
IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Thomas D. Varty,)	
)	
Plaintiff, Appellee,)	Supreme Court No. 20180279
)	
vs.)	Williams County Civil No.
)	53-2011-DM-00565
Kathleen A. Varty,)	
)	
Defendant,)	
Appellant.)	

BRIEF OF DEFENDANT/APPELLANT, KATHLEEN A. VARTY

Appeal from the Findings of Fact, Conclusions of Law and Order for Amended Judgment, dated May 11, 2018, and Amended Judgment dated May 18, 2018,
District Court of Williams County
Northwest Judicial District
The Honorable Josh B. Rustad

H. Malcolm Pippin (I.D. #04682)
malcolm@pippinlawfirm.com
Kaitlin DeCrescente (I.D. #08136)
kaitlin@pippinlawfirm.com
P.O. Box 1487
Williston, ND 58802-1487
(701) 577-5544
Attorneys for the Defendant/Appellant

TABLE OF CONTENTS

Table of Authorities ii

I. Statement of the Issues.....¶ 1

II. Statement of the Case¶ 3

III. Statement of the Facts.....¶ 19

IV. Law and Argument.....¶ 38

 1. The District Court erred in concluding that the parties’ stipulated divorce dispensed with the burden on the party seeking modification of the spousal support award to establish a material change in circumstances.....¶ 40

 A. The District Court’s conclusory statement that a material change in circumstances was established, although it was not required, is not supported by the record ¶ 49

 2. The District Court erred in concluding that the relevant job change on the issue of modifying spousal support was Thomas’s separation from Ranger, rather than Thomas’s move from Calfrac to American Well Service¶ 56

 3. The District Court did not make requisite findings to reduce spousal support from \$3,175.00 per month to \$500.00 per month and said decision is not supported by the record¶ 62

V. Conclusion.....¶ 69

Certificate of Service.....¶72

TABLE OF AUTHORITIES

CASES

Kosobud v. Kosobud, 2012 ND 122, ¶ 11, 817 N.W.2d 384¶51

Mahoney v. Mahoney, 538 N.W.2d 189 (N.D. 1995)¶60

Meyer v. Meyer, 2004 ND 89, ¶ 21, 679 N.W.2d 273¶67

Rothberg v. Rothberg, 2007 ND 24, 727 N.W.2d 771¶¶41, 42, 43, 48, 51

Schulte v. Kramer, 2012 ND 163, 820 N.W.2d 318.....¶¶41, 42, 60

Toni v. Toni, 2001 ND 193, ¶ 22, 636 N.W.2d 396¶¶46, 68

[¶1] **I. STATEMENT OF THE ISSUES**

[¶2] Whether the District Court erred in reducing the spousal support obligation of the Plaintiff and Appellee, Thomas Varty.

[¶3] **II. STATEMENT OF THE CASE**

[¶4] On November 23, 2011, Thomas Varty initiated an action for divorce. See Appellant's App. at 4–8.

[¶5] On November 23, 2011, a Marital Termination Agreement, signed by both parties was filed. See id. at 26–31, Doc. ID # 3. The Marital Termination Agreement included property listings and a list of division of property. See id. 9–18.

[¶6] On December 1, 2011 the Findings of Fact, Conclusions of Law and Order for Judgment and Judgment, based on the Marital Termination Agreement, were issued by the District Court. See id. at 21–34.

[¶7] On August 7, 2017, Thomas made a Motion to Terminate Spousal Support supported by an affidavit and exhibits. See id. at 40–53.

[¶8] On August 29, 2017, Kathleen (Kathy) filed an Objection to Modification of Spousal Support supported by an Affidavit of Kathleen Varty. See id. at 57–60.

[¶9] On September 18, 2017, Thomas filed a Reply to Kathy's Objection to Modification of Spousal Support with an exhibit showing a new paystub and affidavit in support. See id. at 61–71.

