy, intelligent and highly educated. The trial Court specifically states that the evidence does not, "support an argument that the moves diminished Ms. Woodward's employability or job prospects."

Citing a U.S. Supreme Court premise the Beals Court said, "When precedent

alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it." Francis v. Southern Pac Co., 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798, (Black, J., dissenting). In Beals, the Court said it was unable to justify what has grown into the "disadvantaged spouse" doctrine and its overshadowing, if not obliteration of the underlying concept of rehabilitative spousal support. Therefore, the Court elected to dispose of the "disadvantaged spouse" doctrine to reemphasize the importance of a comprehensive analysis under the Ruff-Fischer guidelines when determining the appropriateness of spousal support.

Although a difference in earning power may be considered in determining spousal support, the Court has not endorsed the equalization of income between divorcing spouses as a measure of spousal support. See Sommers v. Sommers, 2003 ND 77, ¶¶ 17–18, 660 N.W.2d 586.

Both of the parties to this divorce have moved on with their lives. The actual divorce judgment was entered over a year and a half from the time the parties separated. Both parties had been in relationships with new individuals for approximately one year at the time of the trial, and both parties had been living with there significant others for an extended period of time.

A review of the cases annotated for N.D.C.C § 14-04-24.1 demonstrates a strong reoccurring theme in cases involving spousal support, children. It is extremely unusual for permanent spousal support to be Ordered when a spouse has foregone no employment opportunities and no children are involved. Such is the case in the matter presently before the Court.

The concept of spousal support is in flux. For better or for worse the traditional roles of men and women have changed dramatically since the time the legal concepts we are dealing with were implemented.

As spelled out in the dissenting opinion in Becker v. Becker, 2011, ND 107, spousal support is not to be based on gender. There still is the imbedded idea that when a

divorce happens that the husband should pay spousal support. This is simply not correct. Spousal support rooted in gender is not sustainable. To award spousal support in this case is ultimately a slap in the face to gender equality. If the facts of this case were reversed, and Mr. Woodward requested permanent spousal support, he would be laughed out of the courtroom.

This is a situation were the marital ties should be severed in totality with the issuance of the judgment of divorce. As previously noted, both parties have moved on with their lives. There are no children or other ties to necessity any continued relationship between the parties. Everything in this case has been separated. Ordering spousal support will only prolong something that has run its course.

"Rehabilitative spousal support is awarded to equalize the burdens of divorce or to restore an economically disadvantaged spouse to independent status by providing a disadvantaged spouse an opportunity to acquire an education, training, work skills, or experience to become self-supporting." Paulson v. Paulson, 2010 ND 100, ¶ 11, 783 N.W.2d 262 (quoting Wagner v. Wagner, 2007 ND 33, ¶ 8, 728 N.W.2d 318). "Rehabilitative support is appropriate when one spouse has bypassed opportunities or lost advantages as a consequence of the marriage or when one spouse has contributed during the marriage to the other's increased earning capacity or moved to further the other's career." Id. (quoting Moilan v. Moilan, 1999 ND 103, ¶ 11, 598 N.W.2d 81).

"Permanent spousal support is appropriate 'when the economically disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities and development she lost during the course of the marriage.'" Christian v. Christian, 2007 ND 196, ¶ 9, 742 N.W.2d 819 (quoting Wagner, at ¶ 8; Staley v. Staley, 2004 ND 195, ¶ 16, 688 N.W.2d 182). "Permanent spousal support is awarded to provide traditional maintenance for a spouse incapable of adequate rehabilitation or self-support." Paulson, at ¶ 11 (quoting Wagner, at ¶ 8).

There is no indication that Rita cannot be or is not already equitably rehabilitated.

Also, Rita has not proven that she lost any opportunity or development during the marriage.

Rita provided little to no evidence to demonstrate how she is disadvantaged. At the time of trial she was living in a household with an income level substantially similar to the income level with Loren.

The Supreme Court has long stated that rehabilitative support is preferred over permanent support. See, e.g., Wiege v. Wiege, 518 N.W.2d 708, 711 (N.D.1994). "We prefer temporary rehabilitative support to remedy [...] indefinite permanent support is appropriate only if a spouse 'cannot be adequately restored to independent economic status.' Heley v. Heley, 506 N.W.2d 715, 720 (N.D.1993). A court should consider rehabilitative support first because it may eliminate the need for permanent support.

In Lindberg v. Lindberg, the district court ordered Chris Lindberg to pay Sherri Lindberg rehabilitative spousal support. In determining Sherri Lindberg was entitled to spousal support, the district court stated,

> 'The Court finds that Sherri is in need of spousal support and Christopher has the ability to pay. Christopher shall pay to Sherri the amount of $750.00 per month for a period of 48 months." At the time of trial, Christopher Lindberg was thirty-seven years old and Sherri Lindberg was thirty-nine years old. The court found Sherri Lindberg "is in good health and able to work but is currently underemployed and capable of earing [sic] $10.00 to $13.00 per hour or slightly over $20,000.00 per year." The court stated Sherri Lindberg has an associate degree in nursing, "but has not been employed as an LPN for approximately 13 years." The court found Chris Lindberg was "in good health and able to work." The court stated Chris Lindberg has a "four-year degree in Electrical Engineering from North Dakota State University and is currently working on his Master's Degree at University of Mary.

