IN THE SUPREME COURT OF THE

STATE OF NORTH DAKOTA

Michael T. Bindas,	)	
	)	
Plaintiff - Appellee,	)	**BRIEF OF APPELLEE**
	)	
vs.	)	Supreme Court File No.
	)	20180232
Mari F. Bindas,	)	
	)	
Defendant - Appellant.	)	

Appeal from the Order entered April 18, 2018,
issued by the Honorable Frank L. Racek,
District Court Judge, Cass County, East Central Judicial District.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PARAGRAPH

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES

I. Did the lower court properly find, by a preponderance of the evidence, that Mari was habitually cohabiting with another individual in a relationship analogous to a marriage?

II. Did the lower court correctly conclude that Mari's spousal support was not "rehabilitative?"

III. May the legislature enact legislation which terminates spousal support based upon cohabitation?

IV. Did the lower court err by failing to award Mari her attorney's fees and costs incurred in this proceeding?

STATEMENT OF THE FACTS

[¶1] Plaintiff/Appellee, Michael T. Bindas ("Michael") filed for divorce on October 21, 2009. (Index No. 1, 2). Michael and Defendant/Appellant, Mari F. Bindas ("Mari") executed a Marital Termination Agreement on October 19, 2009. (Index No. 8; App. 7). The court entered a Judgment and Decree dated November 6, 2009 ("Judgment"), which incorporated the terms of the parties' agreement. (Index No. 10; App. 21)

[¶2] Paragraph 6 of the Judgment provides as follows:

> Commencing November 1, 2009, and continuing on or before the first day of each month thereafter, until the sale of the homestead referred to in paragraph 9 herein, Mike shall pay directly to Mari the sum of One Thousand Five Hundred Dollars ($1,500) per month as and for spousal support. Commencing the first day of the month after the sale of the homestead, and continuing on or before the first day of each month thereafter until Mari is 62 years of age, Mike shall pay to Mari the sum of Three Thousand Two Hundred Dollars ($3,200) per month. Mike's spousal support payments shall continue until the death of either party, Mari's remarriage, or until the payment due on February 1, 2023 has been made, whichever occurs sooner. It is intended

> that the amounts paid to Mari shall be included by her in her gross income for federal and state income tax purposes and shall be deductible by Mike from his gross income for federal and state income purposes during the entire period of payment. The spousal support obligation is subject to immediate income withholding pursuant to Section 14-05-25.2 of the North Dakota Century Code.

(App. 23).

[¶3] In August of 2012, Mari began dating Douglas. (App. 38). In October of 2014, two years after Mari and Douglas started dating, Mari and Douglas purchased a home together. (App. 34, 38). A copy of the deed was provided to the court. (App. 34). Mari and Douglas have been living together since October of 2014. (App. 38). Mari and Douglas have been cohabiting in a relationship analogous to marriage for nearly four years. Id. Mari and Douglas have been in a romantic relationship for six years. (App. 38). Mari and Douglas share the expenses related to the home. (App. 39). Mari and Douglas share the cost of the mortgage, utilities, real estate taxes, homeowner's insurance, groceries, and home maintenance. Id. Mari and Douglas have common assets and debts.

[¶4] Mari and Douglas have maintained a long-term romantic relationship; however, they have decided to not marry. Id. In fact, Mari even admitted she is in an exclusive relationship with Douglas. Id.

[¶5] On August 1, 2015, Section 14-05-24.1 of the North Dakota Century Code was amended to provide as follows:

> 1. Taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for a limited period

of time in accordance with this section. The court may modify its spousal support orders.

2. Unless otherwise agreed to by the parties in writing, spousal support is terminated upon the remarriage of the spouse receiving support. Immediately upon remarriage, the spouse receiving support shall provide notice of the remarriage to the payor spouse at the last known address of the payor spouse.

3. Unless otherwise agreed to by the parties in writing, upon an order of the court based upon a preponderance of the evidence that the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.

4. Subsections 2 and 3 do not apply to rehabilitative spousal support.

N.D.C.C. § 14-05-24.1.

[¶6] On January 17, 2018, Michael brought a Motion to Modify Spousal Support based upon Mari and Douglas cohabiting in a relationship analogous to marriage. (App. 31-32). After a hearing on April 2, 2018, the court issued a decision terminating Michael's spousal support obligation. (App. 41). On June 6, 2018, Mari filed a Notice of Appeal. (App. 48).

