

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

**Supreme Court No. 20150363
Ward County Civil No. 51-96-C-0017**

Vineca Ann Peterson,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
Robert Lee Peterson,)
)
 Defendant-Appellant.)

VINECA PETERSON’S APPELLEE BRIEF

**ON APPEAL FROM ORDER ENTERED
NOVEMBER 28, 2015, THE HONORABLE TODD A.
CRESAP PRESIDING IN WARD COUNTY
DISCTRICT COURT, NORTH CENTRAL JUDICIAL
DISTRICT**

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STATEMENT OF THE CASE

¶1 Vineca Ann Peterson (hereinafter “Vi”) moved for an Order finding Lee in contempt of Court for failure to pay spousal support as required under the Judgment dated March 8, 1996, **Docket No. 14**, amended October 8, 1997, **Docket No. 22**, and continued in force by the Judge Cresap’s Order dated November 14, 2011, **Docket No. 51**. Vi also requested attorney fees of \$2500 for having to make this motion, and if a hearing was required on the motion to find Lee in contempt, Vi requests \$5000 in attorney fees. **Docket No. 51**. At the conclusion of the hearing, Attorney Boughey, within 10 days of the conclusion of hearing, filed his updated request for attorney fees through an affidavit signed by Mr. Boughey along with an itemization of his billing up to the date of trial. **Docket No. 110 & 112**. The post-trial briefing occurred *after* Mr. Boughey submitted the documentation as to attorney fees, and Lee Peterson – through his attorney and in post-trial brief – responded to the attorney fee request. **Docket No. 116, ¶¶23-24**. The instant appeal relates to Judge Cresap’s Order dated November 28, 2015 . **Docket No. 119**.

¶2 ARGUMENT

¶3 The matter became much more complicated and more than just a simple enforcement of the spousal support order when Lee made a his cross-motion to eliminate or reduce the spousal support obligation.

Docket No. 70.

¶4 The hearing in this matter was held on September 9, 2015. The court received substantial financial records of both parties. **Docket No. 90-94, 98-109.** Lee did not submit the medical records or any evidence to support his claim that he retired due to health issues. The only credible “evidence” received from Lee in regards to health issues were his own unsubstantiated statements; he provided no medical records, letters from doctors, anything that would substantiate his bald assertion. More often he merely stated that he retired to spend more time with his new wife, although he did mention he supposedly was unable to continue to work the hours he traditionally worked.

¶5 Within 10 days of the hearing, on September 18, and *before* the post-trial briefs were due, attorney Boughey submitted his affidavit in support of his request for attorney fees, along with an exhibit consisting of his billing letter to Vi Peterson dated the same day. Lee Peterson, in

his post-trial brief, had an opportunity to respond to the attorney fee request (now beyond the initial \$5000 request in the initial motion which it assumed that the hearing would only relate to enforcement of the spousal support and not having to deal with Lee's cross-motion to terminate spousal support in its entirety) and indeed did respond to the request. Lee's Post-trial Brief 9-23-15 at ¶¶23-24, Docket No. 116.

¶6 ISSUE 1: Did the District Court err in granting Vineca's Motion for Contempt?

¶7 Lee first asserts that his "nonpayment of spousal support has been neither willful nor inexcusable." Appellant's Brief at ¶19. However, as is clearly evident from the lower court's decision in this matter – in conjunction with the testimony received and the exhibits received – Lee had the ability to pay at the time the spousal support was due, but instead intentionally took steps to distribute his property towards his new wife in the retirement home that he was building in Montana, instead of paying the court-ordered spousal support. The court found that Lee clearly had the ability to pay, but chose to distribute his assets to his new wife and his Montana retirement home:

[¶9] . . . Specifically, since 2009 Lee has chosen to spend over \$700,000 worth of assets to build his dream home in

Montana. While he has every right to do so, he has no such right to do so as a way to escape his obligation under the divorce judgment. Lee knowingly and voluntarily expended these assets all the time knowing that he had a \$1500 per month obligation owed to Vi until her death or remarriage. . . .

[¶10] . . . Lee claims that the nonpayment is not intentional nor willful as he simply does not have the financial resources to make the spousal support payments upon his retirement. However, the court finds evidence to the contrary.

[¶11] First, upon the sale of their home in Texas in June 2014 (3 months prior to ceasing spousal support payments to Vi) , Lee gave all the equity in the Texas house of \$49,000 to his present wife to whom he owed no legal obligation to pay. Even if Lee were to only take half of the equity in the home, this would've allowed him to continue paying on his obligation under the divorce judgment for another 16 months.

