

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

---

Vineca Ann Peterson,  Plaintiff/Appellee,  vs.  Robert Lee Peterson,  Defendant/Appellant.	<b>SUPREME COURT NO. 20150363</b>  Ward County District Court Civil No. 51-96-C-00017
--	--

---

ON APPEAL FROM ORDER ENTERED NOVEMBER 28, 2015

STATE OF NORTH DAKOTA  
WARD COUNTY DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT  
HONORABLE TODD L. CRESAP

---

**APPELLANT'S BRIEF**

---

James M. Cailao (#07086)  
[jcailao@vogellaw.com](mailto:jcailao@vogellaw.com)  
**VOGEL LAW FIRM**  
218 NP Avenue  
PO Box 1389  
Fargo, ND 58107-1389  
Telephone: 701.237.6983

ATTORNEYS FOR DEFENDANT/APPELLANT

**TABLE OF CONTENTS**

	<u>Paragraph</u>
Statement of Jurisdiction .....	1
Statement of the Issues Presented for Review.....	2
Statement of the Case .....	5
Statement of Facts .....	6
Law and Argument .....	18
I.    The District Court Erred When It Granted Vineca’s Motion for Contempt. ....	18
II.   The District Court Erred When It Concluded There Had Been No Material Change In Circumstances Sufficient to Modify Lee’s Ongoing Spousal Support Obligation. ....	23
III.  The District Court Erred When It Awarded Attorney’s Fees to Vineca.....	34
Conclusion.....	19

## TABLE OF AUTHORITIES

### Paragraph

#### Cases

<u>Amsbaugh v. Amsbaugh,</u> 2004 ND 11, 673 N.W.2d 601 .....	35
<u>BeauLac v. BeauLac,</u> 2002 ND 126, 649 N.W.2d 210 .....	18
<u>Bertsch v. Bertsch,</u> 2006 ND 31, 710 N.W.2d 113 .....	34
<u>Boeckel v. Boeckel,</u> 2010 ND 130, 785 N.W.2d 213 .....	34
<u>Christianson v. Christianson,</u> 2003 ND 186, 671 N.W.2d 801 .....	31
<u>Crandall v. Crandall,</u> 2011 ND 136, 799 N.W.2d 388 .....	24
<u>Eberle v. Eberle,</u> 2009 ND 107, 766 N.W.2d 477 .....	34
<u>Fischer v. Fischer,</u> 139 N.W.2d 845 (N.D. 1966).....	24
<u>Flattum-Riemers v. Flattum-Riemers,</u> 1999 ND 146, 598 N.W.2d 499 .....	18, 20
<u>Heinle v. Heinle,</u> 2010 ND 5, 777 N.W.2d 590 .....	34
<u>Huffman v. Huffman,</u> 477 N.W.2d 594 (N.D. 1991).....	26
<u>In re Guardianship of D.M.O.,</u> 2008 ND 100, 749 N.W.2d 517 .....	35
<u>Lorenz v. Lorenz,</u> 2007 ND 49, 729 N.W.2d 692 .....	24

<u>Mahoney v. Mahoney,</u> 1997 ND 149, 567 N.W.2d 206 .....	26
<u>Martinson v. Martinson,</u> 2010 ND 110, 783 N.W.2d 633 .....	34
<u>Mid-Dakota Clinic, P.C. v. Margaret L. Kolsrud,</u> 1999 ND 244, 603 N.W.2d 475 .....	20
<u>Montgomery v. Montgomery,</u> 2003 ND 135, 667 N.W.2d 611 .....	18
<u>Quamme v. Bellino,</u> 2002 ND 159, 652 N.W.2d 360 .....	28
<u>Ruff v. Ruff,</u> 52 N.W.2d 107 (N.D. 1952).....	24
<u>Sack v. Sack,</u> 2006 ND 57, 711 N.W.2d 157 .....	24
<u>Schulte v. Kramer,</u> 2012 ND 163, 820 N.W.2d 318 .....	23, 34
<u>Sommer v. Sommer,</u> 2001 ND 191, 636 N.W.2d 423 .....	25, 28
<u>Terry v. Terry,</u> 2002 ND 2, 638 N.W.2d 11 .....	34
<u>Theis v. Theis,</u> 534 N.W.2d 26 (N.D.1995).....	27
<u>van Oosting v. van Oosting,</u> 521 N.W.2d 93 (N.D.1994).....	27
<u>Wahlberg v. Wahlberg,</u> 479 N.W.2d 143 (N.D. 1992).....	31
<u>Walstad v. Walstad,</u> 2013 ND 176, 837 N.W.2d 911 .....	35
<u>Wheeler v. Wheeler,</u> 419 N.W.2d 923 (N.D. 1988).....	26