[¶10] On September 28, 2017, Kathy filed a notice of hearing indicating that a hearing on the Motion for Modification of Spousal Support was set for November 13, 2017. See id. at 72.

[¶11] On September 29, 2017, Kathy renewed her objection to the Motion for Modification of Spousal Support. See id. at 73–74.

[¶12] On September 28, 2017, Thomas filed an Objection to the Request for Hearing. See

Doc. ID # 35.

[¶13] On October 3, 2017, Mr. Varty made a Motion to Continue the Hearing. See Appellant’s App. at 75–78.

[¶14] On October 5, 2017, the Motion to Continue the Hearing was granted. See id. at 79. On October 19, 2017, the District Court issued a Notice of Hearing rescheduling the hearing to March 21, 2018. See id. at 80.

[¶15] On March 21, 2018, the District Court heard testimony from Thomas and Kathy and received evidence regarding the issue of modifying the spousal support obligation. At the conclusion of the hearing, the District Court took the matter under advisement and requested that the parties each submit proposed findings and orders. See Tr. of Mot. Hearing [hereinafter “Tr.”], March 21, 2018, 125: 8–23.

[¶16] On May 16, 2018, the District Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment and Amended Judgment. See Appellant’s App. at 157–164. (Doc. ID # 92-93). Also on May 16, 2018, the District Court vacated the Amended Judgment entered at Doc. ID # 93. See id. at 164, Doc. ID #93.

[¶17] On May 18, 2018, the District Court entered a second Amended Judgment reducing Thomas’s spousal support obligation to \$500.00. See id. at 165–166.

[¶18] Kathy filed her Notice of Appeal on July 20, 2018. See id. at 168–170.

[¶19] **III. STATEMENT OF THE FACTS**

[¶20] The parties had been married for 30 years prior to the divorce, and during the marriage, Kathy worked various jobs, and did not worked outside the home for seven years. See Appellant's App. at 57.

[¶21] The parties executed a Marital Termination Agreement stipulating the terms of their divorce, which was approved by the District Court and incorporated into the District Court's Judgment on December 1, 2011. See id. at 21–34.

[¶22] The Marital Termination Agreement contained the following provision regarding spousal support, which was also incorporated into the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment:

Plaintiff will pay Defendant spousal support in the amount of \$3,175 per month for eight years and \$1,500 per month for four years. There will be spousal support for a total of twelve years (144 months). Spousal support will be payable on the first of each month until Defendant dies or remarries, whichever happens first. Spousal support will not increase but may be reduced because of, but not limited to, the following:

1. Plaintiff's income is reduced at no fault of his own;[.]

See id. at 13–14.

[¶23] On August 7, 2017, Thomas made a motion to terminate spousal support asking that the District Court terminate his spousal support obligation in its entirety on the basis that he was separated from his employment on May 5, 2017, and was unable to secure new employment. See id. at 40–53, Doc. ID #16. He requested that spousal support be terminated despite the fact that the parties' agreement contemplates spousal support continuing for at least twelve years. See supra at ¶ 22. Thomas stated that he was earning \$2,520 per month in unemployment, but that he believed his earning capacity had “gone

down as a result of the massive oilfield reductions,” and that his reduction in income “occurred through no fault of his own.” See id. at 52.

[¶24] Kathy filed an Objection to Modification of Spousal Support and Affidavit stating that she still had a need for spousal support because she was unable to work due to medical reasons and that the decrease in Thomas’s income was not “at no fault of his own.” Id. at 57. She stated that she could not afford to lose the spousal support due to her health issues, which had left her unable to work and which required future surgical procedures. See id. at 57–58. Further, she indicated that Thomas’s knowledge, experience, and credentials enabled him to find employment. See id. at 58. Finally, Kathy stated that her need for the spousal support amount was contemplated at the time the parties entered into the stipulated agreement and her need has increased through the years. See id. She requested that the District Court dismiss Thomas’s motion and award her reasonable attorney’s fees. See id.