[¶12] Additionally, in November 2014, after Lee had stopped paying Vi due to the alleged inability of him to be able to do so, Lee payed \$2750 to landscapers for his property in Montana. He also paid a Cabela's Visa bill in October 2014 (after he alleges he was unable to pay) in the amount of \$6893.76. The payment of these obligations are equal to another six months of payments to Vi under the divorce judgment.

[¶13] Finally, on August 19, 2014 Lee gifted 100 acres of the Montana property to his present wife when he had absolutely no legal obligation to do so. While the Court is unaware of the exact location of the 100 acres given to his present wife by Lee, the court notes that this is approximately one-half of the total acreage purchased by Lee in Montana. Lee acquired the approximate 200 acres of property for a little over \$200,000. Even if there are no buildings, dwellings or other structures on the property that have been added by Lee, the value of the land would be at least \$100,000. Such a transfer would have allowed Lee to pay for

another five and one-half years of support payments under the marital judgment.

[¶14] The evidence presented to the court clearly shows that Lee has had funds with which to pay Vi since the time of his retirement and he has simply chosen not to do so. The Court does find that Lee is in contempt of the court order and judgment

Order of November 28, 2015, Docket No. 119, ¶¶ 9-14.

¶8 The Court itself elicited in from Lee a summary of the evidence presented at the hearing regarding his expenditures on the Montana home (which occurred after the 2011 hearing and at a time when Lee could have been setting money aside to comply with the court-ordered spousal support or actually paying Vi—instead of unilaterally suspending the required payments):

THE COURT: Mr. Peterson, just so I am clear. Stop me when I am wrong here. The original 40 acres that were across the road that had the springs on it, you paid \$40,000 for that?

THE DEFENDANT: \$40,000 something.

THE COURT: Right around there?

THE DEFENDANT: Yes, Sir.

THE COURT: And then, the 158 to 160 acres?

THE DEFENDANT: \$169,500.

THE COURT: That was a hundred and - - -

THE DEFENDANT: 158 acres.

THE COURT: It said \$168,000 some hundred dollars?

THE DEFENDANT: It is \$169,500, I think.

THE COURT: The only thing at that time that was on the land was a grain bin, right?

THE DEFENDANT: Correct.

THE COURT: And then, you spent \$135,000 for the building itself. And then, another \$131,000 to erect the building or finish the building?

THE DEFENDANT: Correct. Yes, Sir.

THE COURT: And then, you spent additional money on landscaping?

THE DEFENDANT: Well, it - - - -

THE COURT: I mean, as such - - that is what a check was made out for?

THE DEFENDANT: Bushes and trees and a variety of things. We planted about 15,000 bushes and trees.

THE COURT: Okay. And, what did that cost?

THE DEFENDANT: I suspect it was probably \$20,000, I would suspect.

THE COURT: Okay. So, you've got about a half million dollars into the property?

THE DEFENDANT: I would guess pretty close.

THE COURT: And, you say it is only worth about \$250,000?

THE DEFENDANT: I think he was referring to the building itself.

THE COURT: Oh, what do you think the property is worth?

THE DEFENDANT: I suspect the property is worth near half a million.

THE COURT: Pretty close to what you've got into it?

THE DEFENDANT: Yes, and I've still got loans to pay off on it, but if we had it free and clear it would probably be worth about a half a million.

THE COURT: And, you sold your house in Texas in June of this year?

THE DEFENDANT: June of this year.

THE COURT: And, all the equity went to your present wife?

THE DEFENDANT: Correct.

THE COURT: Okay. You can step down, sir.

T. at 89, lines 8 through page 91 line 10.

¶19 The evidence further showed that Lee is financially savvy, having served as the economic development coordinator for the city of Minot, then the entire state of North Dakota. He continued working in the field of economic development in Texas, earning over a million dollars in his last five years of employment, as well as receiving a \$250,000 stipend that is paid out in \$50,000 a year increments following his retirement. He was well aware that he had options--while he was making substantial sums of money and before he retired—available to him to set aside sufficient money such as purchasing an annuity, to ensure the Vi received the court-ordered amount:

Q. Well, when we - - the records are in. What the bottom line is is that, did you at any time set aside any money that you knew you were going to have to pay for Vi?

A. No.

Q. Did - - are you familiar with the ability to purchase an annuity where you could have, while you were making this type of money, an annuity that would pay Vi \$1,500 a month for the rest of her life? Are you familiar with that type of instrument?

A. Very - - very familiar with it.

Q. As a matter of fact, yes, you used to be in charge of the economic development in Minot and then the whole state, and then something in Texas. You could have easily purchased an annuity at any time in the last 15 years to take care of this when you retired, isn't that true?

