

IN THE SUPREME COURT

AUG 23 2018

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Michael T. Bindas,)	
)	Supreme Court No. 20180232
Plaintiff-Appellee,)	
)	District Court No. 09-2009-DM-00054
v.)	
)	
Mari F. Bindas,)	
)	
Defendant-Appellant.)	

Appeal from Order Dated April 18, 2018

Cass County, North Dakota
East Central Judicial District

Honorable Frank L. Racek

AMICUS BRIEF OF STATE OF NORTH DAKOTA

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
	<u>Paragraph(s)</u>
Statement of the Issues	1
Statement of Identity and Interest	2
Statement of Facts	5
Standard of Review	6
I. The constitutionality of Subsection 3 of 14-05-24.1 need not be addressed because this case may be resolved on alternative grounds.....	7
II. Subsection 3 of 14-05-24.1 is facially constitutional	12
III. Subsection 3 of 14-05-24.1 should be construed to avoid a constitutional conflict	14
Conclusion	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<u>Ash v. Traynor</u> , 1998 ND 112, 579 N.W.2d 180	15
<u>Barrios-Flores v. Levi</u> , 2017 ND 117, 894 N.W.2d 888	7
<u>Bismarck Pub. Sch. v. Walker</u> , 370 N.W.2d 565 (N.D. 1985)	7
<u>Cermak v. Cermak</u> , 1997 ND 187, 569 N.W.2d 280	3, 14
<u>Glass v. Glass</u> , 2017 ND 17, 889 N.W.2d 885	13
<u>Klein v. Klein</u> , 2016 ND 153, 882 N.W.2d 296	3, 13, 14
<u>Larimore Pub. Sch. Dist. No. 44 v. Aamodt</u> , 2018 ND 71, 908 N.W.2d 442	6, 13
<u>Little v. Graff</u> , 507 N.W.2d 55 (N.D. 1993)	7
<u>Minot Daily News v. Holum</u> , 380 N.W.2d 347 (N.D. 1986)	7
<u>Olson v. Bismarck Parks & Recreation Dist.</u> , 2002 ND 61, 642 N.W.2d 864	13
<u>Olson v. Ross</u> , 39 N.D. 372, 167 N.W. 385 (1918)	7
<u>Schulte v. Kramer</u> , 2012 ND 163, 820 N.W.2d 318	9
<u>Simons v. State</u> , 2011 ND 190, 803 N.W.2d 587	6
<u>State v. Dvorak</u> , 2000 ND 6, 604 N.W.2d 445	13

Statutes

U.S. Const. art. I, § 10, cl. 112

N.D.C.C. § 14-05-24.13, 13, 14

N.D.C.C. § 14-05-24.1(3) passim

N.D.C.C. § 32-23-114

N.D. Const. art. I, § 18 12

N.D. Const. art. VI, § 46

N.D.R.App.P. 44.....4

N.D.R.Civ.P. 24(c).....4

Other Authorities

2015 N.D. Sess. Laws ch. 1243

Statement of the Issues

[¶1] Whether North Dakota Century Code § 14-05-24.1(3) is constitutional.

Statement of Identity and Interest

[¶2] The North Dakota Attorney General (Attorney General) has an interest in this appeal as an amicus curiae. On June 8, 2018, the Attorney General received notice of Appellant Mari Bindas' (Appellant) constitutional challenge to N.D.C.C. § 14-05-24.1(3). The Appellant argues N.D.C.C. § 14-05-24.1(3) unconstitutionally infringes on her rights because the law requires a court to terminate her spousal support if it finds that she cohabitated with another individual. Specifically, she argues, subsection 3 of section 14-05-24.1 violates the federal and state Constitutions because the law "significantly impair[s] the right of [the Appellant] to rely on a contractual agreement made in good faith" and "[t]he application of this law is an unconstitutional infringement on the rights of North Dakota citizens who have entered into agreements in the past, intending to rely on them well into the future." Appellant's Brief (Br.) at 22, 23 ¶¶ 54, 56.

[¶3] Before N.D.C.C. § 14-05-24.1 was amended in 2015, courts were statutorily authorized to modify spousal support orders under section 14-05-24.1, but cohabitation alone did not warrant termination of a permanent spousal support award. Klein v. Klein, 2016 ND 153, ¶ 5, 882 N.W.2d 296 (citing Cermak v. Cermak, 1997 ND 187, ¶ 9, 569 N.W.2d 280). The legislature's 2015 amendments to section 14-05-24.1 provide that upon a finding that a "spouse receiving support has been habitually cohabitating with another individual in a relationship analogous

to a marriage for one year or more, the court shall terminate spousal support.”
2015 N.D. Sess. Laws ch. 124, ¶1.

