20180232
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 6, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

APPEAL FROM THE ORDER ENTERED APRIL 18, 2018
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA
THE HONORABLE FRANK L. RACEK, PRESIDING

REPLY BRIEF OF DEFENDANT - APPELLANT

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I. Law and Argument

Issue 1: The narrow definition of rehabilitative support used by the lower court and Appellee is a misapplication of the law.

[¶1] Plaintiff-Appellee, hereinafter "Michael," highlights the lower court's misapplication of the law by stating that if the support award in this case was rehabilitative, it would have provided for Mari's "education, work skills, experience or to become self-supporting." (Appellee Br. ¶23). The North Dakota Supreme Court has held time and again that rehabilitative support may be ordered for other reasons as well. The North Dakota Supreme Court has upheld rehabilitative spousal support where the recipient is already working full time. See, e.g., Wiege v. Wiege, 518 N.W.2d 708, 710 (N.D.1994); Wahlberg v. Wahlberg, 479 N.W.2d 143, 145 (N.D.1992); Williams v. Williams, 302 N.W.2d 754, 758 (N.D.1981). Rehabilitative spousal support is appropriate "when it is possible to restore an economically disadvantaged spouse to independent economic status or to equalize the burden of divorce by increasing the disadvantaged spouse's earning capacity." Riehl v. Riehl, 1999 ND 107, ¶12 595 N.W.2d 10.

[¶2] Michael further states that "rehabilitative support is short term, and for the purpose of getting an education or skill to increase their earning capacity." Michael provides no citation for this statement. (Appellee Br. ¶22). While that may be his opinion, there is no case law in North Dakota which supports this narrow and limiting definition of rehabilitative spousal support.

[¶3] Michael argues that Mari's spousal support should be considered permanent because the duration of spousal support in the case of Peterson v.

Peterson, 2016 ND 157, 883 N.W.2d 449 was for the same duration and was considered "permanent." (Appellee Br. ¶20). Whether or not the spousal support should be considered rehabilitative or permanent was not the issue presented to the court in Peterson. The issue before the court in Peterson was whether or not the lower court erred in determining the duration of the support. There is no case law in North Dakota which limits the duration of rehabilitative support.

[¶4] Mari asks this court to look at the plain language of her decree and ask this question: "Is the spousal support as agreed to by the parties and adopted by the lower court permanent?" The conclusion has to be a resounding "no." It is not permanent because it has an end date. The limitations on the reasons for rehabilitative spousal support used by the lower court are not consistent with prior holdings of the North Dakota Supreme Court and must be rejected.

Issue 2: Assertions made by Appellee not supported by the lower court record must be rejected by this court.

[¶5] The lower court in this case had no evidence before it as to the intent of the parties when entering into the agreement before making the interpretation that the award of spousal support was "permanent." Michael's assertion that "Mari was not awarded spousal support to provide her time and resources to acquire an education, training, work skills, or experience," is not a statement that can be supported by any part of the record. (Appellee Br. ¶21). It is not contained in Michael's affidavit in support of his motion. Simply because a matter is argued to the lower courts, does not make it evidence of a fact. Furthermore, Michael's statement that "spousal support was awarded until she would receive social security payments" is likewise not supported anywhere in the record. Id. There is

no evidence to support when Mari will reach retirement age. There is no evidence to support why spousal support was originally (agreed to) ordered.

[¶6] Furthermore, throughout his brief Michael asserts that Mari and Douglas are in a "romantic" relationship. That description of their relationship does not appear in either Affidavit of Michael or Mari, nor does it appear in the court order terminating the spousal support and is not supported by any facts. Michael's characterization of a "romantic" relationship in ¶¶3, 4, and 11 must be rejected by this court. This court must also reject Michael's unsupported statement that Mari and Douglas have common assets and debts at ¶3, when it is clear that they have one asset and one debt in common. (App. 39). Statements that are not supported by the record must be rejected by the reviewing court.

Issue 3. Appellee's statements regarding unsupported facts make a difference in this matter.

[¶7] The court in Baker v. Baker, 1997 ND 135, ¶14; 566 N.W.2d 806, carefully laid out a framework and analysis for what evidence should be presented in order to find that two people are living together as husband and wife. The scant evidence used by the lower court to find that Mari and Douglas are in a relationship analogous to marriage cannot be considered sufficient, given the parameters set forth in Baker. Michael's expansion of those facts is inappropriate and could lead to the wrong conclusion by this reviewing court, especially regarding the matter subject to a de novo review.

[¶8] Additionally, the North Dakota Supreme Court has consistently held that spousal support should not automatically terminate upon cohabitation because though unmarried cohabitants may voluntarily contribute to each other's

support, they have no legal obligation to pay. Cermak v. Cermak, 1997 ND 187, ¶10, 569 N.W.2d 280. The North Dakota Supreme Court continued to recognize the legal uncertainty of unmarried cohabitants in Woodward v. Woodward, 2013 ND 58, ¶9, 830 N.W.2d 82 when it affirmed the trial court's decision to refuse to terminate spousal support upon cohabitation of the recipient.

