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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20110231

Cheryl Rae Kramer,

Plaintiff, Appellee

vs.

Kenneth Leroy Kramer,

Defendant, Appellant

APPELLANT'S BRIEF

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SECOND AMENDED JUDGMENT DATED JUNE 1, 2011, THE SECOND AMENDED JUDGMENT DATED JULY 5, 2011 AND THE ORDER DENYING PLAINTIFF'S MOTION DATED AUGUST 2, 2011, ALL MADE BY THE HONORABLE DANIEL D. NARUM, JUDGE OF THE DISTRICT COURT, DICKEY COUNTY, NORTH DAKOTA.

DISTRICT COURT OF THE SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE DANIEL D. NARUM, PRESIDING
DISTRICT COURT NO. 11-04-C-00119

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¶ 2 STATEMENT OF THE ISSUES

¶ 3 A. WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO ELIMINATE DEFENDANT'S OBLIGATION, AS SET FORTH IN PARAGRAPH 9 OF THE JUDGMENT ENTERED ON MAY 4, 2005, TO PAY SPOUSAL SUPPORT TO PLAINTIFF, AND ELIMINATING THE DEFENDANT'S OBLIGATION, AS SET FORTH IN PARAGRAPH 13 OF THE JUDGMENT ENTERED ON MAY 4, 2005, TO PROVIDE HEALTH INSURANCE FOR THE PLAINTIFF AND TO PAY ALL OF PLAINTIFF'S NON-COVERED MEDICAL COSTS

¶ 4 B. WHETHER THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF ATTORNEYS FEES.

¶ 5 C. WHETHER THE TRIAL COURT ERRED IN MODIFYING THE PARTIES PROPERTY DIVISION.

¶ 6 STATEMENT OF THE CASE

¶ 7 Plaintiff/Appellant (hereinafter referred to as "Cheryl") and Defendant/ Appellee (hereinafter referred to as "Ken"), signed a Legal Separation Agreement/Property Settlement Agreement on May 10, 2002. Register of Actions, Entry 12, Appellant's Appendix at p. 1. The trial court signed the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment on May 2, 2005, which was entered on May 4, 2005. Register of Actions, Entry 56. Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment was entered by the Court on May 4, 2005. Register of Actions, Entry 57.

¶ 8 Ken submitted a Notice of Motion and Motion to Modify Judgment which was filed on November 2, 2010. Register of Actions, Entry 153. Ken's motion requested the Court to eliminate his obligation (as set forth in paragraph 9 of the Judgment entered on May 4, 2005) to pay spousal support to Cheryl, and to eliminate Ken's obligation (as set forth in paragraph 13 of the Judgment entered on May 4, 2005) to provide health insurance for Cheryl and to pay all of Cheryl's non-covered medical costs. Register of Action, Entry 153.

¶ 9 Cheryl submitted an Affidavit and Brief in opposition to Ken's motion. Register of Actions, Entries 157, 158.

¶10 A hearing was held before the trial Court on April 11, 2011 and continued for a second day on May 12, 2011. Register of Action, Entry 160.

¶11 Findings of Fact, Conclusions of Law and Order for Second Amended Judgment were entered on June 9, 2011. Register of Action, Entry 216.

¶12 A second Amended Judgment was entered on July 5, 2011. Register of Action, Entry 217.

¶13 Cheryl submitted a Notice of Motion and Motion and supporting Brief to Amend Findings of Fact and Order for Judgment and for New Hearing, which was filed on July 8, 2011. Register of Action, Entry 220.

¶14 Ken submitted a Response to Cheryl's motion to Amend Findings of Fact and Order for Judgment and for New Hearing, which was filed on July 21, 2011. Register of Action, Entry 223.

¶15 The Court entered an Order Denying Plaintiff's Motion to Amend Findings of Fact and Order for Judgment and for New Hearing on August 3, 2011. Register of Action, Entry 225.

¶16 Cheryl filed her Notice of Appeal regarding the Findings of Fact, Conclusions of Law and Order for Second Amended Judgment dated June 1, 2011, the Second Amended Judgment dated July 5, 2011 and the Order Denying Plaintiff’s Motion dated August 2, 2011 on August 10, 2011.

¶17 STATEMENT OF FACTS

¶18 From the date of the divorce on May 4, 2005 to July 16, 2010, Ken was working at Bobcat Company (hereinafter Bobcat). Tr(1) p. 69. The Defendant admits that he stole some property from Bobcat, got caught, was fired from Bobcat which led to the elimination of his income from Bobcat, and this was a result of his self-induced actions. Tr.(1), pp. 114, 115, 118, 120, 136; Tr. (2) pp. 80, 121, 129; register of Actions, Entry 181.

¶19 Specifically, on July 16, 2010, Ken met with Bobcat representatives, Dan Jacobson, Christopher Ferderer and Donnie Herbst. Tr.(1) pp. 11, 113. The representatives from Bobcat showed Ken a video tape which showed Ken opening up a fire exit door and placing an item (which was not wood or cardboard) outside the door. Tr.(1) pp. 12, 114; Register of Actions, Entry 181. The video tape also showed Ken returning after he had clocked out after closing and coming back and picking up that very item. Tr.(1) pp. 12, 114; Register of Actions, Entry 181.