A. I guess, Mr. Boughey, I would ask you if you have an

understanding of how big an annuity you would have to have to have \$1,500 a month.

Q. Well, did you make any attempts to purchase an annuity, or check prices?

A. No.

T. at page 51, lines 15 through page 52 line 10.

¶10 The court properly found that Lee had intentionally chosen not to pay the spousal support and to instead spend his assets on his new wife and his Montana retirement home. Lee had every option of paying the spousal support when due, as well as purchasing an annuity – once he decided he wanted to retire – to ensure that all future payments upon his retirement were made to Vi, but did not do so. Adding insult to injury, not only did Lee unilaterally quit making his court-ordered payments to Vi, but when she raised this issue by making a proper motion to have him found in contempt, Lee responded by a cross-motion to terminate the spousal support payments in their entirety.

¶11 The lower court found that Lee could have complied with the order, and this finding is supported by the evidence. Vi most certainly proved that Lee had the ability to pay and chose not to do so. But according to Section 27-10-01 .3, “in a proceeding to impose a remedial sanction for failure to pay child or spousal support, an order to pay

support is prima facie evidence the obligor or has the ability to pay, and the burden of persuasion is upon the obligor to prove inability to pay the support ordered.” Section 27-10-1.3(1)(a). Lee did not meet his burden to prove his inability to pay the court-ordered spousal support. Moreover, when a person creates the situation resulting in the alleged inability to pay, the steps taken to create such an inability to pay are intentional steps, and indeed intentional acts for the purpose of invading or disobeying the court-ordered payments.

¶12 ISSUE 2: 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?

¶13 Lee asserts that the court erred in concluding that Lee did not anticipate retirement at the time the original stipulation was entered, and as such his decision now to retire constitutes a material change in circumstances. First of all, under the agreement reached by the parties, Lee’s retirement, whether he chooses to retire or not, or whether he anticipated retirement or not, is entirely irrelevant. The parties agreed by stipulation that Lee would pay spousal support for life. The only restriction on this payment was if Vi remarried, which she did not. If Lee

wanted to include a restriction that such amount would terminate upon retirement, he could have done so at the time of agreeing to pay Vi's spousal support for life. By not including such restriction, the spousal support should, and must, continue for life.

¶14 Second, the issue of whether retirement would constitute a material change in circumstances was already resolved by Judge Cresap in the 2011 hearing. Lee specifically asserted, and requested, that his spousal support be terminated due to his planned retirement. Judge Cresap determined that such event was not a material change in circumstances and could not at that time serve as a basis for terminating the spousal support. In our view, the issue of whether retirement could serve as a basis for a change in circumstances was already resolved by the 2011 decision.

¶15 Third, Lee's assertion that he did not anticipate retiring is not supported by the record in either the 2011 hearing or in the 2015 hearing. The parties anticipated that Lee would someday retire and that Vi would not be working. Indeed, Lee admitted that he began a retirement account in 1993. T. 81. He also, at a prior hearing in 2011 before Judge Cresap (following his making a motion to terminate spousal support), had

previously testified that the he wished to retire in a year or two, and Judge Cresap referred to Lee's contemplated retirement in his decision denying Lee's motion. T. 81; **Docket No. 29** (Lee's motion and brief 1-31-11); **Docket No. 48 at page 5** (Judge Cresap's Order Denying Lee's Motion 11-14-11).

¶16 Fourth, Lee's attempt to assert that his health was a substantial factor and constitutes a material change in circumstances is not supported by the evidence. Almost all the evidence received at the hearing related to financial issues. Lee did not submit any medical records, medical testimony, or any other credible evidence that supported his self-serving and unsupported statement that he retired due to his health. The court stated that there was no evidence as to Lee's health. Actually, there was no corroborating evidence of Lee's self-serving and unsupported statement as to his health. The court probably should have said that there was no *credible* evidence to support Lee's assertion that he retired due to his health. The statements Lee made in his affidavit and in his testimony were almost entirely focused on his desire to spend more time with his new wife, and not any major focus on his health. If Lee's health was indeed that bad one must wonder why he chose in his retirement years to

run a ranch in Montana that takes hunters out to hunt. Moreover, even if health factors were really the basis of Lee's decision to retire, the record is clear that Lee had more than enough opportunities to set aside money to be able to make the future payments required by the court order, or purchase an annuity so that the payments would be made regardless of Lee's future economic situation. During the last 4-5 years of Lee's employment he made over a million dollars. Instead of making arrangements to be able to pay Vi, Lee intentionally distributed his money to his new wife, and spent hundreds of thousands of dollars in the development of his retirement home. The court concluded that Lee's assertion that he retired for his health¹ was simply not credible and not supported by any credible evidence. But even if that were the reason, he should have made financial arrangements to be able to pay her, and not make himself appear destitute.