Wheeler v. Wheeler,  
548 N.W.2d 27 (N.D. 1996)..... 27

Wold v. Wold,  
2008 ND 14, 744 N.W.2d 541 ..... 25

**Statutes**

N.D. Const. Art. VI § 2 ..... 1

N.D. Const. Art. VI § 6 ..... 1

N.D. Const. Art. VI § 8 ..... 1

N.D.C.C. § 14-05-23 ..... 34

N.D.C.C. § 27-05-06 ..... 1

N.D.C.C. § 28-27-01 ..... 1

## **STATEMENT OF JURISDICTION**

[¶1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6 and N.D.C.C. § 28-27-01.

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

[¶2] Did the District Court err in granting Vineca's Motion for Contempt?

[¶3] Did the District Court err in concluding that there had been no material change in circumstances sufficient to modify Lee's ongoing spousal support obligation?

[¶4] Did the District Court err in awarding attorney's fees to Vineca?

## **STATEMENT OF THE CASE**

[¶5] Appellant/Defendant Robert Lee Peterson (“Lee”) and Appellee/Plaintiff Vineca Ann Peterson (“Vineca”) were divorced by Judgment of the District Court entered March 8, 1996. Appendix (App.) 6-11. On January 31, 2011, Lee motioned to terminate his ongoing spousal support obligation. Doc ID# 29. On March 25, 2011, Vineca cross-motioned to increase Lee’s ongoing spousal support obligation. Doc ID# 39. On November 14, 2011, the District Court issued its Order denying both motions. App. 14-21. On January 27, 2015, Vineca filed a Motion to Find Lee in Contempt for Non-Payment of Spousal Support. Doc ID# 49. On March 9, 2015, Lee filed his resistance to Vineca’s motion for contempt via a Cross Motion to Eliminate or Reduce Spousal Support Obligation. Doc ID# 69. An evidentiary hearing was held on the parties’ competing motions on September 9, 2015. Id. On November 28, 2015, the District Court issued its Order granting Vineca’s motion for contempt and denying Lee’s cross-motion to modify his ongoing spousal support obligation. App. 261-269. Lee now appeals the decision of the District Court. App. 270-272.

## **STATEMENT OF FACTS**

[¶6] Vineca and Lee were divorced by Judgment entered on March 8, 1996. App. 6-11. Pursuant to paragraph VI of the Judgment, Lee was ordered to pay spousal support as follows:

Lee shall pay to Vineca as and for rehabilitative spousal support, the sum of \$1,500.00 per month commencing on the first day of



February, 1996, payable in equal installments on the 1<sup>st</sup> and 15<sup>th</sup> of each month thereafter until Vineca dies or remarries . . . .

App. 9.

[¶7] Vineca and Lee were married for twenty-nine (29) years at the time of their divorce. App. 30. Three children were born from the marriage, all of whom reached the age of majority prior to Vineca and Lee's divorce. Id. As of the date of the evidentiary hearing held on September 9, 2015, Lee was sixty-seven (67) years of age and Vineca was sixty-six (66) years of age. Id.

[¶8] Lee retired from employment on September 30, 2014. Transcript of September 9, 2015 hearing (Tr.) at 57:6-7. Prior to his retirement, Lee was working fifty (50) to eighty (80) hours per week as President of the Temple Economic Development Group (hereafter "Temple"). Tr. At 57:12-14. As he testified to at the evidentiary hearing, Lee's position with Temple entailed significant responsibility and stress; at his current age, it simply was not possible to sufficiently keep up with what was required of him in that role. Tr. 57:24-58:4.