¶20 Ken admitted to what he had done, and further, admitted that he was aware of the policy regarding the removal of items from Bobcat. Tr.(1) pp. 13, 114; Register of Actions, Entry 181. Ken admitted that he was aware that Bobcat policy only allowed the removal of cardboard and wood through the guard shack after following proper procedure. Tr.(1) pp. 13, 115; Register of Actions, Entry 181. Ken admitted that his actions were self-induced. Tr. (1) p. 114; Register of Actions, Entry 181.

¶21 Ken admitted to the contents of Plaintiff's Exhibit 1, which was Donnie Herbst's notes from that very meeting. Tr.(1) p. 115; Register of Actions, Entry 172. Donnie

Herbst's notes set forth the following:

> I explained that the only way that anything is allowed to leave the factory is through the guard shack and with the proper paper work and the only items allowed out currently were cardboard and wood. Ken shook his head that he knew that was the policy. I explained that it was clear that he set it out and checked out and went back to get it. He agreed what he did was wrong.

Register of Actions, Entry 172.

¶22 Ken admitted that what he had done was wrong as he had received and knew about the Notice of Current Scrap Procedures dated October 22, 2010, which specifically outlined the procedures for removing only wood and cardboard from the Bobcat facility. Tr.(1) pp. 116; Register of Actions, Entry 181. Said Notice specifically provides, in relevant part, the following:

> ... you may not remove any material through any access point other than the north guard shack! This is the only position manned at all times. Any employee found to be in violation of this policy would be subject to discipline up to and including termination...

Register of Actions, Entry 173.

¶23 Ken was given a letter from Donnie Herbst which stated that Ken violated Plant Rule 29 identified as "Theft or misappropriation of property of employees, vendor or the Company" and Ken was placed on a 5 day suspension as a result of his actions. Tr.(1) pp. 15, 119; Register of Actions, Entry 174. Within said letter, Ken was asked to provide any additional information to be considered prior to Bobcat making a final decision. Tr.(1) pp. 15, 16, 119; Register of Actions, Entry 174.

¶24 Ken drafted his own response to Bobcat in a letter dated July 22, 2010. Tr.(1) pp.

16, 119, Register of Actions, Entry 176. Ken's response states the following:

> I received your certified letter today, July 21, 2010, and have read it. You asked for information that I wish to be considered before you make your decision. I made a mistake, I removed an item from the trash dumpster and took it home without going through company policy... I respectfully ask that Bobcat gives me another chance to further my employment with them. I also take this time to apologize for the position I have put you in.

Register of Actions, Entry 176; tr.(1) pp. 16, 119.

¶25 Donnie Herbst wrote a letter back to Ken on July 23, 2010. Tr. (1) pp. 17, 120; Register of Actions, Entry 175. Within that letter, Bobcat concluded that Ken had violated Plant Rule 29 for his "Theft or misappropriation of property" and was terminated. Tr.(1) pp. 17; Register of Actions, Entry 175.

¶26 Ken admitted that "based upon your self-induced actions Bobcat fired you" and furthermore, that "because of your self-induced actions your income was eliminated". Tr.(1) p.120, Register of Actions, Entry 181. Donnie Herbst even testified that the reason that Ken was terminated was a result of his own self-induced actions. Tr.(1) p. 32.

¶27 Ken then contacted his Union to see if they could do anything for him. Tr.(1) p.120, Register of Actions, Entry 181. Ken then submitted a grievance to Bobcat through his Union. Tr. (1) p. 18, 121, Register of Actions, Entry 177. The Union's position was that the "discipline was too severe, reduce discipline, return Ken to work and make him whole in every way". Tr. (1) p. 18, 121, Register of Actions, Entry 177.

¶28 Bobcat considered the Union's request and issued a Third Step Grievance Review and Disposition letter to Ken on August 12, 2010. Tr. (1) p. 18, 121, Register of Actions, Entry 178. Said disposition letter provides, in relevant part, as follows:

> Company Disposition:
> There is no doubt that Ken violated plant rule number 29 as shown on video surveillance. Postings dated October 22, 2008 clearly define the process for removing "scrap" from the facility. Ken admitted to knowing the correct process and yet deliberately ignored this process when removing an antenna from the premises. (Which by current policy would not have been allowed at all, again Ken admitted to knowing this.) Bobcat has zero tolerance for theft and unfortunately Ken's actions clearly show Ken took an item he knew he was not authorized to remove and completely ignored the acceptable process, for this reason I believe Ken's termination must stand. However in order to resolve this grievance, on a non-precedent setting basis I would be willing to allow Ken to reapply for a position currently available to the public (material handler, assembler, fab operator, sheer operator, or welder). Ken would be subject to the same requirements as any other newly hired employee and upon completion of the probationary period he would be assigned a seniority number following contract guidelines, the same as any other newly hired employee. As per pension plan 27 Ken would continue to be vested as his separation would be less then the time required for completion of a new vesting period.

Tr. (1) p. 18, 19, 121, Register of Actions, Entry 178.

¶29 Ken admitted that he knew the correct process for removing scrap and that he voluntarily violated the process anyway. Tr. (1) p. 120; Register of Actions, Entry, 181.

¶30 Bobcat offered Ken the opportunity to re-apply for positions which were available. Tr. (1) pp. 19, 121; Register of Actions, Entry, 181. At that time, positions were available in the material handler department, assembler department, fab operator department, shear operator department and welding department. Tr. (1) pp. 19, 121; Register of Actions, Entry, 181.

