

ORIGINAL

20080057

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20080057

Lana K. Ebach,

Plaintiff/Appellee,

vs.

Donald M. Ebach,

Defendant/Appellant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 04 2008

STATE OF NORTH DAKOTA

APPEAL FROM AN ORDER DENYING REQUEST TO
REDUCE SPOUSAL SUPPORT
SOUTH CENTRAL JUDICIAL DISTRICT
McLean ~~BURLINGTON~~ COUNTY CIVIL NO. 28-96-C-01029
THE HONORABLE BRUCE B. HASKELL PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES

ISSUE 1: The facts that Donald reached age 65 and is retired, by themselves, do not establish a material change in circumstances to warrant a reduction or elimination of his obligation to pay spousal support.

ISSUE 2: Given that Donald has the ability to pay spousal support, his health has not deteriorated and that Lana's health has deteriorated and Lana has shown a continuing need for spousal support, the trial court did not err when it determined that Donald had not shown a material change in circumstances to justify the reduction or elimination of spousal support.

STATEMENT OF THE CASE

Donald Ebach and Lana Ebach were divorced after 31 years of marriage pursuant to a Judgment entered on September 24, 1997. Lana was awarded permanent spousal support.

On August 30, 2004, Donald filed a Motion to Reconsider Alimony and Spousal Support. Following an evidentiary hearing, the district court Judge Bruce Romanick, denied the motion. Donald appealed and the North Dakota Supreme Court affirmed. Ebach v. Ebach, 2005 ND 123, 700 N.W.2d 884. (Hereafter, "Ebach I").

On July 19, 2007, Donald brought another motion to reduce or eliminate his spousal support obligation. Lana resisted. Following a hearing, the court, Judge Bruce Haskell, denied the motion.

Donald filed a timely Notice of Appeal on February 25, 2008.

STATEMENT OF THE FACTS

Lana and Donald were married on October 9, 1965. They lived most of their married life together in McClusky and separated in December 1995. After 31 years of marriage, Lana filed a Summons and Complaint for divorce on March 11, 1996. (Appendix, page 146, hereafter, App. 146).

At the time of the divorce, Lana was 52 years old and Donald was 54. (App.150). Donald was a service representative employed by Otter Tail Power Company and in 1996, the year the divorce trial took place, Donald earned \$48,250. (App. 150).

In 1996, Lana was an eligibility worker employed by Sheridan County Social Services. That year she earned \$16,495. At the time Lana worked only 32 hours per week upon the advice of her physician due to Multiple Sclerosis. (App. 150).

The divorce case was tried to the district court, the Honorable James M. Vukelic presiding. The court entered its Memorandum Opinion on September 2, 1997. The court stated: "Lana has Multiple Sclerosis, an incurable disease affecting sensory, motor, vision, hearing, and mental capacities. Van Oosting v. Van Oosting, 521 N.W.2d 93 (N.D. 1994). She has had at least five exacerbations of her condition since 1980. While Lana is in relatively good health otherwise, the nature of the disease makes it

impossible to predict her future medical condition attributable to MS.” (App. 151).

The court also made findings as to Donald’s health condition as follows: “Donald had a knee injury and has high blood pressure but his overall health is good.” (App. 151).

The court awarded Lana \$3,000 more in net property distribution than it awarded to Donald. The court concluded that several factors favored a greater property distribution to Lana including their relative earning abilities, Lana’s diagnosis of Multiple Sclerosis, Donald’s relatively good health, and the fact that Lana’s retirement was much smaller than Donald’s. (App. 151-152).

The court also awarded Lana permanent spousal support of \$750.00 per month to continue until Lana died or remarried. (App. 153). In doing so, the court considered the Ruff-Fischer factors. The court stated its concerns for Lana as follows: “At Lana’s age, it is unlikely that returning to college will result in greater income once the time away from employment is taken into consideration. Lana’s income from work will never come close to equaling Donald’s. Her medical condition is precarious. Her retirement benefits will be less than Donald’s. She faces a substantial diminution in her standard of living vis-à-vis Donald, unless permanent spousal support is ordered.” (App. 153). Following the award of spousal support, the court

stated, "The court retains jurisdiction over this matter and may modify spousal support upon a showing of a change of circumstances.... A deterioration in Lana's medical condition or Donald's retirement would, in this court's opinion, constitute such a change of circumstances." (App. 153) (citation omitted).