¹ One is reminded of the credibility of another person who claimed he did a specific act for his health:

Captain Renault: And what in heaven's name brought you to Casablanca?

Rick: My health. I came to Casablanca for the waters.

Captain Renault: The waters? What waters? We're in the desert.

Rick: I was misinformed.

Casablanca (1942).

¶17 The cases cited by opposing counsel relating to taking health into account are not persuasive. As to the cases that state that health of the party should be taken into account, the court did take these assertions as to his health into account, and determined they were not sufficient to serve as a basis for material change in circumstances. By referring to Lee's raising the issue of health, it's clear that the court took this factor into consideration, but was not convinced by the meager evidence submitted by Lee's self-serving statements. As such, the case is most applicable is the case is Wheeler v. Wheeler, 548 N.W.2d 27, 31 (N.D. 1996), which provides that a 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. By the same token, in this case the possibility, indeed the inevitability, of having health problems when one gets older could certainly have been contemplated at the time the initial settlement documents were signed, particularly since he admitted in his cross-examination that he had had back problems at the time he was divorced, admitted that he had back problems all his life and couldn't get into the Army because of a bad back. T. 85.

¶18 The agreement to which the parties stipulated is for Lee to pay Vi \$1500 “for life.” The record indicates, and the history of this case indicates, that both parties contemplated retiring someday. The parties did NOT agree to pay Vi the \$1500 a month until Lee retires. The plain language is “for life.”

¶19 Lee’s attempt to assert that he did not contemplate retiring is not supported by his actions or his prior statements. Lee started a retirement fund in the 1990s; he continued to put money into that fund throughout his years of employment; he indicated to the Court at the hearing before Judge Cresap in 2011 that he intended to retire in a couple of years and would be receiving \$16,000 a year of retirement benefits upon such retirement. **Docket No. 48 at page 5** (Judge Cresap’s Order Denying Lee’s Motion 11-14-11).

¶20 Lee intentionally reduced his retirement portfolio to build his retirement home, making over a million dollars in his last 5 years of employment but not taking one step to plan for the payments required to be made to Vi. And to make matters more obvious, Lee expended tens of thousands of dollars during his last six months of employment

completing his retirement home, knowing full well that he planned on terminating his Court ordered payments to Vi the moment he retired.

¶21 The lower court in this case made a finding that there was no material change in circumstances justifying Lee's motion to terminate spousal support:

¶7 Applying this authority to a situation in 2011 the court found that the anticipated retirement was not a significant change in circumstances because of the fact that there was no evidence presented by Lee his retirement was not anticipated at the time of the original stipulation entered into by the parties. Like the prior hearing, at this hearing Lee presented no evidence showing that his retirement was not anticipated at the time of the original stipulation. Once again, since the party seeking modification of spousal support bears the burden of proving that there has been a material change of circumstances and since there has been no showing that retirement was not anticipated by the parties at the time of the stipulation, there is no basis for modification of spousal support based upon a change of circumstances.

Docket No. 119, Order ¶7 at page 5 11-28-15. The court’s finding relating to no material change in circumstances, and its conclusion of law, are supported by the record it should be affirmed.²

¶22 ISSUE 3: Did the District Court err in awarding attorney’s fees to Vineca?

¶23 The gravamen of Lee’s objection to an award of attorney fees is Lee’s assertion that because “the facts of this matter do not support a finding that Lee is in contempt of court,” no attorney fees should be granted. Lee’s Appellant’s Brief at ¶36. As discussed above, we assert that the court’s finding of contempt is properly based on the record and justified under the applicable law.

¶24 He next asserts that an award of attorney fees is inappropriate because the payment of such an award for attorney fees “is financially impossible and therefore unreasonable and an abuse of discretion.” Lee’s

² In the event this Court reverses on the issue of finding a material change in circumstances, it would be necessary to remand to the lower court to apply and compare the financial situation of both parties to determine what, if any, change in the spousal support amount would be made. As indicated by the Affidavit in Support of Vi’s Motion for Contempt 1-27-15 **Docket No. 52**, Vi’s testimony, and her Affidavit of Vi Peterson in Opposition to Stay 12-23-15 **Docket No. 133**, it is clear that Vi’s financial situation is worse than Lee’s, and indeed can only be described as dire.

Appellant's Brief at ¶36. It is clear from the evidence received by the court that Lee has substantial assets, particularly those relating to his newly built retirement home in Montana. In addition, Lee receives a stipend of \$50,000 a year from Texas. He therefore has sufficient assets to pay any attorney fees required by the court. In addition, as discussed above, if indeed Lee is truly destitute, as he asserts, he is destitute because he intentionally made himself so by diverting his assets to his wife and to the building of his Montana home.

¶25 As noted above, this case was initially a simple case of Vi's request to enforce the court-ordered spousal support. However, through Lee's response and cross motion, the case became much more complicated, with the case being converted from a simple enforcement action to dealing with Lee's motion to terminate spousal support in its entirety. As such, the initial attorney fee request of \$5000 if there was a hearing should not be employed to limit the amount of fees to be paid when additional fees had to be incurred. Section 14-05-23 specifically rejects the American rule and allows the lower court to award payment of attorney fees in divorce cases.

¶26 Attorney fees can be awarded not only through the divorce proceedings, but also through the motion for contempt. In this case, the lower court found Lee in contempt of court, and as such the provisions relating to remedial sanctions include the amount necessary to compensate a party “for loss or injury suffered as a result of the contempt.” Section 27-10-01 .1(4). Section 27-10-0.1.4, subdivision one, also clearly indicates that the remedial sanction may include a payment of a sum of money sufficient to compensate a party “for a loss or injury suffered as a result of the contempt, including an amount to reimburse the party for costs and expenses incurred as a result of the contempt.” Section 27-10-01 .4 (1)(a).

¶27 Despite these provisions, the court awarded only \$5000 for attorney fees, asserting that the request made for additional attorney fees within 10 days of the hearing failed to comply with due process since Lee did not have an opportunity to respond to the request. The court erred in this regard. Lee had the opportunity to respond to the request for attorney fees, and indeed he actually did so in his post-trial brief. Lee’s Post-trial Brief 9-23-15 at ¶¶23-24, Docket No. 116. The request for attorney fees was provided within 10 days following hearing, and before the post-trial

briefing was due. Lee had every opportunity to respond to any aspects of the attorney fees submitted by Vi in this case. We further note that it is quite common for the attorneys, and applying the attorney fee provisions, often submit updated attorney fee documentation following the conclusion of the case; Lee had every opportunity to respond to the updated amount, either through the post-trial briefing or by any other formal response to the updated billing.

¶28 Not only should the attorney fee amount be affirmed, but the amount should be *increased* so that Vi receives reimbursement for *all* the time and expense incurred in attorney fees in this matter. Rule 54 of the North Dakota Rules of Civil Procedure provides in subdivision (e) an opportunity to request and receive attorney fees after judgment has been entered. By properly requesting attorney fees in this case – through the motion for contempt, at the hearing, and supplemental to the hearing by the submission of proper documentation showing the amount of attorney fees incurred – Vi should receive reimbursement for whatever attorney fees that were incurred relating to this matter, and such reimbursement should have been awarded in full. These fees should have been awarded based either on the statute that applies to an award of attorney fees in

divorce cases, Section 14-05-23, or in the alternative based on the statute relating to contempt, Section 27-10-01 .1(4) and Section 27-10-01 .4(1)(a).

¶29 Vi therefore requests that this court affirm the amount awarded by the lower court but also remand to the lower court the issue of the additional amount of attorney fees to be awarded, with instructions to the lower court to provide an award of reasonable attorney fees for all the time incurred in reference to this matter.

¶30 **CONCLUSION**

¶31 For the reasons stated above, Vi Peterson requests that this court affirm the District Court's decision dated November 28, 2015, docket number 119, and remand the issue of attorney fees with directions to award reasonable attorney fees incurred by Vi's attorney for all the time expended by Vi's Peterson's attorney, based on the submission provided by Mr. Boughey and Lee's response in his post-trial brief.

¶32 Dated this 31st day of May, 2016.

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Vineca Ann Peterson,)	
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Plaintiff-Appellee,)	<u>CERTIFICATE OF</u>
)	<u>SERVICE</u>
vs.)	
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Robert Lee Peterson,)	
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Defendant-Appellant.)	

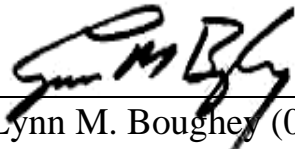
¶1 Appellee, has served the following document:

1. Appellee's Brief

Upon the above named Appellant, Robert Lee Peterson, by EMAIL on Wednesday, June 1, 2016 and filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, to:

James M. Cailao jcailao@vogellaw.com

Dated this 1st day of June, 2016.



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