¶31 Ken admitted that he had worked in the areas of fab operator and welding and that he was a certified welder as he had primarily done welding most of his life. Tr. (1) pp.

19, 122; Register of Actions, Entry, 181.

¶32 Donnie Herbst testified that there were positions in the material handling department, welding department and assembling department that had the same or similar type of work or demand for labor that Ken had been performing in the maintenance department. Tr. (1) pp. 20-22.

¶33 Donnie Herbst further testified that as a material handler, it was not labor intensive as 90% of your time was moving materials by driving a fork lift. Tr.(1) p. 21. He further testified that some of the assembly positions were light assembly, but could be heavier depending upon any restrictions that an employee may have. Tr.(1) p. 21. He also testified that fab operations is performing small press work, typically lifting parts that are 10 pounds or less. Tr.(1) p. 22. He also testified that maintenance (which is where Ken was working at the time he was terminated) was considered their most severe labor department. Tr.(1) p. 41. He further testified that Ken had no physical restrictions and that there wasn't anything physically preventing Ken from doing work in any of the areas of Bobcat that had open positions. Tr.(1) p. 21, 22. Ken confirmed that he had no physical disabilities, that he was healthy, able bodied and a hard worker. Tr.(1) p. 129.

¶34 Donnie Herbst testified that, as part of the agreement with the Union, all Ken had to do was reapply and pass the drug test and he would been offered a position in any one of the five areas in the plant where there were currrently open positions. Tr.(1) p. 23, 24.

¶35 Donne Herbst further testified that Ken would be placed on a 60 probationary period, receive a new seniority number and be paid 70% of his full time wage during his probationary period (60 days) associated with the classification which the employee

worked. Tr.(1) p. 24. Donnie Herbst further testified that If Ken had applied for a welding position (which was available at that time) he would have been paid $16.10 per hour during his 60 day probationary period and $21.70 per hour after his 60 day probationary period. Tr.(1) p. 28, 126.

¶36 Ken admitted that he knew that he could have returned to Bobcat but that he voluntarily chose not to go back to Bobcat to work. Tr.(1) pp.123, 125, 126, 136, 146, 191, 192; Tr.(2) p. 80; Register of Actions, Entry 181.

¶37 At the time that Ken was terminated at Bobcat he was earning $22.70 per hour. Tr.(1) p. 28, 127; Register of Actions, Entry 181. Ken would have made only $1.00 per hour less after his 60 day probationary period had he chosen to go back to work at Bobcat. Tr.(1) p. 28, 127; Register of Actions, 181. Ken's pension would have been immediately reinstated upon re-hire, his health insurance would have been reinstated 30 days after his probationary period, his supplemental unemployment account would have been reinstated when he came off probation, his life insurance and his disability and 401(k) would have come back on the anniversary date of his re-hire Tr.(1) p. 24-26, 123. Ken chose to voluntarily give up all of these benefits. Tr.(1) pp.123, 125, 126, 136, 146, 191, 192; Tr.(2) p. 80; Register of Actions, Entry 181.

¶38 From the time that Ken voluntarily chose not to go back to work at Bobcat (August 12, 2010) to the time that Donnie Herbst testified (April 11, 2011), there were two maintenance positions that came available in the maintenance department. Tr.(1) p. 31. Ken was concerned that he would not be able to return to maintenance right away as he would have a new seniority number, however, Ken testified that he had previously

beat out 94 other people (many of whom had higher seniority numbers) for a maintenance position because he had scored 95% on a maintenance test which was one of the highest test scores. Tr. (1) p. 124-5.

¶39 Despite Ken's admission that it was feasible for him to go back to Bobcat and reapply for his position so that he could keep that job and a second job at Swanson Apartments, he took a job through an employment agency known as Preference Personal working at Trail King located in Fargo, North Dakota (on August 10, 2010), earning $14.00 per hour during his 90 day probationary period and $14.50 per hour after his probationary period, resulting in an annual income of approximately $30,000. Tr.(1) p. 54, 59; Tr. (2) p. 63; Register of Actions, Entry 181. Ken further testified that

¶40 Ken testified that overtime work at Bobcat was pretty much endless. Tr.(1) p. 128. Ken's last payroll check at Bobcat revealed that he had earned $42,228.02 through July 9, 2010 and he confirmed that he was on a pace to earn $81,000 to $82,000 in 2010. Tr.(1) p. 132; Tr.(2) p. 79, 132; Register of Actions, Entry 180. Ken further testified that he had $1,300 to $1,500 of disposable income, after he paid his Court ordered obligations to Cheryl. Tr.(1) p. 150.

¶41 Ken further testified that, while he was employed at Bobcat, he had a second job at Swanson Apartments in Gwinner, North Dakota where he received one-half free rent in the amount of $237.50 per month, plus additional earnings at the rate of $12.50 per hour, which both totaled approximately 6-7 thousand dollars a year. Tr. (1) p. 135, 141. Ken admitted that he voluntarily quit his job at Swanson apartments and moved to Fargo. Tr.(1) p. 140, 141.