[¶9] While it is true that all of these decisions were made prior to the change of law in 2015, it is important to note that this was the status of the law at the time of Mari and Michael's divorce. This is the case law relied upon by Mari when entering into her agreement with Michael. The evidence is unrefuted that Mari is not emotionally ready to enter into a marriage relationship. (App. 39). The evidence is further unrefuted that Mari acknowledges that she is foregoing benefits of marriage, because of her emotional reluctance. Id. By its decision, the lower court is imposing the status of a married couple on Mari and Douglas. However, this does not change Mari's reluctance to enter into a marriage. The result: Mari is left with no promised and agreed upon support from her ex-husband of 25 years and a finding that she is basically married with no legal obligations attached to that relationship.

Issue 4. The correct standard of review must be identified.

[¶10] When there are scant facts present and newly adopted laws involved, it becomes even more important to identify the correct standard of review in this matter. Michael argues that the court's determination of whether or not to terminate spousal support is within the sound discretion of the trial court. (Appellee Br. ¶7). Michael cites to the case of Glass v. Glass, 2017 ND 17, 889 N.W.2d 885,

to identify the standard of review, but his reliance on this case is misplaced. In the case of Glass, the lower court terminated a spousal support obligation after the receiving spouse was remarried five years after the divorce, but thirteen years before the motion to terminate the support obligation was filed. The Court was addressing the specific issue of whether or not spousal support should be terminated in light of the other party's remarriage and whether or not the trial court erred in granting a retroactive modification or termination of spousal support. This is not analogous to the Bindas case because cohabitation (unlike remarriage) does not create a prima facie case to terminate spousal support if there is an award of rehabilitative spousal support.

[¶11] This appeal primarily involves questions of law which are subject to the de novo standard of review. Anderson v. Anderson, 522 N.W.2d 476, 479 (N.D. 1994).

Issue 5. Michael's arguments regarding the legislative authority must be wholly rejected.

[¶12] Michael's reliance on the legislature's power to impose restrictions on private rights so as to preserve the general welfare of all is not applicable to this situation. This is not the case of the legislature exercising "police power." Michael states that "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." (Appellee Br. ¶28). First, the discretion of the court. The clear language of the statute does limit the ability of the lower court to decide these matters. If the court determines that there is a preponderance of the evidence that the spouse receiving support has been habitually cohabitating with another individual in a relationship analogous to

a marriage for one year or more, then the court must terminate spousal support. This indeed limits the discretion of the lower court. The lower court is not free to determine that while the parties may be living in a relationship analogous to marriage, there may be other weighty reasons to continue with the spousal support. If the lower court were to do so, it would be reversed.

[¶13] Second is Michael's assertion that "In fact, Section 14-05-24.1(3) of the North Dakota Century Code provides 'unless otherwise agreed to by the parties in writing…'" (Appellee Br. ¶28). This is precisely Mari's point. The parties agreed in writing that Michael would pay Mari spousal support on certain terms, which were laid out in the agreement and merged into the Judgment. Mari is not arguing that the law takes away her right to enter into an agreement. Mari's argument is that the law affects the private agreement made between Mari and Michael in 2009, when the law in effect at the time of the agreement was that a "material change in circumstances" would need to be shown in order to modify her spousal support. The parties did enter into an agreement wherein her support would terminate on specific terms, not one of which is "cohabitation."

[¶14] This was an agreement made between Mari and Michael that Mari has relied upon ever since the agreement was merged into the judgment for divorce. The lower court had no idea what was considered by the parties at the time this stipulated default divorce was decided, but proceeded to deem the spousal support "permanent." This was not an agreement for permanent support. If it were permanent, the burden would have been on Michael to modify the support upon his retirement. To allow Michael to do away with his promises due to the

nuances of one word, "permanent," is grossly unfair to Mari and must not be upheld by this Court.

II. Conclusion

[¶15] Mari's support was clearly rehabilitative and N.D.C.C. §14-05-24.1(3) does not apply to rehabilitative awards of spousal support. Mari's spousal support should be immediately reinstated to April, 2018. This court must reverse the termination of Mari's support because it is not supported by the facts and was induced by an erroneous view of well-settled case law in North Dakota.

Respectfully submitted this 6 day of September, 2018.

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CERTIFICATE OF COMPLIANCE

[¶16] The undersigned hereby certifies that said reply brief complies with N.D.R.App.P. 32 in that the brief was prepared with Arial, size 12-point font, proportional typeface and that the total number of words does not exceed 2,000 from the portion of the brief entitled "Statement of Issues" through the signature block, including footnotes, if any. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

Dated this 6th day of September, 2018.

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STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF CASS **EAST CENTRAL JUDICIAL DISTRICT**

Michael T. Bindas Plaintiff - Appellee, vs. Mari F. Bindas Defendant - Appellant.	)))))))))	Supreme Court No. 20180232 Civil No. 09-2009-DM-00054 **CERTIFICATE OF ELECTRONIC SERVICE**

[¶17] I, DeAnn M. Pladson, an attorney licensed in the State of North Dakota, hereby certify that on September 6, 2018, the following documents were filed with the Supreme Court Clerk of Court at supclerkofcourt@ndcourts.gov:

a. Appellant's Reply Brief (PDF & Word version); and

b. Certificate of Service.

[¶18] Copies of these documents were served electronically through Odyssey on all separately represented parties at the e-mail addresses listed below:

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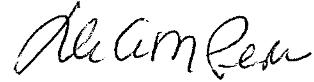
Dated this 6th day of September, 2018.

PLADSON LAW OFFICE, P.L.L.C.



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