On August 31, 2004, Donald filed a Motion and Brief to terminate his spousal support award. At the time, Donald planned to retire early at age 62. Lana resisted the motion on the basis of her disease (M.S.) and her financial circumstances as well as Donald's early retirement. Following a hearing, the court issued its Order Denying Request to Reduce Spousal Support. (App. 177). Donald filed a timely Notice of Appeal and this Court affirmed the trial court's determination that Donald had failed to show a material change in circumstances that warranted a modification of the spousal support obligation. Ebach v. Ebach, 2005 ND 123 ¶ 10, 700 N.W.2d 684.

Shortly before Donald reached age 65, he again filed a motion to reduce or eliminate his spousal support obligation. (App. 4). He brought the motion on the grounds that he was now age 65 and was therefore entitled to a modification based on the language of Judge Vukelic's Memorandum Opinion and he had undergone successful prostate surgery as well as his

preexisting medical concerns of diabetes, high blood pressure and high cholesterol. (Record 71 hereafter R. 71).

Lana again opposed Donald's motion and submitted her affidavit which set forth the facts and circumstances showing that her need for spousal support continues due to the increasing affects of M.S. and the continuing deterioration of Lana's health and financial circumstances.

Following a hearing on the matter on November 21, 2007, the trial court issued an Order Denying Motion for Order Eliminating or Reducing Spousal Support dated January 15, 2008. (App. 136). The court determined that Donald had failed to show a material change in circumstances warranting the reduction or elimination of spousal support. (App 136-138).

LAW AND ARGUMENT

1. STANDARD OF REVIEW

A trial court's determination of whether there has been a material change in circumstances is a finding of fact and will not be reversed on appeal unless it is clearly erroneous. Gibb v. Sepe, 2004 ND 227, ¶7, 690 N.W.2d 230. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or this Court, upon review of all the evidence, is left with a definite and firm conviction a

mistake has been made. Schmitz v. Schmitz, 2001 ND 19, ¶8, 622 N.W.2d 176.

Ebach I at ¶ 10.

2. ISSUE 1: The facts that Donald reached age 65 and is retired, by themselves, do not establish a material change in circumstances to warrant a reduction or elimination of his obligation to pay spousal support.

Donald asserts that now that he has reached age 65, which is the date he anticipated retiring in his testimony at the divorce trial, and the fact that he is receiving retirement income, his spousal support obligation should be reduced or eliminated. However, these facts alone are not sufficient to justify the reduction or elimination of his spousal support.

This Court has not ruled that retirement at age 65 in and of itself is a material change of circumstances that warrants a modification of a spousal support obligation. See Wheeler v. Wheeler, 548 N.W.2d 27, 31 (N.D. 1996); Huffman v. Huffman, 477 N.W.2d 594, 598 (N.D. 1991). In Sommer v. Sommer, 2001 ND 191, 636 N.W.2d 423, the parties were divorced when they were both in their early 50s. The wife was awarded permanent spousal support and the husband appealed asserting that it was clear error for the trial court to fail to provide for the reduction or elimination of his spousal support obligation upon his retirement. Id. at ¶17. In Sommer, this Court distinguished those cases like Wheeler and Huffman,

supra, where the spousal support was based upon a stipulation from cases where the support is ordered based on findings by a trial court and stated:

In contrast, when a supporting spouse has been ordered to pay spousal support based on the trial court's findings, a voluntary change in employment by the supporting spouse that results in lower income may be a valid basis for a modification of spousal support if the change in employment was reasonable and made in good faith. ... Likewise, voluntary retirement by a supporting spouse that results in a material change in circumstances may, under some circumstances, be a valid basis for modification of spousal support.

Id. at ¶ 20 (emphasis added, citation omitted).