[¶9] Prior to his retirement, Lee had been employed with Temple for nine (9) years. App. 30. Lee earned approximately \$145,000.00 per year at Temple, prior to receiving a bonus plan, whereupon he earned a total of approximately \$180,000.00 to \$200,000.00 per year for the last four (4) or five (5) years of his employment. Id. Prior to Temple, Lee worked for five (5) years as the Commissioner of the North Dakota Department of Commerce, earning approximately \$100,000.00 per year. Id. At the time of his divorce from Vineca

in 1996, Lee was working as the Chief Executive Officer of the Minot Area Development Corporation, earning approximately \$82,000.00 per year. Id.

[¶10] Until his retirement in September 2014, Lee consistently made his spousal support payments in full on the 15<sup>th</sup> of each month, by check, mailed from Lee's employer directly to Vineca. Tr. 60:21-61:6. As Lee testified to at the evidentiary hearing, the money was automatically deducted on the 1<sup>st</sup> of each month and sent to Vineca on the 15<sup>th</sup> of each month. Tr. 60:21-61:6. At the hearing, Vineca did not dispute that Lee timely made his spousal support payments prior to his retirement. In fact, over the course of approximately eighteen (18) years, Vineca received approximately \$300,000.00 in spousal support from Lee. Tr. 18:17-21. Only following his significant decrease in monthly income (a direct result of Lee's retirement and receipt of social security) has Lee been unable to continue making the \$1,500.00 monthly payments to Vineca. App. 34.

[¶11] Since retiring, Lee's income has essentially reduced to social security payments of approximately \$2,273.00 per month. App. 62-71. As Lee testified at the evidentiary hearing, social security is his primary source of income. Tr. 61:11-12.

[¶12] Lee also has an Extraco retirement account, half of which was awarded to Vineca following the parties' divorce. App. 35. As Lee testified to at the evidentiary hearing, the funds from that account were previously utilized to make payment on the Texas and Montana properties owned by Lee and Lee's wife, Jennifer. Tr. 63:15-65:5. Although the Texas home has since been sold, the

Extraco retirement funds are still utilized to make payment on the substantial debt owing on the Montana property. Tr. 63:15-65:5. Additionally, aside from Lee's social security, this account is all that Lee has remaining to pay towards his significant debts (discussed below) and to use for the remainder of his life. App. 31.

[¶13] At the time of his retirement, Lee received \$250,000.00 in deferred income owed by Temple as a CD. App. 32. At the time of the evidentiary hearing, there was \$199,000.00 remaining. Tr. 74:19-25. However, as Lee also testified, \$50,000.00 per year from the CD is used to pay back on loans over the next four years, with an additional \$460.00 per month due on interest. Tr. 75:5-12. Thus, the Temple CD does not represent available income to Lee. Tr. 75:5-12.

[¶14] In the summer of 2015, Lee and Jennifer's home in Texas sold, as Lee and Jennifer were unable to afford maintaining two separate residences. Tr. 42:13-17. After deduction of the amount owing on the home loan, the sale of the Texas home realized approximately \$49,000.00 in net equity. Tr. 44:3-7. As Lee testified to at the evidentiary hearing, this amount was paid directly to Jennifer as repayment for the substantial investments she had made in the property from her own funds, including replacement of the HVAC system, re-painting the home, installation of new carpet, fence repair, and landscaping. Tr. 65:11-21.

[¶15] Lee and Jennifer have since relocated to Lewistown, Montana, where they reside in a Morton Farm Building. App. 32. This home is their only home. Tr. 66:19-21. On September 9, 2009, Lee purchased 38 acres of the Montana

property for \$40,850.00, using funds from his retirement account. App. 72-81. An additional 160 acres was acquired on October 15, 2009, for a purchase price of \$169,850.00. App. 82-83. The Morton Farm Building was erected for \$135,406.00, and required an additional \$131,000.00 to finish. App. 84-103. Lee borrowed \$60,000.00 from Extraco Bank on October 6, 2014, in order to help fund the purchase of the home. App. 104-108. There remains approximately \$120,000.00 owing on the Montana home. App. 32. Additionally, \$30,000.00 is owed on the Promissory Note, with \$20,000.00 having been due at the end of 2015. App. 104-108. As Lee testified to at the evidentiary hearing, J & L Hunting and Habitat, LLC (“J & L”) pays a nominal annual fee (\$600.00) for the land. App. 109-118. J & L began because Lee and Jennifer intend to turn the Montana land into a bird habitat. App. 33. Lee is the President and Jennifer is the Manager of J & L. Id. As evidenced by the tax returns submitted at the September 9, 2015 hearing, J & L has produced annual losses since 2011 (specifically, losses of \$63,439.00 in 2011; \$62,357.00 in 2012; \$22,113.00 in 2013; and \$13,646.00 in 2014). App. 36-41; 201-260.