STANDARD OF REVIEW

[¶7] The court's determination of whether spousal support payments should be terminated is within the sound discretion of the trial court and that decision will not be reversed on appeal, unless there is a showing of abuse of discretion. Glass v. Glass, 2017 ND 17, ¶ 10, 889 N.W.2d 885. A lower court abuses

its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or when it misinterprets or misapplies the law. Id.

LAW AND ARGUMENT

I. The lower court found by a preponderance of the evidence that Mari has been habitually cohabiting with another individual analogous to marriage and properly terminated spousal support.

[¶8] Pursuant to Section 14-05-24.1 of the North Dakota Century Code, spousal support terminates when the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to marriage. Section 14-05-24.1 provides, in part:

> Unless otherwise agreed to by the parties in writing, upon an order of the court based upon a preponderance of the evidence that the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.

N.D.C.C. § 14-05-24.1(3).

[¶9] In determining whether two people are cohabiting in a relationship analogous to marriage, the courts look to a variety of factors and have held that "[c]ohabiting in an informal marital relationship is more than merely living together briefly or having sexual relations." Baker v. Baker, 1997 ND 135, ¶14, 566 N.W.2d 806. "The details employed frequently by courts include establishment of a common residence; long-term sexual, intimate or romantic involvement; shared assets or common bank accounts; joint contribution to household expenses; and a recognition of the relationship by the community." Id. The factors are non-exclusive, and no one factor is a requirement for a finding of cohabitation. Id.

[¶10] Mari, in her Affidavit, admits that she has lived with Douglas since October of 2014. (App. 38). Mari admits she is in an exclusive relationship with Douglas. (App. 39). Mari admits that she and Douglas own a home together, they are jointly obligated for the debt associated with the home, and they share the expenses related to home, such as the mortgage, utilities, real estate taxes, homeowner's insurance, groceries, and home maintenance. (App. 38-39). Mari argues that Michael has not offered evidence about the intimacy of the relationship between Mari and Douglas and whether they have engaged in sexual relations. In Baker, the court referenced the sexual relations factor and in doing so stated, "the absence of a sexual relationship would not be dispositive because, '[a]s marriage partners may mutually consent to a cessation of a sexual relationship, or as age or illness may render its practice impossible, all without disturbing the obligations of the contract, so too may it be the case with cohabitation." Baker at ¶ 15 (quoting Perri v. Perri, 79 Ohio App. 3d 845, 850, 608 N.E.2d 790, 794 (1992)).

[¶11] Mari compares her relationship with Douglas to that of roommates. Mari argues that if the legislature intended for spousal support to terminate merely when a person cohabitates with another person, they would not have included the terms "in a relationship analogous to a marriage." In doing so, Mari cites the testimony of Representative Alex Looysen as follows: "[t]he phrase analogous to marriage was chosen in order to avoid penalizing a supported spouse who is living with a friend or relative." Testimony of Rep. Alex Looysen (February 9, 2015). Mari is not living with a friend or relative. Mari and Douglas have been in an

exclusive romantic relationship since August of 2012, two years before they purchased a home together. (App. 38-39). Mari and Douglas are living together in a romantic relationship analogous to marriage.

[¶12] The legislature intended to prevent someone from living with a significant other and refusing to marry so as to continue receiving spousal support. In addressing the intent of the new law, Senator Armstrong explains as follows:

> You're trying to get at the divorced spouse who maintains an efficiency apartment but is truly living with his/her girlfriend and won't get married and is maintaining a private residence solely for the purpose of keeping their spousal support going.

Testimony of Sen. Armstrong (March 23, 2015). Senator Armstrong further explains:

> I think what you're trying to get away from is the situation of large money divorces where there is a large order of spousal support and the whole reason for the other side receiving this spousal support not to get married, they essentially become a common law marriage or very close to it, and the only reason they don't get married is so they can continue to receive spousal support. A typical example would be a doctor divorces a wife, wife hasn't worked for 15-20 years, wife doesn't remarry, keeps a studio apartment that she doesn't go into, essentially for all intents and purposes is living with her new boyfriend and refuses to marry simply because of her spousal support being terminated. That was the original intent of the bill.

Testimony of Sen. Armstrong (March 30, 2015). The intent of the new law was to prevent situations exactly like Mari's situation.