A retirement and a reduction in income alone do not automatically justify the modification or elimination of spousal support. The court must also look to the needs of the supported spouse and other relevant factors. Each spousal support determination is fact specific. Christian v. Christian, 2007 ND 196, ¶13, 742 N.W.2d 819. As this Court concluded in Ebach I, supra,

There are a variety of factors which should be considered in analyzing whether such changed circumstances do, in fact, exist as would justify a modification of [spousal support]. A

court may consider, for instance, the age gap between the parties; whether at the time of the initial [spousal support] award any attention was given by the parties to the possibility of future retirement; whether the particular retirement was mandatory or voluntary; whether the particular retirement occurred earlier than might have been anticipated at the time [spousal support] was awarded; and the financial impact of that retirement upon the respective financial positions of the parties. It should also assess the motivation which led to the decision to retire, i.e., was it reasonable under all the circumstances or motivated primarily by a desire to reduce the [spousal support] of a former spouse. A court may also wish to consider the degree of control retained by the parties over the disbursement of their retirement income, e.g., the ability to defer receipt of some or all. It may also wish to consider whether either spouse has transferred assets to others, thus reducing the amount available to meet their financial needs and obligations.

Silvan, 632 A.2d at 530. In Deegan, 603 A.2d at 546, the court added:

Even in a case in which the retiring spouse has been shown to have acted in good faith and has advanced entirely rational

reasons for his or her actions, the trial judge will be required to decide one pivotal issue: whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse. Only if that answer is affirmative, should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing support obligation.

See also Pimm, 601 So. 2d at 537 (court must consider the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire, and the needs of the receiving spouse and the impact a termination or reduction of spousal support would have on him or her); In re Marriage of Smith, 396 N.E.2d at 863 (whether spouse may voluntarily retire depends on circumstances of each case, including the age, health of the party, the motives in retiring, the timing of the retirement, the ability to pay support even after retirement, and the ability of the other spouse to provide for himself or herself); Smith, 419 A.2d at 1038 (same). We conclude the trial court properly focused on these factors in deciding whether there was a material change in circumstances justifying a reduction of spousal support in this case.

Ebach I at ¶ 12-13.

The court must look to much more than age and retirement status to determine whether a material change in circumstances has occurred so that a modification is justified.

ISSUE 2: Given that Donald has the ability to pay spousal support, his health has not deteriorated and that Lana's health has deteriorated and Lana has shown a continuing need for spousal support, the trial court did not err when it determined that Donald had not shown a material change in circumstances to justify the reduction or elimination of spousal support.

The trial court ruled that Donald had not shown a material change in circumstances and stated:

Donald makes much of the fact that he retired early and that Lana received money she would not have had Donald worked until age sixty-five. That issue was resolved by the 2004 ruling and appeal. In his brief and at the hearing, the only changes in circumstances (other than retirement) cited by Donald are that Donald's health "has not improved" (as opposed to has deteriorated), that Donald had surgery for prostate cancer but that there is no evidence of continuing problems, that Lana's retirement benefits have improved, and that Lana now has more monthly income than does Donald. The evidence is also that

Lana's health has deteriorated, but not to the point that her ability to work has been affected. No evidence was presented that Donald's capacity to pay spousal support has changed, nor that Lana's need for spousal support has changed.

(App. 137).

These findings are supported by the evidence. Since Ebach I was decided, Lana suffered both urinary and fecal incontinence which are a result of nerve damage due to her MS. (App. 17-19). The fecal incontinence became so difficult that unless something was done, she would no longer be able to work. (App. 11). Fortunately she was referred to and qualified for an experimental study on sacral nerve stimulation through the Fairview Pelvic Floor Clinic, University of Minnesota Hospital. (App. 11). In May, 2006 she underwent an implant of an experimental stimulator. This has provided some relief although Lana continues to have pain, bloating and occasional incontinence. (App. 11). In addition, Lana had a benign adrenal tumor removed from her left kidney in 2007. At the time of the hearing, Lana was experiencing an increase in problems with her right foot which requires her to concentrate when she walks to avoid dragging her foot. This is symptom of her MS that comes and goes. (Transcript page 21-22 hereafter T. 21-22).

