

ORIGINAL

20080057

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20080057

Lana K. Ebach,

Plaintiff-Appellee,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

- vs -

MAY 09 2008

Donald M. Ebach,

STATE OF NORTH DAKOTA

Defendant-Appellant.

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

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

- I. Did Judge Haskell err when he ruled that Donald's retirement wasn't a significant change in circumstances justifying elimination or reduction of spousal support?

- II. Did Judge Haskell err when he ruled that cancer of the prostate, prostate surgery and Donald's current health are not to be considered a significant change in circumstances, justifying elimination or reduction of Donald's child support? *Sic.*

NATURE OF THE CASE

This case began when Donald M. Ebach ("Donald") and Lana K. Ebach ("Lana") were divorced on September 16, 1997. This is the second time Donald has appealed from a denial of his motion to reduce or terminate spousal support payment.

The trial judge, James M. Vukelic in his Memorandum Opinion said that, "the court retains jurisdiction over this matter and may modify spousal support upon showing of a change in circumstance. A deterioration in Lana's medical condition or Donald's retirement would in this court's opinion constitute such a change in circumstances.

Donald retired at age 62 and made a motion to have his spousal support reconsidered. The district judge who heard this motion was Bruce Romanick. Judge Romanick denied that motion because:

1. Donald's retirement was voluntary.
2. The age for retirement in North Dakota is 65.
3. Donald's health was average for a 62 year old.
4. The \$862.00 or \$907.00 that Lana would be receiving monthly because of Donald's retirement is Lana's property and can't be considered income.

Donald appealed Judge Romanick's denial of his motion to the North Dakota Supreme Court. The North Dakota Supreme Court affirmed Judge Romanick's denial of Donald's motion.

When Donald turned 65, he made a motion to reduce or eliminate his spousal support. The judge who heard that motion was Bruce B. Haskell. Judge Haskell denied Donald's motion by finding there was no change in circumstances.

Donald has now timely appealed Judge Haskell's denial of his motion to the North Dakota Supreme Court.

This matter is now before the North Dakota Supreme Court.

STATEMENT OF THE FACTS

Donald M. Ebach ("Donald") and Lana K. Ebach ("Lana") were divorced on September 16, 1997. In the Divorce Judgment, Lana was awarded \$750 per month spousal support. Donald has been paying Lana \$750 a month spousal support ever since. App. P. 154.

The District Judge that presided over Donald and Lana's divorce was James Vukelic. In Judge Vukelic's Memorandum Opinion he wrote that either a deterioration in Lana's medical condition or Donald's retirement would constitute a change of circumstances meriting modification of spousal support. See App. P. 146.

Donald decided to voluntarily retire from Ottertail Power when he reached age 62. Prior to retiring, he made a Motion to Reconsider what his spousal support payments would be after retirement. Judge Vukelic was no longer on the bench. The District Judge that was appointed to hear the Motion to Reconsider was Bruce A. Romanick. Judge Romanick denied Donald's Motion to Reconsider and left Donald's spousal support payments at \$750 because:

1. Donald's retirement was voluntary.
2. The retirement age in North Dakota is 65.
3. Donald's health was average for a 62 year old.
4. The \$862 or \$907 that Lana will be receiving after Donald retires is Lana's property and can't be considered income.

Donald appealed Judge Romanick's denial of his motion to the Supreme Court of North Dakota. The North Dakota Supreme Court in Ebach v. Ebach, 2005 ND 123, 700

N.W.2d 684, Affirmed Judge Romainck's denial.

After the ruling in Ebach, Donald remained retired. He believed Judge Vukelic's Memorandum Opinion provided that his retirement would constitute a change of circumstances meriting modification of his spousal support, but because of Judge Romanick's ruling and Ebach, he would be considered employed until he reached age 65. Therefore, when Donald's 65th birthday occurred, he could:

1. Retire.
2. His retirement would constitute a change of circumstances meriting modification of his spousal support.

Donald made a Motion to Reduce or Terminate his spousal support just before he turned 65.

Judge Romanick is in the military, he can't hear the motion. The District Judge appointed to hear Donald's Motion to Reduce or Terminate his spousal support was Bruce B. Haskell.

In Judge Haskell's Order Denying Motion for Order Eliminating or Reducing Spousal Support Judge Haskell found, "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 there is no continuing problem, that Lana's retirement benefits have improved and that Lana now has more monthly income than Donald does." See App. P. 136. Therefore, Judge Haskell found Donald retired.

Judge Haskell's Opinion then goes on to say, "The original Judgment was for

“permanent” spousal support an contemplated the facts that Donald would retire, that Lana would receive benefits from Donald’s retirement, and that Lana had and will continue to have health issues.” See App. P. 137 and 138. This is not a correct interpretation of Judge Vukelic’s Memorandum Order.