¶42 Ken testified that with his Bobcat income and his Swanson Apartment income, he would have made approximately 86-87 thousand dollars in 2010, but that he voluntarily gave up his Bobcat income and his Swanson Apartment income and his monthly one-half free rent. Tr.(1) pp.123, 125, 126, 136, 146, 191, 192; Tr.(2) p. 80; Register of Actions, Entry 181. Ken confirmed that he was on a pace to earn approximately $51,000 net income just at Bobcat during 2010, which was approximately $21,000 more than Ken's expected entire gross income at Trail King for an entire year. Tr.(1) p. 134, 54, 59.

¶43 Ken admitted that by not going back to work at Bobcat and Swanson Apartments he voluntarily gave up approximately $50,000 in additional income, which was sufficient funds to pay his court ordered obligations to Cheryl. Tr.(2) p. 132, 142, 145. Ken admitted that the only reason he's not paying Cheryl her Court ordered obligations is because he doesn't have the money. Specifically, Ken testified as follows:

¶44 Q: So why should Cheryl pay because you voluntarily chose not to go back to work for Bobcat:

¶45 A: 'Cause I don't have the money to pay her.

¶46 Q: And that's the only reason?

¶47 A: Well, if you don't have the money somebody ain't gettin' paid.

¶48 Q: But you could go back to Bobcat and earn more money if you chose to. Correct?

¶49 A: If I chose to yeah.

¶50 Q: And you're voluntarily choosing not to do so. Correct?

¶51 A: I've made that statement all along.

Tr.(1) p.192.

¶52 Ken further admitted that he had no intentions of leaving Bobcat up until the time he was terminated and admitted that he loved working in maintenance. Tr.(1) p. 167. Ken further testified that he had pre-determined thoughts about leaving Bobcat to reduce his spousal support, that his obligations were an integral part of his agreement with Cheryl, that he was against paying his obligations to Cheryl, that he didn't like paying Cheryl, that he was upset with the Supreme Court's decision and that he had cash stashed at home when he wasn't paying his obligations to Cheryl. Tr.(1) p. 153-155; Tr. (2) p. 71.

¶53 Cheryl testified that she has six jobs, plus taking on additional painting jobs just to make ends meet. Tr.(2) p. 42 Cheryl testified that she was looking for full time employment with benefits but had been unsuccessful. Tr.(2) p. 20. Cheryl's income was $29,462.00 in 2006, 19,825.00 in 2007, $14,337 in 2008, 13,534.00 in 2009, $18,279.00 in 2010 and her expected income in 2011 was 16 to 17,000, which all included payments made by Ken to Cheryl for spousal support of $500.00 per month. Tr. (1) pp. 233-4.

¶54 Cheryl testified that she has no benefits offered through her employment, that her monthly expenses totaled approximately $2,200 per month and her net income per month in the year 2011 was approximately 1,166.00. Tr.(1) p. 263- 264. Cheryl further testified that there was no way that she could make it financially without Ken paying his court ordered obligations. Tr.(1) p. 264. Cheryl testified that she had to spend nearly $5,000 just in the last three months to pay her bills and that there was no way that she could make it financially unless she continued to take money out of the property settlement she received from the divorce. Tr. (2) p. 5, Tr. (1) p. 239.

¶55 Cheryl testified that she was taking a number of prescriptions and had health issues including problems with her feet, cholesterol, hormones, migraines and allergies. Tr. (1) p. 245-246.

¶56 Cheryl submitted a number of exhibits that she received from Ken through discovery which demonstrated that Ken had made multiple purchases for his Harley Davidson, that he had spent a considerable amount of money on alcohol, that he had made multiple cash withdrawels from his accounts, that he had multiple deposits that were not from his Bobcat income. Tr. (1) pp. 254-260; Register of Actions, 187-193.

¶57 Cheryl contacted Ken to inform him how he could save one-hundred dollars on his health insurance premium costs in relation to Cheryl's health insurance premium, but Ken testified that, although he had received the information, he hadn't followed up with it for nearly 7 months. Tr(1) 253-4, 165-6.

¶58 Cheryl testified that her legal fees associated with this matter totaled $8,118.60 and that she had deposition costs in the amount of $536.30. Tr.(2) p. 3-5.

¶59 LAW AND ARGUMENT

¶60 I. WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO ELIMINATE DEFENDANT'S OBLIGATION, AS SET FORTH IN PARAGRAPH 9 OF THE JUDGMENT ENTERED ON MAY 4, 2005, TO PAY SPOUSAL SUPPORT TO PLAINTIFF, AND ELIMINATING THE DEFENDANT'S OBLIGATION, AS SET FORTH IN PARAGRAPH 13 OF THE JUDGMENT ENTERED ON MAY 4, 2005, TO PROVIDE HEALTH INSURANCE FOR THE PLAINTIFF AND TO PAY ALL OF PLAINTIFF'S NON-COVERED MEDICAL COSTS.

¶61 A. THE STANDARD OF REVIEW.

¶62 The district court's determination whether there has been a material change in circumstances warranting modification of spousal support is a finding of fact and will be set aside on appeal only if it is clearly erroneous. Lohstreter v. Lohstreter, 623 N.W. 2d 350.

¶63 B. STIPULATED SPOUSAL SUPPORT AWARDS SHOULD BE CHANGED WITH GREAT RELUCTANCE AND ONLY UPON A SHOWING OF A MATERIAL CHANGE OF CIRCUMSTANCES.