Lana's financial condition has also continued to deteriorate since Donald brought his last motion. In 2006, she was required to travel to Minneapolis eight times for the sacral nerve stimulation study and implant. (T. 22). Not only is she uncomfortable driving in the Twin Cities, if Lana drives, she must shut off her stimulator because occasionally it will cause such a shock that it may cause her to have an accident. (T. 22-23). Without the stimulator, incontinence returns. Lana's friend, Duane, drives her to Minneapolis and he usually drives her to Bismarck. (T. 23). Lana had expenses for gasoline and food each trip and although she was able to stay with her friend's children four times, on four of the trips she had to pay for a hotel room. (T. 22). She continues to follow up as part of the experimental study with annual trips to the Pelvic Floor Clinic at University of MN Hospital and as needed with her neurologist at Medcenter One in Bismarck for her MS.

All of this is expensive for Lana. Although she had hoped to save her payments from her share of the Ottertail pension to supplement her retirement, she has not been able to do that. She has needed those funds for uncovered medical expenses and her trips to Minneapolis for treatment. (App. 12). Before she started receiving the pension payments in 2004, she had savings of \$2900. (App. 22). Due to her increased medical needs and expenses, she depleted \$2,000 of that PLUS all of the pension payment in

the amount of \$775.95 per month. (App. 12, 107). Lana's uncovered health care expenses average \$369.00 per month. (App. 36).

Lana continues in her employment with Sheridan County at 28 hours per week. Her employer does not have enough work for Lana to work full time and her disease makes it impossible for her to do so. (App. 12, T. 13). In 2007, Lana's net pay from employment was about \$764. per month after deductions for her deferred compensation plan of \$200, taxes, social security and some insurances. (App. 12, 23, 121 - 132). The income from the Ottertail Power pension is about \$776 per month and she received \$750 per month in spousal support. (App. 12). All of Lana's income is subject to tax.

Lana's monthly expenses total about \$2830 per month. (App. 36). The estimate of her expenses is based on her actual spending. She saved every receipt and kept track of every dime she spent for two years and averaged the monthly expenses over two years. (T. 24-25). Donald did not show that Lana's expenses were inflated or unnecessary so as to reduce her need for continued spousal support.

Lana testified she would be getting a raise in 2008 which will increase her gross monthly pay from about \$1655 per month to \$1800 per month. (T. 3-4). Lana showed that even with the raise in 2008, and including all of her income from the Ottertail pension, interest, dividends and spousal

support, she would basically have discretionary income of about \$150 per month. (App. 35). It only takes one unanticipated trip to the doctor or an unexpected necessary home, car or appliance repair to eat up her discretionary money very quickly.

The trial court also reviewed Donald's health and financial circumstances. The evidence shows that since Donald's prior motion in 2004, his income has remained steady. Donald's 2006 tax return he filed jointly with his current wife, Susan, shows gross income of \$70,977. (App. 38). About half of this is attributable to Susan Ebach. Donald's income as shown on the tax return includes \$3,000 in an IRA distribution, \$15,452 from his Otter Tail Power Pension, and \$16,824 in Social Security benefits. His gross income is \$32,752. All of this income is subject to tax, however, the spousal support of \$9,000 that he paid to Lana in 2006, reduces his taxable income to \$26,276.

Donald's income is clearly sufficient to meet his monthly expenses set forth in Defendant's Exhibit 31. (App. 135). Donald is paying for just about everything for his household except food and internet service. Yet, in 2006, his wife earned approximately \$35,000 from employment. While the court does not add her income to Donald's for purposes of spousal support, it is obvious that her income affects Donald's expenses and ability to pay spousal support to Lana. Donald's expenses show that Donald covers all of

the real estate taxes on the home in which he and his wife live as well as all of the taxes on the cabin on Lake Sakakawea that Donald and Susan own jointly with Donald's son. (T. 45). Although he doesn't own the entire interest, he does pay all of the insurance, electricity and all of the taxes on the cabin. Donald covers all of the household utilities, electricity, heat, water, garbage, telephone and cable TV for himself and Susan Ebach. (T. 46). He covers all home repairs and maintenance and gas and maintenance on his vehicles. (T. 47). Donald pays for his long term care insurance, and uncovered medical expenses and prescriptions, hearing aids and glasses. Donald's annual expenses total \$15,945. (App. 135). Donald's expenses show he spends \$50 per month on clothing, yet he is retired and needs no work related clothing. His expenses also provide support for his wife, Susan because these are expenses she does not have to pay. While Donald's income is less, his expenses are also less.