[¶25] Thomas filed a reply to Kathy’s objection stating that he had obtained employment with Calfrac Well Services Corp. (“Calfrac”) in Williston, ND, on August 22, 2017. See id. at 67. Thomas’s affidavit indicated that he was earning \$10,695.72 per month at the time the judgment was entered, and his paystub, which he submitted as an exhibit, indicated that he was, in August of 2017, earning \$32.00 per hour: \$27.00 an hour as a base, plus a \$5.00 per hour premium for living and working in the Williston area. See id. at 66–70. He also attempted to shift the burden of proof to Kathy, indicating that she “failed to provide evidentiary proof” of her medical conditions and her need for spousal support. See id. at 63. He again requested that the court grant his motion to terminate spousal support. See id. at 64.

[¶26] Kathy filed a renewed objection to Thomas’s proposed spousal support modification requesting a hearing on the matter. See id. at 73–74. Kathy attempted to set a hearing on the motion to modify the spousal support, scheduled for November 13, 2017. See id. at 72. The hearing was continued due to unavailability of Thomas’s counsel. See id. at 77–79. The hearing was ultimately rescheduled for March, 21, 2018. See id. at 80.

[¶27] A hearing was held on March 21, 2018 on the Motion to Terminate Spousal Support before Honorable Josh B. Rustad, Judge of the District Court in Williams County, North Dakota.

[¶28] At the hearing, the timeline regarding Thomas’s employment was established as follows: Thomas left Sun Well Services in June 2012 and went to Magna Energy (“Magna”) after a friend convinced him to change positions. See Tr. at 11:2-23, 53: 13-16. Magna was purchased by Ranger Energy in January of 2017 and, in May of 2017, Ranger terminated Thomas’s position. See Tr. at 12:1-8; 14:7-14. He found employment with Calfrac in August of 2017. See Tr. at 23:2-7. Although Thomas testified that he made \$22.50 per hour, plus a five dollar “Williston differential” (Tr. at 23:8-13), Exhibit 4 (Appellant’s App. at 70–71) indicates that he made \$27.00 per hour, plus the \$5.00 bonus. Thomas testified that he worked at Calfrac until November 26, 2017 (Tr. at 23:18-19) and grossed roughly \$24,380.00 in that time frame (Tr. at 55:9-25, 56:1-2). Thomas then took a job at American Well Service making \$75,000.00 per year, where he was still employed at the date of the hearing. (Tr. at 23:20-25, 24:1-13).

[¶29] The District Court received evidence that Thomas received a severance payment of \$21,752.00 from Ranger Energy Services on or around May of 2017. See Appellant’s App.

at 81, 83.

[¶30] Thomas testified and provided evidence that he currently had approximately \$12,965.44 in the bank in both savings and checking accounts. See Tr. at 26:18-20, 29:6-9; Appellant's App. at 88–94. The District Court also received evidence and heard testimony that Thomas had an IRA valued at \$29,653.31, even after taking a \$25,000 IRA distribution in 2016. See Tr. at 30:11-25, 54:8-19; Appellant's App. at 88–90, 95.

[¶31] In presenting evidence regarding his monthly expenses, Thomas provided bills for Montana-Dakota Utilities (Appellant's App. at 105), Verizon Wireless (Appellant's App. at 106–107), and Midco (Appellant's App. at 108) which were in the name of Tammy Otteson, Thomas's girlfriend. These documents were admitted over Kathy's objection. See Tr. at 43:1-24. Thomas testified that he pays seventy percent of the Montana-Dakota Utilities bill (Tr. at 43:1-24), one-third of the Verizon bill (Tr. at 44:12-24), and seventy percent of the Midco bill (Tr. at 45:6-22).