Judge Vukelic’s Memorandum Order says:

“Donald is ordered to pay Lana \$750 per month beginning September 15, 1997 and continuing until Lana dies or remarries. Payments are to be paid to the clerk of the district court on or before the 15th day of each month by cash, certified check or money order. The court retains jurisdiction over this matter and may modify spousal support upon a showing of a change of circumstances. *Wickstrom v. Wickstrom*, 359 N.W.2d 821 (ND 1984). A deterioration in Lana’s medical condition or Donald’s retirement would, in this court’s opinion, constitute such a change of circumstances.” (Emphasis added)

ARGUMENT

ISSUE I. Did Judge Haskell err when he ruled that Donald’s retirement wasn’t a significant change in circumstances justifying elimination or reduction of spousal support?

The standard of review of a trial court’s determination on whether or not there has been a material change of circumstance is found in Ebach [¶10]:

“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. Id.”

The jurisdiction of a trial court to modify spousal support and the definition of a material change in circumstances are set out in Ebach [¶ 9]:

“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. The party seeking modification of spousal support bears the burden of showing a material change in circumstances warrants modification. Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360. A material change in circumstances is something that substantially affects the parties’ financial abilities or needs, and the reasons for the changes in income must be examined as well as the extent to which the changes were contemplated by the parties at the time of the initial decree. Schmalle v. Schmalle, 1998 ND 201, ¶ 12, 586 N.W.2d 677. Not every financial change in circumstances justifies a modification, and if a change is self-induced, no modification is warranted. Schmitz v. Schmitz, 2001 ND 19, ¶ 8, 622 N.W.2d 176.”

There is no doubt that the words permanent spousal support appear in Judge Vukelic’s Memorandum Opinion. However, Judge Vukelic’s Memorandum Opinion also sets out two future occurrences that are a change in circumstances that will allow modification of permanent spousal support. These two conditions are:

1. A deterioration of Lana’s medical condition.
2. Donald’s retirement.

Therefore, Judge Vukelic’s Memorandum Opinion makes it clear that even the

words "permanent spousal support" don't mean forever because Donald's spousal support can be modified when Donald retires.

Since no specific age is set for Donald's retirement in Judge Vukelic's Memorandum Opinion, Donald believed he could retire at 62. On August 30, 2004 before Donald reached age 62, he made a Motion to reconsider the spousal support he was paying to Lana. App. P. 176. Since, James M. Vukelic was no longer a District Judge, Donald's motion was assigned to Judge Bruce A. Romanick. After Judge Romanick heard testimony regarding Donald's motion and reviewed the file he denied Donald's motion because:

1. Donald retired voluntarily.
2. The retirement age in North Dakota is 65.
3. Donald's health is average for a 62 year old.
4. The \$862.00 to \$907.00 that Lana will be receiving monthly because of Donald's retirement is Lana's property and can't be considered income.

Donald appeals Judge Romanick's denial of his motion to the North Dakota Supreme Court. The North Dakota Supreme Court affirms Judge Romanick's denial of Donald's motion. (Ebach v. Ebach 2005 ND 123).

After Judge Romanick's denial of Donald's motion and Ebach, Donald knows he can't voluntarily retire because his retirement age is set at age 65. Also, Donald knows it doesn't matter whether he is employed or not from age 62 to 65 because until Donald reaches 65, he will be considered employed.

Donald's 65th birthday will occur on August 26, 2007. On July 19, 2007, Donald

decides it is time to make a motion to reduce or end his spousal support to Lana. Don will turn 65 on August 26, 2007. The motion is set to be heard on December 28, 2007.

Judge Romanick is in the military, so Donald's motion is assigned to Judge Bruce B. Haskell.

Judge Haskell's Order Denying Donald's Motion for Order Eliminating or Reducing Spousal Support as follows:

"The original Judgment was for "permanent" support and contemplated the facts that Donald would retire, that Lana would receive benefits from Donald's retirement, and that Lana had and will continue to have health issues.

Donald has failed to establish a significant change in circumstances justifying elimination or reduction of his child support obligation. *Sic*.

Therefore, it would appear that Judge Haskell is not aware that Judge Vukelic's Memorandum Opinion, Judge Romanick's Denial of Donald's Motion and Ebach say that when Donald reaches age 65 he will have met the change of circumstances needed to modify his spousal support.