[¶16] At the time of the evidentiary hearing, Lee’s average monthly expenses totaled approximately \$8,048.29 to \$8,381.29 per month. App. 120. This includes a \$1,119.29 monthly payment to Wells Fargo towards a business loan of \$110,536.30, obtained on April 5, 2015. App. 119.

[¶17] The bank statements submitted by Lee at the hearing evidence the fact that he is simply incapable of continuing monthly spousal support payments of

\$1,500.00 under his current income. The most current balance available for Lee's Wells Fargo checking account at the time of the evidentiary hearing was \$1,687.30. App. 121-169. This included a low balance of \$120.70 in April 2015. Id. The most current balance available for Lee's Extraco checking account at the time of the evidentiary hearing was \$302.91. App. 170-196. This included a low balance of \$175.76 in February 2015. Id.

## LAW AND ARGUMENT

### **I. THE DISTRICT COURT ERRED WHEN IT GRANTED VINECA'S MOTION FOR CONTEMPT.**

[¶18] The North Dakota Supreme Court has outlined the standards for proving civil contempt and for appellate review of the lower court's decision:

In a civil contempt proceeding, a complainant must clearly and satisfactorily show that the alleged contempt has been committed. Civil contempt requires a willful and inexcusable intent to violate a court order. When reviewing a contempt sentence, the ultimate determination of whether or not a contempt has been committed is within the trial court's sound discretion. A trial court's finding of contempt will not be overturned unless there is a clear abuse of discretion. An abuse of discretion occurs when the trial court acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law.

Montgomery v. Montgomery, 2003 ND 135, ¶ 18, 667 N.W.2d 611, 615, quoting BeauLac v. BeauLac, 2002 ND 126, ¶ 10, 649 N.W.2d 210 (quoting Flattum-Riemers v. Flattum-Riemers, 1999 ND 146, ¶ 5, 598 N.W.2d 499).

[¶19] In this case, Lee's non-payment of spousal support has been neither willful nor inexcusable. As Lee testified to at the evidentiary hearing, his monthly income has decreased significantly since his retirement on September 30, 2014. Lee receives social security payments of approximately \$2,273.00 per month. App. 62-71. Lee's monthly expenses – while containing no unreasonable items – are significant. App. 120. These expenses currently surpass Lee's monthly income, even before including his monthly spousal support obligation. Accordingly, the bulk of Lee's only other available monthly income, his Extraco retirement account, is used to pay towards his substantial debts, including his

monthly expenses. App. 35. As indicated above, the Temple CD funds have also been designated to pay towards prior debt. Tr. 75:5-12.

[¶20] Lee's failure to make the full \$1,500.00 monthly payments to Vineca is a reflection of his inability to comply with the terms of the parties' stipulation, and not, as Vineca alleges, a willful and inexcusable intent to violate a court order. Accordingly, a finding of contempt, and the imposition of any remedial sanctions against Lee, was not appropriate. See Mid-Dakota Clinic, P.C. v. Margaret L. Kolsrud, 1999 ND 244, 603 N.W.2d 475, 480 (the inability to comply with an order is a defense to contempt proceedings based on a violation of that order) (quoting Flattum-Riemers v. Flattum-Riemers, 1999 ND 146, ¶ 7, 598 N.W.2d 499).

[¶21] The significant and material change in Lee's circumstances (his retirement and subsequent reduction in income) is the sole reason for his inability to continue the \$1,500.00 monthly spousal support payments to Vineca. Until September 2014 (the month of his retirement), Lee consistently made his spousal support payment in full on the 15<sup>th</sup> of each month, as required by the parties' stipulation. Tr. 60:21-61:6. Only following the significant decrease in Lee's income has he been unable to continue making the \$1,500.00 monthly payments. App. 34.