[¶32] On May 11, 2018, the District Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment. See id. at 157–163. The District Court found that Thomas was terminated from his \$132,000.00 per year position with Magna Energy Services in May of 2017 through no fault of his own when Ranger Energy Services purchased Magna, that Thomas obtained employment benefits from June to August of 2017, that he obtained “an hourly position at Calfrac, where he made \$4,680 gross per month” in August of 2017, that he “obtained a salaried position at America [sic] Well Service as a safety director, where he currently earns \$75,000 per year,” and that “Plaintiff's income reduction occurred through no fault of his own” and that he “is unable to provide spousal support at the current

level mandated by the Judgment.” Id.

[¶33] The District Court further found “that Defendant failed to prove that she is unable to work and provide for herself, even if it be in a light duty capacity” and “that Defendant failed to show a need for spousal support to continue at current levels.” Id. at 158, 160.

[¶34] The District Court concluded that the Marital Termination Agreement “made the ‘material change’ threshold inapplicable to this spousal support modification.” Id. at 161. The District Court also concluded that “Plaintiff became unemployed and had reduced income through no fault of his own, thus meeting the criteria for the spousal support reduction clause in the parties’ marriage termination agreement.” Id. at 162. The District Court also stated:

This Court rejects Defendant’s argument that Plaintiff should have had the foresight to stay at his position at Calfrac instead of moving to a new position at American Well Service. Also this issue is irrelevant to the issues at hand, as it was not the move from Calfrac to American Well Service that caused Plaintiff’s financial distress but his release from Ranger in May of 2017.

Id. at 162–163.

[¶35] Finally, the District Court concluded, “[A]lthough Plaintiff was not required to show a material change in financial circumstances to obtain a reduction in spousal support due to the marriage termination agreement, he did in fact make such a showing.” Id. at 163.

[¶36] The Amended Judgment terminated the spousal support obligation in its entirety. See id. at 164. Also on May 16, 2018, the District Court vacated the Amended Judgment entered at Doc. ID # 93. See id.

[¶37] On May 16, 2018, the District Court issued a second Amended Judgment which instead reduced Thomas’s spousal support obligation to \$500.00 per month. See id. at 165–

166. This appeal followed.

[¶38] **IV. LAW AND ARGUMENT**

[¶39] The evidence in the record and presented at the hearing does not support the District Court's findings of fact and conclusions of law. First, the District Court erred in finding that the parties' stipulated divorce dispensed with Thomas's burden to establish a material change in circumstances justifying a modification in spousal support. Further, the court's conclusory statement indicating that, even though Thomas was not required to establish a material change in circumstances, he did in fact make such a showing, is not supported by the record or any findings of fact. The record shows that Thomas clearly did not meet his burden to support the District Court's decision to modify the spousal support obligations. The District Court's conclusion that Thomas's release from Ranger in May of 2017 from Ranger was what caused Thomas's financial distress, not his move from Calfrac to American Well Service, is not supported by the record. Finally, the District Court makes no explanation or findings which rationally explain its decision to reduce Thomas's spousal support obligation from \$3,175 monthly to \$500.00 monthly. For these reasons, the District Court's decision should be reversed.

[¶40] **1. The District Court erred in concluding that the parties' stipulated divorce dispensed with the burden on the party seeking modification of the spousal support award to establish a material change in circumstances.**

[¶41] The legal standard for a modification of spousal support is well established:

The party seeking modification of spousal support bears the burden of proving there has been a material change in the financial circumstances of the parties warranting a change in the amount of support. The district court's determination whether there has been a material change in circumstances warranting modification is a finding of fact and will be set aside on appeal only if it is clearly erroneous.

A material change is a change that substantially affects the financial abilities or needs of the parties and that was not contemplated by the parties at the time of the original decree. In assessing whether a material change has occurred, the reasons for changes in the parties' income or needs must be examined, as well as the extent to which the changes were contemplated by the parties at the time of the initial decree. Not every change in the parties' financial circumstances justifies modification of spousal support, and no modification is warranted when the change is self-induced. This Court encourages agreements between divorcing parties, and stipulated spousal support awards should be changed only with great reluctance.