¶64 In the 2006 case of Rothberg v. Rothberg, 2006 ND 65, the Supreme Court stated the following:

> When the original divorce judgment includes an award of spousal support, the district court retains jurisdiction to modify the award. N.D.C.C. § 14-05-24.1; Gibb v. Sepe, 2004 ND 227, ¶ 7, 690 N.W.2d 230; Stanley v. Stanley, 2004 ND 195, ¶ 17, 688 N.W.2d 182. 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. Gibb, at ¶¶ 7-8; Schmalle v. Schmalle, 1998 ND 201, ¶ 12, 586 N.W.2d 677. The district court's determination whether there has been a material change in circumstances warranting modification of spousal support is a finding of fact and will be set aside on appeal only if it

> is clearly erroneous. Gibb, at ¶ 7; Lohstreter v. Lohstreter, 2001 ND 45, ¶ 10, 623 N.W.2d 350.
>
> 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. Gibb, 2004 ND 227, ¶ 7, 690 N.W.2d 230; Schmalle, 1998 ND 201, ¶ 12, 586 N.W.2d 677. 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. Lohstreter, 2001 ND 45, ¶ 13, 623 N.W.2d 350; Schmalle, at ¶ 12. Not every change in the parties' financial circumstances justifies modification of spousal support, and no modification is warranted when the change is self-induced. Lohstreter, at ¶ 13. This Court encourages agreements between divorcing parties, and stipulated spousal support awards should be changed only with great reluctance. Gibb, at ¶ 8; Toni v. Toni, 2001 ND 193, ¶ 11, 636 N.W.2d 396.

Rothberg, 2006 ND 65.

¶65 Pursuant with the foregoing, the District Court retains jurisdiction to modify spousal support awards. Id. The Defendant bears the burden of proving a material change in the financial circumstances of the parties warranting a change in the amount of the support. Id. The trial court must assess whether a change has occurred, and if so, the reasons for changes in the parties' income or needs must be examined. Id. The court must examine whether such changes were contemplated by the parties at the time of the initial decree and no modification is warranted when the change is self-induced and stipulated spousal support awards should be changed only with great reluctance. Id.

¶66 In this case, the Cheryl and Ken entered into a Legal Separation Agreement/ Property Settlement Agreement dated May 10, 2002, which was incorporated into the

Judgment dated May 4, 2005. The Court has repeatedly held that agreements between divorcing parties should only be changed with great reluctance. Gibb v. Sepe, 2004 ND 227; Toni v. Toni, 2001 ND 193; Eberhart v. Eberhart, 301 N.W.2d 137, 143 (N.D. 1981), quoting Bryant v. Bryant, 102 N.W.2d 800, 807 (N.D. 1960).

¶67 Since the parties entered into a voluntary agreement, this Court should take great reluctance in modifying the parties' agreement.

¶68 C. NO MODIFICATION IS WARRANTED WHEN THE CHANGE IS SELF-INDUCED.

¶69 In the case of Muehler vs. Muehler, 333 N.W.2nd 432 (N.D. 1983), the Supreme Court set forth the trial court's duties with respect to determining whether an obligor's spousal support obligation should be modified. Specifically, the Supreme Court stated the following:

> This Court has often held that a material change in circumstances of the parties must be shown by the moving party before a modification of a divorce decree is proper. Eberhart v. Eberhart, 301 N.W.2d 137 (N.D. 1981) [modification of spousal support]; Corbin v. Corbin, 288 N.W.2d 61 (N.D. 1980) [modification of child support]; Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976) [modification of spousal support]. A fact finding process implementing Rule 52(a), North Dakota Rules of Civil Procedure, is necessary before it can be determined that a material change in circumstances has occurred. Becker v. Becker, 262 N.W.2d 478 (N.D. 1978). In Bingert v. Bingert, 247 N.W.2d at 467, we said:
>
> > "We believe that a 'change in circumstances,' in the context of consideration of a motion to reduce alimony, means a change which affects the financial abilities or needs of one party or the other, and not a change which indicates an increase

> or decrease in the rectitude of the conduct of one party or the other or an change which might have affected the grounds for divorce if it had occurred prior to the decree."

A determination that a change in circumstances has occurred is not an end in itself but triggers the further inquiry to determine what brought about the change. The type of change will govern the further inquiry. If it involves spousal or child support, or both, the basic inquiry is: Has a substantial change in the financial ability of the payer occurred? If yes, what was or is the underlying cause? Was it self-induced or is it the result of economic conditions, or has the payer become physically or mentally disabled, or did the payer incur new or additional financial obligations and, if so, were they voluntarily assumed or were they imposed by other factors?

If the change relates to or involves the person receiving spousal or child support, then further inquiry is necessary to determine what brought about the change. Did the earnings of the payee-spouse increase, and if so, what brought about the increase? Was it the result of extra work, such as a double shift or extra hours? If yes, then further inquiry is necessary to determine if the extra work was voluntarily undertaken to provide luxuries or to provide the necessities of life to avoid seeking public or governmental assistance? If it was the latter, then it is necessary to determine what brought about the situation. Was it the result of not receiving the payments from the payer-spouse, or were the payments inadequate because of a change in economic conditions?

Within these concepts, consideration must be given to whether or not the change in circumstances was contemplated at the time of the original divorce decree or previous modifications. The legal concept of "change in circumstances," as used in divorce matters, is closely tied to equity and contemplates the applications of equitable principles.