[¶13] The lower court had sufficient evidence to conclude that Mari and Douglas are cohabitating in a relationship analogous to a marriage, based upon

Mari's own admissions. Mari never denied the romantic relationship. The lower court's decision must be affirmed.

[¶14] Mari's argument that the new law should only apply to the spousal support orders that were the result of trial is without merit. Mari cites Schulte v. Kramer, 2012 ND 163, 820 N.W.2d 318, to support her position that the court should reluctantly disturb agreements between parties. In that case, the Supreme Court reversed the lower court's decision to terminate spousal support holding "it clearly erred in finding a material change in circumstances justifying a complete elimination of spousal support." Schulte at ¶ 37. The case did not reverse the lower court's decision to terminate spousal support due to the private agreement between the parties as Mari leads the court to believe.

[¶15] Section 14-05-24.1 of the North Dakota Century Code provides, in part:

> Unless otherwise agreed to by the parties in writing, upon an order of the court based upon a preponderance of the evidence that the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.

N.D.C.C. § 14-05-24.1(3).

[¶16] The parties reached an agreement as to the issue of spousal support. The parties' agreement does not specifically state that spousal support continues even if Mari cohabitates with another individual. The purpose of Section 14-05-24.1(3) of the North Dakota Century Code is to prevent someone from living with

a significant other and refusing to marry so as to continue receiving spousal support. Mari's situation is exactly what the legislature was trying to address.

[¶17] The lower court found by a preponderance of the evidence that Mari and Douglas have been habitually cohabiting in a relationship analogous to marriage for at least four years. The court properly terminated spousal support pursuant to Section 14-05-24.1(3) of the North Dakota Century Code.

II. The lower court properly applied the law by finding that Mari's spousal support was not "rehabilitative."

[¶18] Section 14-05-24.1(4) of the North Dakota Century Code provides, "[s]ubsections 2 and 3 do not apply to rehabilitative spousal support." The lower court held that Mari's spousal support was not rehabilitative support. The court found as follows:

> An interpretation of a judgment is in the discretion of the Court. So the Court interprets its own judgments and this case, looking at the Judgment in this case, this was not rehabilitative spousal support. It was meant to last for a period from 2009, the date of divorce, which would have anticipated payments for approximately 14 years, until the wife was age 62 and retirement age. It was – there is no indication it was to provide for education, work skills, experience or to become self-supporting. So it was not rehabilitative. So the exception in 14-05-24.1(4) does not apply.

(App. 45, 7:10-21).

[¶19] A trial court has great discretion when interpreting its own orders. "When a stipulation is incorporated into a judgment, 'the agreement is interpreted and enforced as a final judgment and not as a separate contract between the parties." Kienzle v. Selensky, 2007 ND 167, ¶ 10, 740 N.W.2d 393. "When the language of

a judgment is clear and unambiguous, the judgment must be construed to give effect to the unambiguous language, but '[i]f the language of a judgment is ambiguous, we give great weight to a [district] court's construction of its own decree..." Id. Here, the lower court determined that Mari's spousal support was not rehabilitative.

[¶20] "Rehabilitative spousal support is awarded to provide a spouse time and resources to acquire an education, training, work skills, or experience that will enable the spouse to become self-supporting." Peterson v. Peterson, 2010 ND 165, ¶14, 788 N.W.2d 296. Peterson is nearly identical to this case. In Peterson, the parties had been married for 12 years, the husband was 46 years of age, the wife was 51 years of age, the husband was the primary income earner, and the wife was primarily responsible for taking care of the children. Id. at ¶ 6. The court awarded the wife spousal support until the wife turned 65 years of age. Id. at ¶ 2. Spousal support was awarded to the wife for 14 years. The court considered the award of spousal support to be permanent. Id. at ¶ 18.

[¶21] Mari's argument is directly contradicted by Peterson. Mari was not awarded spousal support to provide her time and resources to acquire an education, training, work skills, or experiences. Spousal support was awarded until she would receive Social Security payments, similar to that of Peterson. Michael and Mari were married for 25 years. Michael was the primary income earner. At the time of the divorce, Michael was 46 years of age and Mari was 48 years of age. Mari was awarded spousal support for 14 years, which is the same amount of time the wife was awarded spousal support in Peterson.