Schulte v. Kramer, 2012 ND 163, ¶ 10, 820 N.W.2d 318 (citing Rothberg v. Rothberg, 2007 ND 24, ¶ 6, 727 N.W.2d 771 (quotations and citations omitted)).

[¶42] It is equally well-settled that requests for modification of spousal support which were originally stipulated between the parties should be analyzed with greater scrutiny. See Schulte, 2012 ND 163 at ¶ 28; Rothberg v. Rothberg, 2007 ND 24, ¶ 13, 727 N.W.2d 771.

[¶43] This matter is subject to the clearly erroneous standard of review. "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, after review of the entire record, we are left with a definite and firm conviction a mistake has been made." Rothberg, 2007 ND 24, ¶ 7, 727 N.W.2d 771.

[¶44] In its conclusions of law, the District Court correctly stated that parties are free to agree and bargain with their own legal rights regarding spousal support, and "[p]ermitt[ing] parties to determine future modifiability of their spousal support agreements maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties." Appellant's App. at 162. The District Court also concluded that "the parties entered into a contractual agreement whereby they determined that the criteria for modification of Plaintiff's spousal

support obligation would be based on a no-fault reduction in Plaintiff's income." Id. at 161.

[¶45] Accordingly, the District Court concluded that "the 'material change' threshold" was inapplicable to this spousal support modification" and "the marriage termination agreement executed by the parties expressly contemplated a reduction of spousal support under certain conditions, which the Plaintiff met." Id. at 161–162.

[¶46] The District Court cites *Toni v. Toni*, 2001 ND 193, ¶ 19, 636 N.W.2d 396, in support of its rationale. See id. at 162. However, *Toni* is distinguishable. That case analyzed parties' ability to contractually divest the court of its jurisdiction to modify the award of spousal support. In *Toni*, this Court found that parties may waive their legal rights under a contract, and a contract waiving the court's jurisdiction to modify a spousal support award should be no different. This Court, in *Toni*, explicitly stated that the holding of the case was narrow. See Toni v. Toni, 2001 ND 193, ¶ 22, 636 N.W.2d 396. The District Court's application of *Toni* to the facts of this case takes the terms of the marital termination agreement too far.

[¶47] The language of the Vartys' marital termination agreement does not contractually do away with the moving party's burden to establish a material change in circumstances to justify a modification of spousal support. The language merely contemplates that spousal support will continue for a term of twelve years and, while it will not be increased it may be reduced if Thomas's income was reduced at no fault of his own. The parties made no agreement as to the burden of proof, or lack thereof, to justify a modification.

[¶48] For example, in *Rothberg v. Rothberg*, 2007 ND 24, 727 N.W.2d 771, the parties contractually agreed that spousal support would continue at a set rate for an established

period of time “...at which time, without any necessity of Plaintiff showing a substantial change in circumstances or need” the spousal support award would increase. Rothberg v. Rothberg, 2007 ND 24, ¶ 2, 727 N.W.2d 771. The Vartys agreed to no such provision and, therefore, Thomas should have been required to establish a material change in circumstance in order to justify a modification of the award of spousal support. Clearly, the District Court’s reasoning on this issue was induced by an erroneous view of the law and should be reversed.

[¶49] A. *The District Court’s conclusory statement that a material change in circumstances, while not required, was established, is not supported by the record.*

[¶50] The District Court hedges its decision dispensing with the requirement for the moving party to establish a material change in circumstances by making the conclusory statement that, even though Thomas was not required to show a material change in circumstance, “he did in fact make such a showing.” Appellant’s App. at ¶ 163. However, this conclusion is not supported by the evidence in the record.