The foregoing are only examples of the additional questions that need to be answered if it is determined that a change in circumstances occurred. The nature of the change

will dictate the further specific inquiries that must be made.

Generally, a self-induced change in circumstances does not constitute valid grounds for modification. Volume 27A C.J.S., Divorce, § 239 (1959) at page 1133, states:

> "Generally, the decree will not be modified because of a change of circumstances which was brought about by the act of the person seeking modification..."

The same concept is supported in 24 Am.Jur.2d, Divorce and Separation, § 677 (1966), at page 795:

> "Where the modification is sought by the husband, it should be made to appear that he himself has not caused or contributed to the existence of the grounds whereon the alternation is sought. A self-induced decline in the husband's income does not, in the absence of a substantial showing of good faith or cause therefor, constitute such an exceptional change in circumstances as to afford the required basis for modifying an alimony award."

Volume 24 Am.Jur.2d, Divorce and Separation, § 680 (1966), at page 798, states:

> "Assuming that a reduction in payments is proper where the wife has secured employment, the court will not ordinarily reduce the payments in the exact amount of her earnings, for that would take away her incentive to work. If the improvements in the wife's earnings is only temporary, the court may refuse to consider it a ground for reducing alimony."

These concepts have been generally followed by our Court in Bridgeford v. Bridgeford, 281 N.W.2d 583 (N.D. 1979) [change in financial circumstances of wife because of increased income did not justify reduction of spousal support because wife's reasonable monthly expenditures

> exceeded her monthly income]; Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976) [increase in income because wife took second job babysitting to supplement earnings during period when spousal support was not paid was not entitled to favorable judicial recognition for spousal support]; and Foster v. Nelson, 206 N.W.2d 649 (N.D. 1973) [change of condition voluntarily assumed by a divorced husband by remarriage did not authorize a modification of child support payments in the divorce decree].
>
> The underlying legal principle governing change in circumstances affecting child or spousal support payments is equity, which necessarily brings into focus the concept that he who seeks equity must do equity. Changes in circumstances which make it equitable to reduce or increase spousal or child support are entitled to judicial recognition.
>
> In all of these matters both the constitutional rights of the children and of the parents must be considered and balanced. To accomplish this, courts have the authority to employ contempt powers to compel compliance with its orders. NDCC § 14-08-07.

Muehler v. Muehler, 333 N.W.2d 432 (N.D. 1983).

¶70 Pursuant with the foregoing, this Court must make inquiry as to what was the underlying cause of Ken's change in his income, i.e., was it self-induced, the result of economic conditions, physical or mental disability, additional financial obligations, etc.

¶71 A self-induced change in circumstances does not constitute valid grounds for modification. Id; Lipp v. Lipp, 355 N.W.2d 817 (N.D. 1984); Huffman v. Huffman, 477 N.W.2d 594, 597 (N.D. 1991); Wheeler v. Wheeler, 419 N.W.2d 923 (N.D. 1988); Mahoney v. Mahoney, 516 N.W.2d 656 (N.D.Ct.App. 1994); Schmitz v. Schmitz, 622 N.W.2d 176 (N.D. 2001); Meyer v. Meyer, 679 N.W.2d 273 (N.D. 2004); Lohstreter v. Lohstreter, 2001 N.D. 45, ¶ 10; Rothberg v. Rothberg, 711 N.W.2d 219 (N.D. 2006).

¶72 Ken admitted that he stole some property from Bobcat, got caught, was fired from Bobcat which led to the elimination of his income from Bobcat, and this was a result of his self-induced actions. Tr.(1), pp. 114, 115, 118, 120, 136; Tr. (2) pp. 80, 121, 129; Exh. 10, pp. 8, 9, 15, 33; Register of Actions, Entry 181. Ken further admitted that he knew that he could have returned to Bobcat but that he voluntarily chose not to go back to Bobcat to work. Tr.(1) pp.123, 125, 126, 136, 146, 191, 192; Tr.(2) p. 80; Register of Actions, Entry 181.

¶73 Ken confirmed that he had no physical disabilities, that he was healthy, able bodied and a hard worker. Tr.(1) p. 129; Tr. (2) p. 79.

¶74 Ken did not have offer any good faith or cause for self-reducing his income, rather, simply stated that he had never stolen from Bobcat before and that he didn't think that he should have gotten fired. Tr. (2) p. 129.

¶75 Even though Ken claims that he didn't anticipate getting fired from taking an item from Bobcat, Ken was offered employment at Bobcat even after he was terminated. Tr. (1) p. 19, 122-3. Ken would only have been placed on probation for 60 days at which time he could have returned to work for just one dollar per hour less than he was making before he was terminated. Tr. (1) p. 24, 122-23, 130.

¶76 However, Ken chose to work at Trailking earning substantially less than he did at Bobcat, and furthermore, voluntarily gave up his second job at Swanson Apartments where he gave up receiving one-half month free rent and additional earnings at the rate of $12.00 per hour. Tr. (1) p. 139-42; Tr. (2) p.78. Specifically, Ken admitted to giving up approximately $55-60 thousand dollars per year in income by voluntarily not going back

to Bobcat and Swanson Apartments. Tr.(2) p. 81. Ken admitted that he was on a pace to earn nearly $81,000 at Bobcat in 2010, plus another 6-7 thousand dollars per year at Swanson apartments, yet took a job at Trailking earning $30,000 per year. Tr. (1) p. 59, 141; Tr.(2) p.79. Ken consistently maintained that he knew that he could have returned to Bobcat but that he voluntarily chose not to go back to work at Bobcat Tr.(1) pp.123, 125, 126, 136, 146, 191, 192; Tr.(2) p. 80; Register of Actions, Entry 181.