In Ebach Chief Justice VandeWalle's concurring opinion which was joined in by Justice Sandstrom, the following appears [¶ 27]:

"When the divorce decree was issued in this case it clearly stated that spousal support may be modified upon a change of circumstances and that Donald's retirement would, in the court's opinion, constitute a change of circumstances. Apparently the presumption is that people retire at age 65 and not at age 62, although that is also not entirely clear to me from this record. A person can retire at age 62 and draw social

security at a reduced rate. That is often referred to as “early retirement.” Under recent changes to social security a person under a certain age may have to work beyond age 65 to receive full social security retirement. In any event, although I do not believe retirement at age 62 is unusual. I recognize that in the original divorce case Donald said he contemplated retiring at age 65 and, for the purposes of this case, that may have set a standard to which he should be held absent other circumstances.”

The facts in the case now before the Court establish that Donald has now attained that standard because he is 65 years of age. Therefore, he has met all of the requirements on Judge Vukelic’s Memorandum Opinion, Judge Romanick’s Denial of Motions and in Ebach and has established a significant change in circumstances justifying elimination or reduction of child support.

Chief Justice VandeWalle’s concurring opinion also states [¶28]:

“I also agree with the majority’s adoption of a totality-of-the-circumstances analysis of the evidence in a motion to modify spousal support. However, some of the rhetoric of the majority opinion as well as the trial court, gives me concern that an argument will be made that because of Lana’s condition, Donald could be expected to work beyond age 65. I would not agree with that argument. If age 65 is “normal” retirement, retirement by a person of that age is a change in circumstances, even if it is anticipated. More likely, notwithstanding the divorce court’s statement about Donald’s retirement constituting a change in circumstances this is simply the prelude to Lana’s request for permanent spousal support when Donald does retire, even at age 65. Absent subsequently occurring circumstances, to the extent the majority opinion may be read to

support the objective. I do not join it.

Judge Haskell's Order Denying Motion for Order Eliminating or Reducing Spousal Support has done just what Chief Justice VandeWalle was afraid of. Judge Haskell's Order says that Donald can't retire at age 65 and he will have to continue to pay Lana spousal support even after age 65.

ISSUE II. Did Judge Haskell err when he ruled that cancer of the prostate, prostate surgery and Donald's current health are not to be considered a significant change in circumstances, justifying elimination or reduction of Donald's child support? Sic.

Since Judge Romanick's denial of Motion and Ebach, Donald's health has gotten worse. Donald has had cancer which required prostate surgery. He also has a hernia that will require an operation. His diabetes can't be cured and he requires daily medication. His blood pressure continues to be high and requires daily medication. His hearing is deteriorating and he is on his second set of hearing aids. Tr. P. 35, L. 2 - 25, P. 36, L. 1 - 25, P. 37, L. 1 - 6, P. 44, L. 2 - 15 and P. 45, L. 15.

Donald will be tested in February to see whether or not he needs chemotherapy. He may not need chemotherapy in February, but will have to be tested after that to determine if his PSA is going up. If it is, he will need chemotherapy. Tr. P. 44, L. 8 - 24.

Lana's MS according to Judge Haskell's Order has caused a deterioration in health, but hasn't affected her ability to work. App. P. 136.

Donald's cancer, removal of prostate, hernia, diabetes and high blood pressure, according to Judge Haskell aren't changes in circumstances that would effect Donald's

ability to work after he is age 65. App. P. 136.

CONCLUSION

The standard for Donald's retirement age has been set at age 65 by Judge Vukelic's Memorandum Opinion, Judge Romanick's denial of Motion and Ebach. Therefore, when Donald reaches age 65, his spousal support to Lana can be modified.

Donald is now 65 and has met that standard. It is time to eliminate or reduce his spousal support to Lana.

At this time Donald has had cancer, his prostate has been removed, his PSA must be checked regularly to see if he needs chemotherapy, he has diabetes and high blood pressure which requires daily medication. His hearing has deteriorated so that he is required to wear hearing aids and at this time he is on his second set of hearing aids.

Donald's health was not good at 62. Donald's health is much worse today than it was in 2004. His cancer situation alone is a serious enough change in circumstances to allow the modification of his spousal support to Lana.

For the above and foregoing reasons, Donald has established changes of circumstances sufficient to modify his spousal support to Lana.

This case should be remanded to the trial court so such modifications can be made.

Dated this 9 day of May, 2008.

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on May 9, 2008, she served, by hand delivering, a copy of the following:

APPELLANT'S BRIEF

by leaving a copy with the person(s) hereinafter named or with their office, at their last known address as follows:

Patricia E. Garrity
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The undersigned further certifies that on May 9, 2008, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.

Jacqueline Haag
Jacqueline Haag, Legal Assistant to
Benjamin C. Pulkrabek