[¶51] As stated above, when a trial court assesses whether a material change has occurred, “the reasons for changes in the parties’ income or needs must be examined, as well as the extent to which the changes were contemplated by the parties at the time of the initial decree.” See supra at ¶ 41. Further, “earned income is not the sole consideration in determining a party’s ability to pay spousal support, and . . . a court must consider a party’s net worth, including the extent of his assets and his earning ability demonstrated by his past income.” Rothberg v. Rothberg, 2007 ND 24, ¶ 16, 727 N.W.2d 771. Income-averaging can be used as a reliable indicator to consider financial issues involved in divorce. See Kosobud v. Kosobud, 2012 ND 122, ¶ 11, 817 N.W.2d 384.

[¶52] In this case, the District Court’s conclusion that there has been a material change in circumstance is not supported by the evidence in the record. The full picture of Thomas’s financial situation involves more than just earned wages as income. Thomas admitted at the hearing that, in 2016—four years after he stopped working at Sun Well Services—he received a payment of \$72,400.00 from Sun Well Services for what Thomas referred to as “phantom stock.” See Tr. at 58:11-25, 59:1-7. In 2016, it is undisputed that Thomas was still working for Magna making approximately \$130,000.00 annually. See Tr. at 13:12-15. However, these funds were not considered or mentioned in the District Court’s findings. Thomas’s testimony supports a finding that, taking this payout into account, he made approximately \$202,400.00 in earned wages in 2016.

[¶53] Further, the District Court received evidence that Thomas received a severance payment from Ranger in the amount of \$22,253.92 in 2017. See Appellant’s App. at 81, 83. Thomas made \$43,500.00 at Ranger in 2017, from January through April 30. See id. at 50. He testified that he grossed \$24,380.00 at Calfrac from August of 2017 through November 26, 2017. See Tr. at 55:9-25, 56:1-10. Thomas grosses approximately \$2,884.62 per month at American Well Services. See Tr. at 40:23-24. Combined, these figures alone place Thomas’s gross income in 2017 at \$93,018.54.

[¶54] The District Court did not consider Thomas’s assets or earning ability, but considering these significant additions to Thomas’s income, the record supports the fact that Thomas’s average income since 2012 at \$127,202.65 (\$130,000 per year from Magna from 2012 through 2015, \$202,400.00 in 2016, and \$93,018.54 in 2017). This is even so with the assumption that he makes only \$75,000.00 in 2018.

[¶55] Based on the evidence in the record and testimony at the hearing, it is clear that the District Court’s findings lack sufficient specificity to discern the factual basis for the conclusion that there was a material change in circumstance, and that the District Court erred in finding that Thomas established a material change in circumstance sufficient to reduce his spousal support obligation. For these reasons, the District Court’s decision should be reversed.

[¶56] **2. The District Court erred in concluding that the relevant job change to consider was Thomas’s separation from Ranger, rather than Thomas’s move from Calfrac to American Well Service.**

[¶57] The District Court stated that it rejected “Defendant’s argument that Plaintiff should have had the foresight to stay at his position at Calfrac instead of moving to a new position at American Well Service.” Appellant’s App. at 162–163. The record establishes that this was not Kathy’s argument at all. See Tr. at 55:1-25, 56:1-17, 68:3-10. Rather, she indicated that the move from Calfrac to American Well Service was the relevant job change because it was the situation at the time of the hearing, and it was a voluntary change, as opposed to a layoff. See id.

[¶58] The District Court also found that “it was not the move from Calfrac to American Well Service that caused Plaintiff’s financial distress, but his release from Ranger in May of 2017.” Id. at 163.

[¶59] The fact that Thomas’s employment situation changed in the eight-month time frame from when he initially brought the motion to the date of the hearing should not disadvantage Kathy. The trial court must consider the circumstances before it at the time of the hearing. Thomas originally brought the motion to modify spousal support when he

was between jobs and collecting unemployment. In the interim, Thomas secured a job at Calfrac where he admitted he grossed \$24,380.00 in three months and “could have been” on track to make \$91,000.00 annually. See Tr. at 55:9-25, 56:1-17. It is undisputed, and the District Court found, that Thomas voluntarily left Calfrac for American Well Service. See Tr. at 55, 2-8, 56:8-12, Appellant’s App. at 158.