[¶4] The Attorney General, through undersigned counsel, submits this brief under N.D.C.C. § 32-23-11, N.D.R.Civ.P. 24(c), and N.D.R.App.P. 44, which provide that the Attorney General is entitled to appear and be heard, or intervene, if a party questions the constitutionality of a statute. The Attorney General declines to intervene in this case, but instead submits this brief as amicus curiae based upon the authority granted under the aforementioned statute and rules.

Statement of Facts

[¶5] The Attorney General adopts the facts as set forth in the Appellant's brief. Appellant's Br. at 4-6, ¶¶ 11-17.

Standard of Review

[¶6] The Supreme Court's ability to declare a legislative act as unconstitutional is “one of the highest functions of the courts, and that power must be exercised with great restraint.” Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587. This Court recently explained its well-established rules for a party challenging the constitutionality of a law:

Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. “ ‘All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution.’ ” “ ‘The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination.’ ” This Court exercises the power to declare legislation unconstitutional with great restraint. Under N.D. Const. art. VI, § 4, this Court “shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.”

Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶ 7, 908 N.W.2d 442 (citations omitted).

I. The constitutionality of Subsection 3 of 14-05-24.1 need not be addressed because this case may be resolved on alternative grounds.

[¶7] Before the Court analyzes the Appellant's constitutional argument, the Court must first inquire as to whether alternative grounds exist for a decision. If the Court can resolve the matter on other appropriate grounds, then the constitutionality need not, and should not, be addressed. Minot Daily News v. Holum, 380 N.W.2d 347, 350 (N.D. 1986); Bismarck Pub. Sch. v. Walker, 370 N.W.2d 565, 566 (N.D. 1985) ("a court will refrain from deciding constitutional issues where there are appropriate alternative grounds to resolve the case before it."); Little v. Graff, 507 N.W.2d 55, 59 (N.D. 1993); Barrios-Flores v. Levi, 2017 ND 117, ¶ 33, 894 N.W.2d 888 (Sandstrom, J. concurring) ("This Court for more than one hundred years has reiterated the principle that courts do not decide unresolved constitutional cases if a case may be resolved on other grounds."). A party who attacks the constitutionality of a statute must show, among other things, "that a decision on the constitutional question is necessary in order to protect [her] in the enjoyment of the rights guaranteed to [her] by the Constitution." Olson v. Ross, 39 N.D. 372, 167 N.W. 385, 386 (1918).

[¶8] The Appellant's argument, that N.D.C.C. § 14-05-24.1(3) is unconstitutional as applied to her, may not need to be addressed by this Court since alternative grounds exist to resolve this appeal and Appellant has not shown that a decision on the constitutionality of the statute is necessary.

[¶9] First, the Court could conclude that the language of N.D.C.C. § 14-05-24.1(3) precludes application of the statute to the spousal support awarded in this case. Subsection 3 of section 14-05-24.1 uses the language: “[u]nless otherwise agreed to by the parties in writing” The Court could conclude that the parties agreed in writing to the terms of their divorce which was later merged into the final judgment, and that subsection 3 of section 14-05-24.1 does not apply based on that fact alone, not to mention the fact that the Court reviews the issue of modification of spousal support with greater scrutiny. Appellant’s Br. at 12, ¶ 32; Schulte v. Kramer, 2012 ND 163, ¶ 12, 820 N.W.2d 318.

[¶10] Second, the Court may determine that the lower court erred in determining that Appellant’s spousal support was not rehabilitative. Appellant’s App. at 45-46, ll. 18-25, 1-20. The Appellant relied upon case law from this Court discussing rehabilitative spousal support and the goals of awarding such support. If the Court were to find the spousal support in this case is in fact rehabilitative based on the facts of the case and prior precedent, then N.D.C.C. § 14-05-24.1(3) is inapplicable to this case.

[¶11] Third, the Court could conclude there are factual issues that have not been resolved by the lower court in determining whether, based upon a preponderance of the evidence, a relationship analogous to marriage exists between the Appellant and her boyfriend. Such a finding would certainly dispense of the issue before the Court and the constitutional application of N.D.C.C. § 14-05-24.1(3) would not need to be addressed to make this finding; nor on points one and two.

II. Subsection 3 of section 14-05-24.1 is facially constitutional.

[¶12] If this Court determines that other appropriate grounds do not exist to decide this case, the Court may address the Appellant's argument that the law contravenes the state or federal constitution. The Appellant appears to argue first that N.D.C.C. § 14-05-24.1(3) is unconstitutional on its face: "[i]f this court finds that N.D.C.C. § 14-05-24.1[3] as amended is not unconstitutional, then it should find that the application of the statute to the current facts would be an unconstitutional application of the law because it violates the contracts clause." Appellant's Br. at 28, ¶ 63. The contracts clause in the Constitution of the United States mandates "[n]o state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts" U.S. Const. art. I, § 10, cl. 1. The Constitution of North Dakota echoes the Constitution of the United States, "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." N.D. Const. art. I, § 18.