[¶22] Lee has not willfully and inexcusably intended to violate the Court's Judgment in this matter. His failure to pay the \$1,500.00 monthly spousal support obligation to Vineca is the result of his inability to do so, given his current income

and expenses. To hold Lee in contempt is unreasonable and would misapply the law as it relates to available defenses to civil contempt proceedings. Accordingly, the District Court's finding that Lee has had the funds with which to pay Vineca since the time of this retirement constitutes a clear abuse of discretion, necessitating a reversal by this Court.

**II. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THERE HAD BEEN NO MATERIAL CHANGE IN CIRCUMSTANCES SUFFICIENT TO MODIFY LEE'S ONGOING SPOUSAL SUPPORT OBLIGATION.**

[¶23] The standard governing the Supreme Court's review of a trial court's decision on a motion to modify spousal support is well-established:

When the original divorce judgment includes an award of spousal support, the district court retains jurisdiction to modify the award. 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 of spousal support is a finding of fact and will be set aside on appeal only if it is clearly erroneous.

Schulte v. Kramer, 2012 ND 163, ¶ 10, 820 N.W.2d 318.

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, although there is some evidence to support it, on the entire evidence the reviewing court is left with a definite and firm conviction a mistake has been made.

Crandall v. Crandall, 2011 ND 136, ¶ 19, 799 N.W.2d 388 citing Lorenz v. Lorenz, 2007 ND 49, ¶ 5, 729 N.W.2d 692.



[¶24] A determination of the amount and duration of spousal support requires consideration of the Ruff-Fischer guidelines<sup>1</sup> outlined below:

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

Sack v. Sack, 2006 ND 57, ¶ 11, 711 N.W.2d 157, 160. The requirement of an independent or separate finding that a spouse is “disadvantaged” was abrogated in the Sack case. Id. at ¶14.

[¶25] North Dakota recognizes two types of spousal support:

Permanent spousal support and rehabilitative spousal support are two distinct remedies. Sommer v. Sommer, 2001 ND 191, ¶ 14, 636 N.W.2d 423. Rehabilitative spousal support is appropriate when it is possible to restore a spouse to independent economic status or to equalize the burden of the divorce by increasing that spouse’s earning capacity. Id. Permanent spousal support is generally appropriate when a spouse cannot be equitably rehabilitated to make up for the opportunities lost in the course of the marriage. Id. Even when a spouse is capable of rehabilitation, permanent spousal support may be an appropriate remedy to ensure the parties equitably share the overall reduction in their separate standards of living. Id.

Wold v. Wold, 2008 ND 14, ¶ 14, 744 N.W.2d 541, 547.

---

<sup>1</sup> Referring to the factors adopted by the Ruff court and altered by the Fischer court as the “Ruff-Fischer guidelines”; Fischer v. Fischer, 139 N.W.2d 845, 847 (N.D. 1966) (restating the factors adopted by the Ruff court, and adding the factor “and such other matters as may be material”); Ruff v. Ruff, 52 N.W.2d 107, 111 (N.D. 1952) (adopting a set of factors from Nebraska that are used to allocate property distribution and spousal support).

[¶26] North Dakota law provides that there must be a material change in circumstances to justify a modification of spousal support. Mahoney v. Mahoney, 1997 ND 149, ¶ 24; Huffman v. Huffman, 477 N.W.2d 594, 596 (N.D. 1991). The standards for modifying spousal support are set forth in Wheeler v. Wheeler, 419 N.W.2d 923, 925 (N.D. 1988):

To modify spousal support, circumstances must have changed materially . . . Slight, or even moderate, changes in the parties' relative incomes are not necessarily material . . . 'Material change' means something which substantially affects the financial abilities or need of a party . . . The reason for changes in income must be examined, . . . as well as the extent that the changes were contemplated at the time of the agreed decree.

[¶27] Following the evidentiary hearing, the District Court determined that “Lee presented no evidence showing that his retirement was not anticipated at the time of the original stipulation.” App. 265. This finding by the District Court was clearly erroneous, as evidence contrary to the finding was presented at the hearing. Specifically, Lee testified that he did not contemplate retirement at the time of his divorce, and did not contemplate a significant decrease in his income (as evidenced by the debt Lee has acquired). Tr. 58:7-15. Lee’s decline in health has essentially necessitated Lee’s retirement. Tr. 59:15-60:12. Lee testified that if he had not retired when he did, he would not be around to enjoy any retirement. App. 30. Lee, now sixty-seven (67) years of age, is happily married and would like to spend his remaining years with his wife and with the quality of health he has left. That Lee’s health prompted his retirement is particularly relevant in establishing a material change in circumstances sufficient to justify a modification