[¶60] Undoubtedly, Thomas was no longer in the situation where he was unemployed and collecting unemployment at the time of the hearing. He had obtained employment at Calfrac and, in fact, voluntarily left that position for a different one at American Well Services. Thomas complained at the hearing that he now only makes \$75,000.00 salary. However, that is a self-induced position, and the District Court erroneously attributed no fault to Thomas. Thomas clearly voluntarily left a position where evidence shows that he was projected to make over \$90,000.00 annually for a position where he makes \$75,000.00. See Tr. at 68:3-10 “Absent a substantial showing of good faith or cause, a self-induced decline in income does not constitute such an exceptional change in circumstances as to afford the required basis for modifying a ... spousal support award.” Schulte v. Kramer, 2012 ND 163, ¶ 23, 820 N.W.2d 318 (citing Mahoney v. Mahoney, 538 N.W.2d 189, 191 (N.D. 1995)). Thomas made no showing of good faith or cause to support the reason for his move from Calfrac to American Well Service.

[¶61] The District Court erred in concluding that Thomas’s move from Calfrac to American Well Service was “irrelevant to the issues at hand.” Appellant’s App. at 163. The District Court must consider the current situation of the parties. To do otherwise would be to decide a moot issue. As has been established above, no modification of spousal support

is warranted when a change in the party's financial situation is self-induced. See supra at ¶ 41. Therefore, the District Court's finding that the "Plaintiff's income reduction occurred through no fault of his own" and its conclusion regarding the relevance of the job change from Calfrac to American Well Service was clearly erroneous, and the District Court's decision should be reversed.

¶62] 3. The District Court did not make requisite findings to reduce spousal support from \$3,175.00 per month to \$500.00 per month and said decision is not supported by the record.

¶63] The District Court did not provide sufficient analysis regarding Kathy's need or Thomas's ability to pay spousal support to justify the reduction in the award of spousal support.

¶64] As established above, the District Court did not make a proper analysis of Thomas's net worth and earning ability, considering all relevant factors beyond just earned income. The District Court accepted Thomas's testimony that he has net monthly disposable income of \$1,200.00 without considering any of the additional payments he has received aside from earned wages and without considering his earning ability. See Tr. at 71:8-12; Appellant's App. at 159. However, even if the District Court had considered these relevant factors regarding Thomas's ability to pay and come to a conclusion that Thomas had a disposable net income of \$1,200.00, the District Court presents no rationale for reducing the spousal support obligation to \$500.00 per month.

¶65] Thomas did not make a request at the hearing for the spousal support obligation to be reduced to \$500.00 per month. There was some discussion on the record at the hearing about the amount of the spousal support obligation, and Thomas merely requested

“something that [he] can afford to ... pay.” Tr. at 51:15-21. When asked what he could afford to pay, Thomas mentioned \$300. Tr. at 51:22-25, 52:1-16. Kathy testified that the \$300 Thomas proposed “doesn’t even pay for [her] health insurance.” Tr. at 123:6-10. It appears that the \$500.00 figure appeared for the first time in the proposed order that Thomas filed post-hearing. See Appellant’s App. at 163. The \$500.00 requested is arbitrary number significantly lower than any amount the parties had contemplated at the time of the agreement.

[¶66] Further, the District Court improperly considered expenses legally in the name of a third party, Tammy Otteson, as part of Thomas’s monthly expenses to determine that he has a net monthly disposable income of “only \$1,200.00.” See supra at ¶ 31; Appellant’s App. at 159. There was initially some confusion on the record as to the amount of Thomas’s net monthly disposable income. Initially, he testified that it was “just over \$600 per month[.]” Tr. at 40:5-7, 51:15-21. He later testified that his average net monthly disposable income was around \$1,200 per month. See Tr. at 71:8-12.