¶77 The trial court's finding that Ken's reduction in income was not voluntary, self-induced or made in bad faith is in direct conflict with Ken's own testimony. Ken repeatedly testified throughout his deposition and at the trial that he had taken some property from Bobcat, got caught, was fired from Bobcat which led to the elimination of his income from Bobcat and this was all the result of his self-induced actions, and furthermore, voluntarily chose not to go back to work at Bobcat. Tr.(1), pp. 114, 115, 118, 120, 123, 125, 126, 136, 146, 191, 192; Tr. (2) pp. 80, 121, 129; Register of Actions, Entry 181. The Court's Finding that Ken's reduction in income was not voluntary, self-induced or made in bad faith is clearly erroneous.

¶78 The Court's finding that Ken's reduction in income was not foreseeable, once again, is in direct conflict with Ken's testimony. Ken admitted that what he had done was wrong as he had received and knew about the Notice of Current Scrap Procedures dated October 22, 2010, which specifically outlined the procedures for removing only wood and cardboard from the Bobcat facility. Tr.(1) pp. 116; Register of Actions, Entry 181. The Notice specifically provides that

> " ... you may not remove any material through any access point other than the north guard shack! This is the only

> position manned at all times. Any employee found to be in violation of this policy would be subject to discipline up to and including termination..." Register of Actions, Entry 173.

¶79 Ken's admission that he had received the Notice, and knew the contents of the Notice, is in direct conflict with the Court's Finding that it was unforeseeable that Ken would be fired for violating Bobcat's scrap removal policy. Not only that, if Ken could remove the item from Bobcat, why didn't he just walk out the front door with it. Instead, he hid the item outside the fire door, then went back for it after he had clocked out for the day. Tr. (1) p. 12, 114-8. Ken testified that he didn't know that there was a videotape at this very door, and after he got caught, admitted that what he had done was wrong. Tr.(1) p. 115, 118; Register of Actions, Entry 176. Ken also admitted that he knew he wasn't supposed to take items from Bobcat but did it anyway. Tr. (2) p. 121. The Court's Finding that Ken's reduction in income was not foreseeable is clearly erroneous.

¶80 The Court's Findings that there has been a material change of circumstances and Ken's ability to pay spousal support, health insurance, dental insurance and non-covered medical expenses has been eliminated as a result of his reduction in income is also clearly erroneous as the Court totally disregarded Ken's repeated testimony that his reduction in income was self induced and that the elimination of his income was voluntary. Tr.(1), pp. 114, 115, 118, 120, 123, 125, 126, 136, 139, 140, 146, 191, 192; Tr. (2) pp. 80, 121, 129; Register of Actions, Entry 181. The trail court also disregarded Ken's testimony that, had he stayed at Bobcat, he would have had sufficient income to pay his court ordered obligations to Cheryl. Tr. (1), p. 142, 150.

¶81 The Court further found that Cheryl has the ability to cover her monthly expenses

and that there was no need for ongoing support from Ken. However, Cheryl's submitted her income and expense information which clearly demonstrated that her gross income for 2011 was expected to be 16-17,000, resulting in a monthly net of $1,166.00, but having monthly expenses of approximately $2,200.00. Tr. (1) p. 233, 240. Cheryl further presented evidence that for the five months after Ken stopped paying his court ordered obligations, she had to use $5,000 from her property distribution just to pay her bills. Tr.(1) 239. The Court's Finding is clearly erroneous.

¶82 II. WHETHER THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF ATTORNEYS FEES.

¶83 A. STANDARD OF REVIEW.

¶84 An award of attorney fees under N.D.C.C. § 14-05-23 lies within the sound discretion of the district court and will not be set aside on appeal absent an abuse of discretion. Oldham v. Oldham, 2004 ND 62, ¶ 16, 677 N.W.2d 196. A district court abuses its discretion if it misinterprets or misapplies the law. Bertsch v. Bertsch, 2006 ND 31, ¶ 8, 710 N.W.2d 113.

¶85 B. DEFENDANT'S ACTIONS AND ABILITY TO PAY AND PLAINTIFF'S NEED.

¶86 In deciding whether to award attorney fees under N.D.C.C. § 14-05-23, the court must balance the parties' financial needs and ability to pay. Litoff v. Pinter, 2003 ND 172, ¶ 19, 670 N.W.2d 860. In assessing the parties' needs and ability to pay, the court should consider the property owned by each party, their relative incomes, whether property is liquid or fixed assets, and whether the actions of either party unreasonably

increased the time spent on the case. Dvorak v. Dvorak, 2005 ND 66, ¶ 32, 693 N.W.2d 646. The district court's decision will not be interfered with by this court unless it is affirmatively established that the district court has abused its discretion. Bohnenkamp v. Bohnenkamp, 253 N.W.2d 439 (N.D.1977); Halla v. Halla, 200 N.W.2d 271 (N.D.1972).