of Lee's spousal support obligation. Cf. Theis v. Theis, 534 N.W.2d 26, 28 (N.D.1995) (directing trial courts to consider the health and physical condition of the parties when making distributions); van Oosting v. van Oosting, 521 N.W.2d 93, 101 (N.D.1994) (holding the health and physical conditions of the parties are significant factors to consider in awarding support). Contra Wheeler v. Wheeler, 548 N.W.2d 27, 31 (N.D. 1996) (former husband's health problems did not provide sufficient basis for modification of spousal support where he voluntarily retired long before he learned that he had health problems and his health problems were not unforeseeable as he was 65 years old when stipulation was agreed to and, at that time, he agreed to make support payments until his death). Unlike Wheeler, however, Lee was approximately forty-eight (48) years old at the time the stipulation was agreed to; Lee did not, at that time, contemplate any health problems necessitating his retirement; did not contemplate such retirement; and did not in fact retire prior to experiencing any health problems.

[¶28] Lee's unanticipated retirement from his job on September 30, 2014 and subsequent reduction in income is undoubtedly a material change in circumstances. "A change which can now be called foreseeable with the benefit of hindsight is not necessarily a change contemplated by the district court at the time of the original divorce decree." Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360 (citation omitted). The District Court itself acknowledged that there had been a significant decline in Lee's income for the year 2015, although,

as discussed below, its finding that Lee's available income is in excess of \$75,000.00 per year was clearly erroneous. App. 265.

[¶29] As indicated above, at the time of his divorce from Vineca, Lee was employed as the Chief Executive Officer of the Minot Area Development Corporation, earning approximately \$82,000.00 per year. App. 30. Subsequent to that, Lee worked for five (5) years as the Commissioner of the North Dakota Department of Commerce, earning approximately \$100,000.00 per year. Id. Prior to his retirement, Lee was employed as the President of the Temple Economic Development Group, earning approximately \$145,000.00 per year, with the exception of the last four (4) or five (5) years preceding Lee's retirement, in which he earned approximately \$180,000.00 to \$200,000.00 per year. Id.

[¶30] Since his retirement on September 30, 2014, Lee's income has been reduced to social security payments of approximately \$2,273.00 per month. App. 62-71. Lee also has a retirement fund (half of which was awarded to Vineca in the divorce) which is used to make payments towards his substantial debt.<sup>2</sup> App. 35. Additionally, the entirety of Lee's deferred income received from Temple is used to pay back loans over the next four (4) years, including an additional \$460.00 per month due on interest. Tr. 75:5-12. Lastly, Lee's monthly living expenses have increased since his divorce. App. 120. Even excluding his

---

<sup>2</sup> The current balance of Lee's retirement account is approximately \$115,000.00.

monthly spousal support obligation, these monthly expenses far surpass his monthly income. Id.

[¶31] There has been a material change in circumstances justifying the elimination of Lee’s spousal support obligation to Vineca. The North Dakota Supreme Court has stated that a “valid consideration in determining whether a spouse is disadvantaged is whether there is a need to equitably balance the burdens created by the divorce where the parties cannot maintain the same standard of living apart as they enjoyed together.” Sommer v. Sommer, 2001 ND 191, ¶10, 636 N.W.2d 423, 428. Currently, the spousal support award does not balance the burdens, instead it punishes Lee. The North Dakota Supreme Court has also stated that a trial court’s award of spousal support should allow the parties to equitably share the overall reduction in the parties’ separate standards of living. Wahlberg v. Wahlberg, 479 N.W.2d 143, 145 (N.D. 1992). Again, the overall reduction in this case is not being shared, but instead is being disproportionately borne by Lee. Prior cases have held that “[e]qualization is not a goal of spousal support, and equalization of income between divorcing spouses is not a measure of spousal support although it is a factor that can be considered.” Christianson v. Christianson, 2003 ND 186, ¶20, 671 N.W.2d 801, 806 (citation omitted).