[¶67] In considering a motion to modify spousal support, the District Court must still consider the former spouse’s needs and the supporting spouse’s ability to pay. See Meyer v. Meyer, 2004 ND 89, ¶ 21, 679 N.W.2d 273. Kathy testified that her monthly health insurance payment is \$494.62. See Tr. at 106:19-22. Kathy testified she is unable to work due to medical issues and still has a need for the spousal support payments. See Tr. at 75:4-7, 122:16-25, 123:1-10. Kathy testified and provided evidence that, at the time she was last employed, she made approximately \$24,750.00 annually. See Tr. at 85:9-13. Yet, the District Court made no finding regarding Kathy’s need for spousal support payments other

than stating she previously worked as a dispatcher and dismissing Kathy's testimony that she was unable to work due to her medical conditions. See Appellant's App. at 159–160, 165–166.

[¶68] This Court's strong policy of encouraging stipulated divorces not only promotes prompt and peaceful resolution of divorce disputes, but also allows the parties themselves to establish a plan for the future. See, e.g., Toni v. Toni, 2001 ND 193, ¶ 19, 636 N.W.2d 396. Thomas admitted that "the amount of spousal support to be paid and the length of time that it was to be paid was a very contested, very negotiated issue during the divorce negotiations." See Tr. at 69:19-25, 70:1-5. The District Court's arbitrary decision to reduce spousal support from \$3,175.00 to \$500.00 has disrupted the plan the Vartys set in place, which was contemplated to extend at least eight years at that level before reducing to \$1,500.00 for four years. By accepting the fact that Thomas's current salary is \$75,000.00, and disregarding Thomas's past earning ability and average salary, the District Court has reduced Kathy's spousal support to \$1,000.00 less than the parties had ever contemplated without establishing a rational explanation for the significant reduction. This warrants a reversal of the District Court's decision.

[¶69] **V. CONCLUSION**

[¶70] For the foregoing reasons, and for those reasons to be submitted during oral argument in this matter, the Appellant herein respectfully requests that this Court reverse the District Court's Findings of Fact, Conclusions of Law and Order for Amended Judgment and Decree, dated May 11, 2018, and Amended Judgment, dated May 18, 2018.

[¶71] RESPECTFULLY SUBMITTED this 26th day of September, 2018.

PIPPIN LAW FIRM
111 East Broadway
P. O. Box 1487
Williston, ND 58802-1487
Telephone: (701) 572-5544
malcolm@pippinlawfirm.com
kaitlin@pippinlawfirm.com
Attorneys for the Defendant/Appellant

/s/ H. Malcolm Pippin

BY: H. Malcolm Pippin
N.D. ID #04682
Kaitlin DeCrescente
N.D. ID #08136

[¶72] **CERTIFICATE OF SERVICE**

[¶73] I hereby certify that a true and correct copy of the foregoing Brief of Defendant and Appellant, Kathleen Varty, was served electronically on this 26th day of September, 2018, addressed to:

<input type="checkbox"/> U.S. Mail	Thomas J. Corcoran Attorney for Plaintiff/Appellee 125 Main Street, Ste. 240 Williston, ND 58801 tjc@corcoranlaw.com
<input type="checkbox"/> FedEx/UPS	
<input type="checkbox"/> Hand-Delivery	
<input type="checkbox"/> Facsimile	
<input checked="" type="checkbox"/> E-mail	
<input type="checkbox"/> Odyssey	

PIPPIN LAW FIRM
111 East Broadway
P. O. Box 1487
Williston, ND 58802-1487
Telephone: (701) 572-5544
malcolm@pippinlawfirm.com
kaitlin@pippinlawfirm.com
Attorneys for the Defendant /Appellant

BY: /s/ H. Malcolm Pippin
H. Malcolm Pippin
N.D. ID #04682
Kaitlin DeCrescente
N.D. ID #08136