> The court found Sherri Lindberg "has gross earnings of $240.00 per month" and Chris Lindberg has gross monthly earnings of $5,620. In looking at the necessities of each party, the court determined Chris Lindberg's monthly expenses totaled $2,510. The court found that Sherri Lindberg "is currently living in her parents home and has no expenses relating to mortgage payments, utilities, etc. However, Sherri testified that she plans on moving out of her parents home once the divorce is finalized. Therefore, the Court finds Sherri's anticipated monthly living expenses to be $2,915.00." 770 N.W.2d 252, 262, 263 (N.D., 2009).

The Court in that Lindberg ordered rehabilitative spousal support because it found Sherri Linberg to be in "good health and able to work, but is currently underemployed." In this case, Rita is currently in good health and fully able to support herself. Additionally, Rita has two college degrees. At a minimum, having the ability to successfully obtain 2 four-year degrees demonstrates that an individual has the ability to provide for themself.

In Peters-Riemers v. Riemers, 644 NW2d 197 (ND 2002) the Defendant was Ordered to pay temporary support in the amount of $500/month for a period of 5 years. The Defendant's behavior was found to be untruthful and destructive. The Defendant's income was found to be $110,000/year and the Plaintiff (wife), was grossing only $14,560/year.

In this case the parties were not living high on the hog. Loren only started earning in excess of $30,000/year six (6) years prior to the trial. The parties did have some toys, but there was a large amount of debt associated therewith. Loren ended up being responsible for this debt.

Mr. Woodward asks that the Court reveres the decision of the trial court and hold that no spousal support is appropriate. If the Court deems that some form of spousal

support is needed it is respectfully requested that temporary support be considered for a period of 5 years.

II. Whether lifetime spousal support should terminate upon Rita's cohabitable.

The Court in *Cermak v. Cermak,* 1997 ND 187, ¶ 16, 569 N.W.2d 280. held that cohabitation is not treated the same as a remarriage because cohabitants do not have a legal obligation to support each other, the length of the relationship is unknown and the permanent benefits of marriage may be absent. *Id.* at ¶ 10. Terminating spousal support upon cohabitation leaves the recipient with an uncertain means of support because cohabitants do not have any obligation to support each other and no continuing obligation exists. *Id.* The appellant believes that this concept is in need of review.

The issue of elimination of spousal support in the event of cohabitation is premised upon different principles. Generally, remarriage of a spousal support recipient creates a prima facie case to terminate spousal support unless there are extraordinary circumstances justifying the continuance of alimony, Roen v. Roen, 438 N.W.2d 170, 173 (N.D. 1989). The concept of "common law marriage" has been the assumption behind termination of spousal support upon cohabitation. (See footnote 1 Snyder, supra)

Cohabitation is not criminal. For right or for wrong, long-term cohabitation is now a viable alternative to marriage. Common law marriage is still not recognized in our State but in Snyder, the Court notes that Section 14-03-08, N.D.C.C., provides "[a]ll marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, are valid in this state." The Court then notes that although a common law marriage cannot be entered into in North Dakota, a common law marriage shown to be validly entered into in another jurisdiction may be entitled to recognition in North Dakota under N.D.C.C. § 14-03-08. It should also be noted that the jointly acquired property of a long-term "couple" can be distributed under a partnership concept.

Not having spousal support terminate upon cohabitation is essentially adopting the position of restricting marriage. There is no longer the stigma connected with cohabitation as there was in the past. Telling someone that re-marriage will end their support will be a major deterrent to marriage, and is clearly inconsistent with the concept of spousal support terminating upon remarriage.

In this case there is no finding that Ms Woodward is currently "cohabitating in an informal marital relationship." Should that issue become an issue down the road it could be looked into to ensure that a continued spousal support obligation is appropriate and not being abused by carrying on as a married couple, without a sheet a paper, for the sole purpose of continuing the spousal support payments.

Based on actuary tables, the amount of spousal support Ordered in this case will likely be around 5 times the net marital estates. In looking at the cases decided by the North Dakota Supreme Court this is a disproportionally large award. Mr. Woodward's income will drop significantly upon retirement and a $1000 monthly payment will be an extreme hardship. Ms. Woodward already has her own retirement account, the spousal benefits from BNSF, the potential for social security, and any additional income from her significant other's retirement account. Additionally, Mrs. Woodward testified that her current household income is essentially the same as the household income with Mr. Woodward.

CONCLUSION

For the reasons cited above, the Appellant respectfully asks that the Trial Court's Judgment be reversed.

Respectfully submitted this 7 day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the _2_ day of November, 2012, the Brief of Appellant was served by first-class mail with postage prepaid, facsimile transmission or by electronic mail to all parties as follows:

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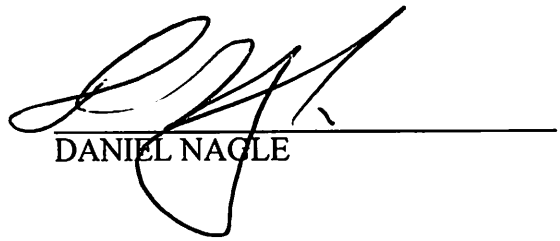

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