[¶22] Section 14-05-24.1(4) of the North Dakota Century Code does not apply to rehabilitative support. Senator Hogue, in explaining rehabilitative support, explains, "the concept of rehabilitation is that this spouse would be given support for a period of time sufficient to allow them to go out and get an education for some new skill that will increase their earning capacity." Testimony of Sen. Hogue (April 21, 2015). In determining the length of time a party must be cohabitating prior to terminating spousal support, Representative Mary Johnson stated, "five years because rehabilitative and spousal support is typically four to five years." Testimony of Rep. Mary Johnson (April 21, 2015). The legislature intended the new law to not apply to rehabilitative support, due to the purpose of rehabilitative support. Rehabilitative support is short term, and for the purpose of getting an education or skill to increase their earning capacity.

[¶23] Here, Mari was not awarded rehabilitative spousal support. Mari was not awarded spousal support for a short period of time. Mari was awarded spousal support for 14 years, until retirement age. Further, Mari was not awarded spousal support to gain additional education or skills. Therefore, the exception in Section 14-05-24.1(4) does not apply.

[¶24] The lower court properly determined that the spousal support awarded to Mari was permanent spousal support. This court should affirm the lower courts decision.

III. The legislature may enact legislation which terminates spousal support based upon cohabitation.

[¶25] "[A]n Act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity." Southern Valley Grain Dealers Ass'n v. Board of County Comm'rs, 257 N.W.2d 425, 434 (N.D.1977). "A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution." Richter v. Jones, 378 N.W.2d 209, 211 (N.D.1985).

[¶26] Mari argues the new law is unconstitutional and impacts the rights of parties to enter into a contractual agreement in a divorce. Michael disagrees. Mari fails to cite authority supporting her claim that the legislature lacks authority to enact the new law. In discussing the legislatures authority to enact statutes, the North Dakota Supreme Court has held as follows:

> The term 'police power', as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all. Rippe v. Becker, 56 Minn. 100, 57 N.W. 331 [22 L.R.A. 857]. And it must be confined to such restrictions and burdens as are thus necessary to promote the public welfare, or in other words, to prevent the infliction of public injury. State v. Chicago, etc., Company, 68 Minn. 381, 71 N.W. 400 [38 L.R.A. 672, 64 Am.St.Rep. 482]. And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499 [38 L.Ed. 1076].

State v. Cromwell, 72 N.D. 565, 575–76, 9 N.W.2d 914, 919–20 (1943). Further,

> The development of the law relating to the proper exercise of the police power of the state clearly demonstrates that it is very broad and comprehensive, and is exercised to promote the general welfare of the state, as well as its health and comfort. And the limit of this power cannot and never will be accurately defined, and the courts have never been willing, if able, to circumscribe it with any definiteness." State v. Wagener, 77 Minn. 483, 80 N.W. 633, 635, 778, 1134, 46 L.R.A. 442, 77 Am.St.Rep. 681. And this court, considering the police power, has said that it is "'the power inherent in every sovereignty, *** the power to govern men and things', under which power, the legislature may, within constitutional limitations, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but prescribe regulations to promote the public health, morals, and safety and add to the general public convenience, prosperity, and welfare." State ex rel. Linde v. Taylor, supra [33 N.D. 76, 156 N.W. 564]. It is not limited to regulations necessary for the preservation of good order or the public health and safety but the prevention of fraud and deceit, cheating, unfair competition, and imposition are equally within the power. State v. Armour & Company, 27 N.D. 177, 145 N.W. 1033, L.R.A.1916E, 380, 386, Ann.Cas.1916B, 1149; Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219.

Id.

[¶27] The legislature has authority to enact laws restricting private rights of citizens. Id. In enacting laws, the legislature has great discretion. Id. The legislature amended Section 14-05-24.1 of the North Dakota Century Code to provide as follows:

> Unless otherwise agreed to by the parties in writing, upon an order of the court based upon a preponderance of the evidence that the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.

N.D.C.C. § 14-05-24.1(3).

[¶28] The legislature amended Section 14-05-24.1 of the North Dakota Century Code to prevent someone from living with a significant other and refusing to marry just to continue receiving spousal support. The legislature intended for spousal support to terminate upon cohabitation similar to remarriage. The legislature did not amend the law to take away discretion from the court or to take away rights of citizens to enter into agreements. In fact, Section 14-05-24.1(3) of the North Dakota Century Codes provides, "[u]nless otherwise agreed to by the parties in writing..." N.D.C.C. § 14-05-24.1(3). Instead, the legislature exercised its broad discretion to enact laws to promote public interest.