[¶13] A facial challenge to a statute requires the challenger to establish that no set of circumstances exists under which the statute would be valid. Larimore Pub. Sch. Dist. No. 44, 2018 ND 71, ¶ 38, 908 N.W.2d 442. The Appellant is arguing, however, that the law cannot be applied to agreements or divorce judgments that pre-exist the 2015 amendments to N.D.C.C. § 14-05-24.1; she argues "[t]he application of this law is an unconstitutional infringement on the rights of North Dakota citizens who have entered into agreements in the past" Appellant's Br. at 23-24, ¶ 56. The Appellant is not arguing, nor does she have standing to argue, that the legislature's 2015 amendments to section 14-05-24.1

unconstitutionally impair agreements entered into after the enactment of the law. “Generally, a party may only challenge the constitutionality of a statute as applied to that party.” Olson v. Bismarck Parks & Recreation Dist., 2002 ND 61, ¶ 10, 642 N.W.2d 864 (citing State v. Dvorak, 2000 ND 6, ¶ 28, 604 N.W.2d 445. The legislature’s enactment of amendments to section 14-05-24.1 could not impair any obligation that did not yet exist. Furthermore, this Court’s prospective application of subsection 3 of section 14-05-24.1 in Klein should remove any doubt about its constitutional prospective application.¹ See also Glass v. Glass, 2017 ND 17, ¶ 6, 889 N.W.2d 885. The law is facially constitutional.

III. Subsection 3 of 14-05-24.1 should be construed to avoid a constitutional conflict.

[¶14] The Appellant asserts that N.D.C.C. § 14-05-24.1(3) is unconstitutional as applied to her because it impairs her right to rely on a contractual agreement and “the application of this law has the effect of stripping Mari of her bargained for support without any meaningful discretion of the court.” Appellant’s Br. at 22, 25 ¶¶ 54, 60. The Appellant’s argument is based upon the position that before section 14-05-24.1 was amended in 2015, courts were statutorily authorized to modify spousal support orders under section 14-05-24.1, but cohabitation alone did not warrant termination of a permanent spousal support award. Klein, 2016 ND 153, ¶ 5, 882 N.W.2d 296 (citing Cermak, 1997 ND 187, ¶ 9, 569 N.W.2d 280).

[¶15] The Attorney General recognizes that this Court “construe[s] statutes to avoid constitutional conflicts, if possible.” Ash v. Traynor, 1998 ND 112, ¶ 7, 579

¹ The Attorney General recognizes that neither party in Klein made the constitutional argument made by Appellant in this case.

N.W.2d 180. "If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, we adopt the construction that avoids constitutional conflict. Id. (citations omitted). Unless this Court orders or requests otherwise, the Attorney General respectfully declines to further address the Appellant's arguments regarding how or whether N.D.C.C. § 14-05-24.1(3) may be constitutionally applied to the circumstances of Appellant's case.


Conclusion

[¶16] If the Court chooses to address the facial constitutionality of the law, the Attorney General respectfully requests this Court find that N.D.C.C. § 14-05-24.1(3) is constitutional.

Dated this 23rd day of August, 2018.

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Mari F. Bindas,)	CERTIFICATE OF
)	COMPLIANCE
)	
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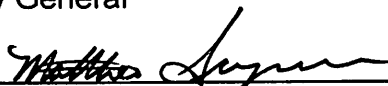
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[¶1] The undersigned certifies pursuant to N.D.R. App. P. § 32(a)(8)(A) that the text of State of North Dakota Amicus Brief (excluding the table of contents and table of authorities) contains 1,776 words.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 23rd day of August, 2018.

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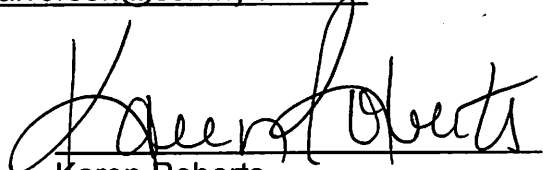
Karen Roberts states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

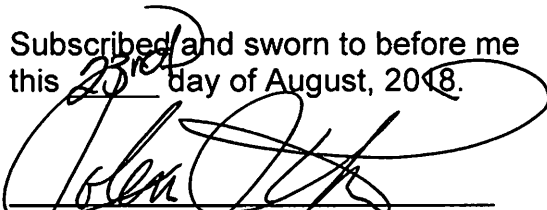
2. I am of legal age and on August 23, 2018, I served the attached **MOTION TO FILE AMICUS BRIEF and AMICUS BRIEF OF STATE OF NORTH DAKOTA** by emailing a true and correct copy thereof as follows:

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Karen Roberts

Subscribed and sworn to before me
this 23rd day of August, 2018.


Notary Public