¶87 Cheryl presented evidence that her attorney's fees regarding this matter totaled $8,118.60. Tr. (2) p. 4, Register of Actions, Entry 194. Cheryl also presented evidence of her deposition costs, which totaled $536.30. Tr. (2) p. 5, Register of Actions, Entry 198. Cheryl testified that without utilizing her property settlement award, she has no funds within which to pay those fees as her monthly net income was $1,166.00 and her monthly expenses totaled $2,200.00. Tr. (2) p. 5; Tr. (1) p. 233, 240.

¶88 Ken admitted that by not going back to work at Bobcat and Swanson Apartments he voluntarily gave up approximately $50,000 in additional income, which was sufficient funds to pay his court ordered obligations to Cheryl. Tr.(2) p. 132, 142, 145. He further testified that he had $1,300 to $1,500 of disposable income, after he paid his Court ordered obligations to Cheryl. Tr.(1) p. 150. Ken also has a pension at Bobcat and retirement funds in the amount of $45,000. Tr. (1) p. 262.

¶89 The Court's denial of Cheryl's request for attorneys fees and costs was clearly erroneous.

¶90 III. WHETHER THE TRIAL COURT ERRED IN MODIFYING THE PARTIES PROPERTY DIVISION.

¶91 A. THE STANDARD OF REVIEW

¶92 Division of property in a divorce action is treated as a finding of fact and will not

be set aside on appeal unless it is clearly erroneous. Schmidt v. Schmidt, 325 N.W. 2d 230 (N.D. 1982).

¶93 B. COURT'S CANNOT MODIFY PROPERTY DIVISION

¶94 Ken's court ordered obligations set forth in Paragraph 3 of Exhibit III of the parties Legal Separation Agreement/Property Settlement Agreement dated May 9, 2002, which was incorporated into paragraph 13 of the Conclusions of Law of the Judgment and Decree dated May 2, 2005 are part of the parties property division and cannot be modified by the Court.

¶95 As set forth in in the case of Wastvedt vs. Wastvedt, 371 N.W. 2d 142 (N.D. 1985),

> It is well settled in North Dakota that the final distribution of property which has been decreed by a Court is not modifiable other than in the same manner and on the same grounds as other Judgments. Section 14-05-24, N.D.C.C.; Wikstrom vs. Wikstrom, 359 N.W. 2nd 821, 823 (N.D. 1984); Harwood vs. Harwood, 283 N.W. 2nd 144, 146 (N.D. 1979); Nastrom vs. Nastrom, 262 N.W. 2nd 487, 490 (N.D. 1978); Sabot vs. Sabot, 187 N.W. 2nd 59, 62 (N.D. 1971): Dietz vs. Dietz, 65 N.W. 2nd 470, 474 (N.D. 1954); Sinkler vs. Sinkler, 194 N.W. 817, 820 (1923).

Wastvedt at 144.

¶96 Ken's Court ordered obligation to provide Cheryl with health insurance, pay for all of her non-covered health related costs and pay for and keep in existence all life insurance policies is in separate paragraphs than Ken's obligation to pay spousal support/alimony. Specifically, Ken's obligation to pay health insurance is set forth in paragraph 3 of the Exhibit III of the parties Legal Separation Agreement/Property Settlement Agreement dated May 9, 2002, which was incorporated into paragraph 13 of

the Judgment and Decree dated May 4, 2005. Ken's spousal support obligation is set forth in paragraph 7 of Exhibit III of the parties Legal Separation Agreement/Property Settlement Agreement dated May 9, 2002, which was incorporated into paragraph 9 of the Judgment and Decree dated May 4, 4005. The separation of Ken's obligations evidences that these were not spousal support, rather, part of the parties property division.

¶97 In addition, in Redlin vs Redlin, 436 N.W. 2nd 5 (N.D. 1989), the Supreme Court discerned whether an amount paid by one spouse to the other is a property division or spousal support. Id. The Supreme Court stated that one of the factors that indicate that the payments are distribution of property is if the payments continue even after the obligee remarries. Id., (citing) Nugent vs. Nugent, 152 N.W. 2nd 232 (N.D. 1967). Ken's obligation to pay Cheryl's health insurance, non-covered health related costs and life insurance premiums continues after Cheryl's remarriage. Contrary, Ken's spousal support obligation specifically provides that said payments shall continue each and every month until "the wife shall remarry or die, which ever first occurs."

¶98 In Redlin, the Supreme Court indicated that one of factors which may indicate the amount paid is spousal support includes payments that terminate upon the obligees death or remarriage. Id., citing , Coulter vs. Coulter, 328 N.W. 2nd 232 (N.W. 1982). Once again, Ken's obligation to pay these obligations does not cease upon Cheryl's remarriage. Ken's obligation to pay spousal support to Cheryl does cease upon Cheryl's remarriage.

¶99 Accordingly, in regard to Ken's obligation to pay Cheryl's health insurance premiums, non-covered health related costs and keep all life insurance premiums in

existence, the trial court's decision was clearly erroneous.

¶100 CONCLUSION

¶101 The trial court erred in granting Ken's motion to eliminate his court ordered obligations, failed to award Cheryl any attorneys fees and modified the parties property settlement award, which was clearly erroneous. Cheryl should also be awarded her costs in this appeal.

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