[¶29] The court has the authority to modify its spousal support orders. N.D.C.C. § 14-05-24.1(1). This law was in place at the time the parties entered into the Marital Termination Agreement. The parties were aware the court could modify the spousal support order. At the time the parties entered into the Marital Termination Agreement, the court could modify spousal support based upon a material change in circumstances or upon remarriage. Now, the court may modify spousal support based upon a material change in circumstances, upon remarriage, or upon cohabitation.

[¶30] Section 14-05-24.1 of the North Dakota Century Code does not contravene the state or federal constitution. The Section does not take away the parties rights.

IV. The lower court did not err by failing to award Mari her attorney's fees and costs incurred in this proceeding.

[¶31] Mari requested an award of attorney's fees incurred defending against Michael's motion to terminate spousal support. The lower court properly denied her request. Generally, the court applies the "American Rule," which requires the parties to be responsible for their own attorney's fees. In re Guardianship & Conservatorship of D.M.O., 2008 ND 100, ¶ 14, 749 N.W.2d 517. "A successful litigant is not entitled to attorney's fees unless [those fees] are expressly authorized by statute or by agreement of the parties." Id. (quoting Gratech Co. v. Wold Eng'g, P.C., 2007 ND 46, ¶ 17, 729 N.W.2d 326). "This Court reviews a district court's decision regarding attorney's fees under the abuse of discretion standard." Id. "A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or if it misinterprets or misapplies the law." Id.

[¶32] In divorce proceedings, the court has the discretion regarding whether to award attorney's fees. N.D.C.C. § 14-05-23. The principal consideration in determining whether to award attorney's fees is each party's ability to pay. Lee v. Lee, 2005 ND 129, ¶ 16, 699 N.W.2d 842. The court could not award attorney's fees during a divorce proceeding based on the parties' financial conditions and needs without addressing the need of the requesting party, even if the other party has the ability to pay. Datz v. Dosch, 2014 ND 102, ¶ 23, 846 N.W.2d 724. An award of attorney's fees is within the sound discretion of the court and will be disturbed on appeal only if the court abuses its discretion. Id. at ¶ 22.

[¶33] Mari was unsuccessful in defending against Michael's motion to terminate spousal support. Further, Mari did not adequately address her need for attorney's fees. Mari did not provide any proof of her need, either by way of affidavit or testimony, to allow the court to address the parties' financial conditions and needs. Mari simply requested attorney's fees due to responding to Michael's motion. (App. 40). Mari stated, "I requested that Mike withdraw his motion due to the plain language of the statute." (App. 40). Mari further stated, "I believe that I should be awarded my attorney's fees in having to submit this response, in an amount not less than $3,500." (App. 40). Mari did not provide any proof of her financial condition or the need for attorney's fees.

[¶34] The lower court properly denied Mari's request for attorney's fees. This court should affirm the lower courts decision to deny Mari's request for attorney's fees and costs.

CONCLUSION

[¶35] For the above stated reasons, Appellee, Michael T. Bindas, respectfully requests that this court issue an order affirming the lower court's decisions regarding the issues appealed by Appellant, Mari F. Bindas.

Dated this 23rd day of August, 2018.

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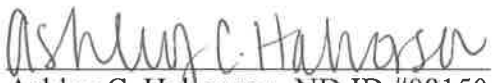
CERTIFICATE OF COMPLIANCE

[¶36] The undersigned hereby certifies, that the above brief complies with Rule 32 of the North Dakota Rules of Appellate Procedure, in that the above brief was prepared with proportional type face and the number of words in the above brief, excluding words in the table of contents, table of authorities, and certificate of compliance, does not exceed 8,000.

Dated this 23rd day of August, 2018.



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20180232
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 24, 2018
STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS

I, KRYSTAL SCHULDHEISZ, hereby certified that on the 24th day of August, 2018, I served the following document on Wayne Stenehjem, Attorney General, Matthew A. Sagsveen, Solicitor General, and Courtney R. Titus, Assistant Attorney General, State of North Dakota, by electronic means by forwarding them to masagsve@nd.gov and ctitus@nd.gov.

BRIEF OF APPELLEE

/s/ Krystal A. Schuldheisz
Krystal A. Schuldheisz