Donald's statement of his retirement assets shows that Donald has nearly \$324,000 in retirement funds in addition to his pension payment. (App. 71). If these funds earned just 6% interest in 2006, Donald could have drawn \$19,439 in interest without touching any of the principal. Yet, Donald chose to withdraw only \$3,000 in 2006. (App. 38). Donald chooses to continue to let his retirement funds grow rather than to draw the interest earned on those funds. Donald definitely has the ability to continue

to pay spousal support to Lana especially given the fact that he is in fact paying less than \$9,000 per year because he can deduct that amount from his gross income to determine his taxable income.

While Donald has had some serious health concerns, they do not compare to the continuing deterioration of Lana's health condition due to MS. Donald could control his high blood pressure and high cholesterol with diet and exercise and he can and does take medication. Donald had prostate cancer and surgery in the spring of 2007. He returned for a recheck in September, 2007, and no chemotherapy, radiation or other treatment was required. (T. 44). He was scheduled to return in February, 2008. There was no evidence that the surgery affected his daily life. He will continue to "go hunting until I die." (App. 45). Donald goes fishing a lot and his surgery has no impact on his fishing unless he lifts something. (T. 45). Lana does not discount Donald's surgery and some temporary resulting pain and restrictions on lifting, but these do not come close to the deterioration in Lana's nerves and other effects of the MS. Lana suffers from the effects of MS every single day and the effects are getting more severe.

After consideration of the totality of circumstances, the trial court did not err when it found that Donald had failed to meet his burden to show a material change in circumstances to reduce or eliminate his spousal support obligation to Lana.

Judge Vukelic opined in his Memorandum Opinion in the original divorce proceeding "A deterioration in Lana's medical condition or Donald's retirement would, in this court's opinion, constitute such a change in circumstances." In fact, both of these things have occurred. Lana's condition is much worse than it was in 1997 and has deteriorated since 2004. Donald has retired and is 65 years old. Not every financial change in circumstances justifies a modification. See Schmitz, 2001 ND 19 ¶8, 622 N.W.2d 176; Wheeler, 548 N.W.2d at 31. Donald has the continuing ability to pay spousal support and Lana continues to need spousal support. Lana is still able to work 28 hours per week, thankfully, because without her employment income and the employer paid health insurance she would be in dire straits. Her net income from all sources if she cannot work between age 63 and 65, after taxes and after the current cost of health insurance would be \$16,366 per year. (App. 37). Not enough to meet her estimated monthly living expenses.

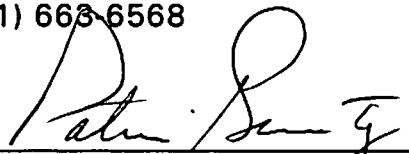
CONCLUSION

The trial court did not err in its determination that Donald has failed to meet his burden of proof. Given a consideration of all the evidence and a consideration of all the circumstances there has not been a material change of circumstances so that a modification of spousal support is warranted. Judge Haskell correctly determined that the disadvantage to Lana of losing

the support outweighs the disadvantage to Donald. The decision should be affirmed.

Respectfully submitted this 4th day of June, 2008.

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That a copy of the above document was securely enclosed in an envelope and addressed as follows:

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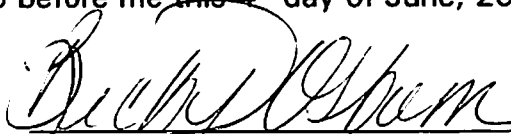
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Elizabeth Fuchs

Subscribed and sworn to before me this 4th day of June, 2008.



Notary Public
State of North Dakota.
My commission expires:

