

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

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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
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ON APPEAL FROM ORDER ENTERED NOVEMBER 28, 2015

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

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**APPELLANT'S REPLY BRIEF**

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## LAW AND ARGUMENT

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

[¶1] At paragraph 13 of Appellee/Plaintiff Vineca Ann Peterson’s (“Vineca”) Appellee Brief, Vineca contends that Appellant/Defendant Robert Lee Peterson’s (“Lee”) decision to retire, as well as his anticipation of retirement, was and is “entirely irrelevant” to the consideration of whether Lee’s actual retirement constitutes a material change in circumstances sufficient to consider modification of his ongoing spousal support obligation. This contention is inapposite to North Dakota case law.

[¶2] “[T]his Court said ‘voluntary retirement by a supporting spouse that results in a material change in circumstances may, under some circumstances, be a valid basis for modification of spousal support.’” Ebach v. Ebach, 2005 ND 123, ¶ 11, 700 N.W.2d 684 (Ebach I) (quoting Sommer v. Sommer, 2001 ND 191, ¶ 20, 636 N.W.2d 423). In Ebach I, this Court affirmed the district court’s denial of a motion to modify an award of permanent spousal support, premised, in part, on the district court’s reasoning that the obligor “has the ability to work until he is at the customary retirement age of 65 . . . [The Obligor] has not proved his burden to this Court that the early retirement was reasonable and done in good faith.” Ebach I, 2005 ND 123, ¶ 7.

[¶3] Unlike Ebach I, Lee’s retirement was not early. Lee retired from employment on September 30, 2014, at approximately 66 years of age. Transcript of September 9, 2015 hearing (Tr.) at 57:6-7. This is one year after the usual and customary age of retirement. Accordingly, Lee’s voluntary retirement can and does constitute a material change in circumstances, allowing the District Court to consider the totality-of-the-circumstances analysis by examination of the non-exclusive factors for consideration. Ebach I, 2005 ND 123, ¶ 12. The District Court’s finding that Lee’s retirement and subsequent reduction in income did not constitute a material change in circumstances was clearly erroneous.

[¶4] In addition to finding that a material change in circumstances existed, the District Court should have and was required to “decide whether the change justifies modifying the support obligation and must consider and make findings about the obligor's ability to pay and the receiving spouse’s needs.” Ebach v. Ebach, 2008 ND 187, ¶ 12, 757 N.W.2d 34 (Ebach II) (citation omitted). As the District Court erred in finding that no material change in circumstances had occurred, it conducted no analysis of Vineca’s financial needs and abilities. On remand, the District Court should be required to make “specific findings about the parties’ financial needs and abilities and the financial changes.” Ebach II, 2008 ND 187, ¶ 15.

[¶5] Vineca also alleges that “the issue of whether retirement would constitute a material change in circumstances was already resolved by Judge Cresap in the

2011 hearing.” Appellee Brief at ¶ 14. As the District Court noted in its November 14, 2011 Order, “[t]he only fact set forth above which would support the relief requested by Lee would be his anticipated retirement and corresponding reduction in income. There was absolutely no testimony or other evidence presented by Lee that his retirement was not anticipated at the time they [sic] original stipulation was entered into by the parties.” Appendix (App.) 18-19. Vineca further contends that 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. *Id.* at ¶ 15. As discussed below, however, the analysis of whether a material change in circumstances has occurred must focus on: (1) whether Lee’s retirement was anticipated at the time the parties entered into their stipulation; and (2) whether Lee presented any testimony or evidence at the September 9, 2015 evidentiary hearing to support his argument that his retirement was not anticipated at the time of the parties’ stipulation and divorce.

[¶6] In its November 14, 2011 Order, the District Court denied Lee’s motion to terminate his ongoing spousal support obligation, as well as Vineca’s cross-motion to increase Lee’s ongoing spousal support obligation. App. 14-21.

When the court has denied a previous motion to modify, however, the court does not consider the circumstances at the time of the denial for purposes of determining whether there has been a material change in circumstances for subsequent motions to modify, instead the court must consider the circumstances at the time of the last order awarding support or order that modifies support in some way.

Ebach II, 2008 ND 187, ¶ 10 (citation omitted). Furthermore, “[a] contemplated change is one taken into consideration by the district court in fashioning its original decree.” Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360 (citation omitted). “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.” Id. (citation omitted). Therefore, Vineca’s argument that the November 14, 2011 Order foreclosed retirement as a material change in circumstances is without merit, as the District Court was required to consider whether Lee’s retirement was anticipated at the time of the parties’ stipulation.

[¶7] At the time the District Court issued its November 14, 2011 Order, Lee’s retirement was only contemplated. The District Court was clearly erroneous in determining that “Lee presented no evidence showing that his retirement was not anticipated at the time of the original stipulation” at the September 9, 2015 evidentiary hearing. App. 265. Unlike the 2011 hearing, Lee specifically testified that he did not contemplate retirement at the time of his divorce, nor did he contemplate a corresponding significant decrease in his income. Tr. 58:7-15. Lee further testified that his decline in health essentially necessitated his retirement. Tr. 59:15-60:12. Unlike Wheeler v. Wheeler, 548 N.W.2d 27, 31 (N.D. 1996), this is not a case whereby retirement preceded health problems. Additionally, Lee was approximately forty-seven (47) years old at the time he entered into the

parties' stipulation regarding permanent spousal support. *Contra Wheeler*, 548 N.W.2d at 31 (“Bert was 65 years old when the second stipulation was agreed to in 1988. At that time, he agreed to make support payments until his death. It is foreseeable that in the future, persons at Bert's stage in life might experience health problems.”).

[¶8] Vineca further contends that despite his retirement, Lee has the means to pay his ongoing spousal support, having earned “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.” Appellee’s Brief at ¶ 9. As previously noted, Lee received \$250,000 in deferred income owed by Temple as a CD at the time of his retirement. App. 32. From this CD, \$50,000 per year 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. Accordingly, the Temple CD is not available income for use in paying Lee’s ongoing support obligation. Tr. 75:5-12. Additionally, until his retirement in September 2014, 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 to Vineca. App. 34.

[¶9] 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. This matter should be remanded to the District Court for a determination as to whether Lee's retirement justifies a modification of Lee's ongoing spousal support obligation, considering and making findings about Lee's ability to pay, Vineca's needs and abilities, and the parties' financial changes. Ebach II, 2008 ND 187, ¶¶ 12, 15.

**II. THE DISTRICT COURT ERRED WHEN IT AWARDED ATTORNEY'S FEES TO VINECA, AND TO THE EXTENT SUCH FEES ARE AFFIRMED, THE AWARD SHOULD NOT BE INCREASED.**

[¶10] Vineca alleges that the District Court erred in only awarding her \$5,000 in attorney's fees, and that she is entitled to "reimbursement for *all* the time and expense incurred in attorney fees in this matter." Appellee's Brief at ¶ 28 (emphasis in original).

[¶11] As indicated within his principal brief, 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. Accordingly, the District Court abused its discretion in making the attorney's fee award in this case. Additionally, Lee does not have the ability pay Vineca's attorney's fees. Because the award of attorney's fees is financially impossible it is therefore unreasonable and an abuse of discretion. Lee therefore requests that the District Court's Order be reversed, requiring each party to pay their own attorney's fees.

[¶12] If, however, this Court affirms Vineca’s award of attorney’s fees, it should not remand the matter to the District Court for a determination as to whether Vineca is entitled to additional attorney’s fees. The District Court properly considered Vineca’s request for additional attorney’s fees, above and beyond the \$5,000 originally requested. Following this consideration, the District Court ordered that “Lee shall pay Vi the amount of \$5.000 [sic] to reimburse her for her attorney’s fees as a remedial measure for Lee being in contempt of the court order and judgment.” App. 269. “Although the trial court and this Court have concurrent jurisdiction to award attorney fees for an appeal in divorce proceedings, we prefer the trial court to consider whether attorney fees are appropriate.” Ebach I, 2005 ND 123, ¶ 21, (*citing* Dvorak v. Dvorak, 2005 ND 66, ¶ 33, 693 N.W.2d 646).

### **CONCLUSION**

[¶13] 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, including its finding that Lee’s retirement did not constitute a material change in circumstances sufficient to consider a modification of 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 14th day of June, 2016.

**VOGEL LAW FIRM**

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WARD COUNTY DISTRICT COURT  
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HONORABLE TODD L. CRESAP

**AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA    )  
  )  ss.  
COUNTY OF CASS             )

Lori Danielson, being first duly sworn upon oath, deposes and says that she is of legal age and not a party to the above-entitled matter. On June 14, 2016, Affiant delivered via e-mail a true and correct copy of the following documents:

**APPELLANT'S REPLY BRIEF**

A copy of the foregoing was securely e-mailed to the address as follows:

Lynn M. Boughey  
[lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com)

*Lori Danielson*  
\_\_\_\_\_  
Lori Danielson

Subscribed and sworn to before me this 14<sup>th</sup> day of June, 2016.

*Karen M. Haugen*  
\_\_\_\_\_  
Notary Public, Cass County, North Dakota