[¶32] Vineca has emphasized Lee’s prior income, as evidenced by his tax returns for 2011 through 2014. However, the fact that Lee no longer receives this income, combined with the fact that Lee fulfilled his monthly spousal support obligation while he received this income, makes consideration of the above-referenced tax

returns irrelevant. They simply do not accurately reflect Lee's current financial standing, as evidenced by the District Court's acknowledgment of the significant decline in Lee's income for 2015. Lee's retirement, and subsequent receipt of social security as his primary source of income, constitutes a material change in circumstances justifying the reduction or elimination of Lee's spousal support obligation to Vineca.

[¶33] The District Court's finding that Lee presented no evidence showing that his retirement was not anticipated at the time of the parties' stipulation was clearly erroneous, as was the finding that Lee's retirement and subsequent reduction in income did not constitute a material change in circumstances. Therefore, the District Court erred when it found no material change in circumstances sufficient to modify Lee's ongoing spousal support obligation.

### **III. THE DISTRICT COURT ERRED WHEN IT AWARDED ATTORNEY'S FEES TO VINECA.**

[¶34] Under N.D.C.C. § 14-05-23, the trial court in divorce proceedings has broad discretion to award attorney's fees and costs." Schulte v. Kramer, 2012 ND 163, ¶ 33, 820 N.W.2d 318, citing Heinle v. Heinle, 2010 ND 5, ¶ 32, 777 N.W.2d 590; Bertsch v. Bertsch, 2006 ND 31, ¶ 8, 710 N.W.2d 113. "A district court's decision whether to award attorney fees is within the district court's discretion and will not be reversed absent an abuse of discretion." Boeckel v. Boeckel, 2010 ND 130, ¶ 30, 785 N.W.2d 213, citing Eberle v. Eberle, 2009 ND 107, ¶ 39, 766 N.W.2d 477.

A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, misinterprets or misapplies the law, or its decision is not the product of a rational mental process leading to a reasoned determination. Martinson, 2010 ND 110, ¶ 15, 783 N.W.2d 633. “A [district] court acts in an arbitrary, unreasonable, or unconscionable manner when its \*330 decision is not the product of a rational mental process by which the facts and law relied on are stated and considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.* (quoting Terry v. Terry, 2002 ND 2, ¶ 4, 638 N.W.2d 11).

Schulte, 2012 ND 163, ¶ 34.

[¶35] Although the North Dakota Supreme Court generally applies the “American Rule,” which requires parties to bear their own attorney’s fees unless such fees are expressly authorized by statute, “district courts in domestic cases have more latitude in awarding attorney fees.” Walstad v. Walstad, 2013 ND 176, ¶ 30, 837 N.W.2d 911, citing In re Guardianship of D.M.O., 2008 ND 100, ¶ 14, 749 N.W.2d 517. The key factor in determining the propriety of an attorney fee award is one party’s needs and the other party’s ability to pay. Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 44, 673 N.W.2d 601.

[¶36] The District Court awarded Vineca \$5,000.00 in attorney’s fees as a remedial measure for Lee’s contempt of court. App. 268-69. However, an award of attorney’s fees to Vineca as a remedial sanction against Lee was not appropriate, as the facts of this matter do not support a finding that Lee is in contempt of court. See supra ¶ 22. The District Court abused its discretion in making the attorney’s fee award in this case. Although Vineca may be able to show the need, the record shows that Lee simply does not have the ability to pay

Vineca's attorney's fees, given his income and expenses, as well as his own attorney's fees owed in this case. The District Court's award of Vineca's attorney's fees is financially impossible and therefore unreasonable and an abuse of discretion. Accordingly, Lee requests that the District Court's Order be reversed, requiring each party to pay their own attorney's fees.

### **CONCLUSION**

[¶37] The District Court erred in granting Vineca's motion for contempt and denying Lee's motion to eliminate or reduce his ongoing spousal support obligation. This Court should reverse the District Court's November 28, 2015 Order and remand with direction that the District Court determine the appropriate reduction or elimination of Lee's spousal support obligation.

Dated this 22nd day of April, 2016.

### **VOGEL LAW FIRM**

By: /s/ James M. Cailao  
James M. Cailao (#07086)  
[jcailao@vogellaw.com](mailto:jcailao@vogellaw.com)  
218 NP Avenue  
PO Box 1389  
Fargo, ND 58107-1389  
Telephone: 701.237.6983

**ATTORNEYS FOR  
DEFENDANT/APPELLANT**





