

SUPREME COURT OF THE STATE OF NORTH DAKOTA

No. 20180279

Thomas D. Varty
PLAINTIFF – APPELLEE

v.

Kathleen A. Varty
DEFENDANT – APPELLANT

Appeal from the Findings of Fact, Conclusions of Law and Order for Amended Judgment, dated
May 11, 2018, and Amended Judgment dated May 18, 2018,
District Court of Williams County
Northwest Judicial District
The Honorable Josh B. Rustad
Williams County Civil No. 53-2011-DM-00565

APPELLEE’S BRIEF

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TABLE OF CONTENTS

DESCRIPTION	PARAGRAPH/PAGE
Table of Contents.....	i
Table of Authorities.....	ii
Statement of Issues Presented for Review.....	1
Statement of the Case.....	2
Statement of the Facts.....	3-20
Argument.....	21-54
Conclusion.....	55

TABLE OF AUTHORITIES

CASES	PARAGRAPH
<u>Alvarez v. Carlson</u> , 524 N.W.2d 584, 591 (N.D. 1994).....	39
<u>Fischer v. Fischer</u> , 139 N.W.2d 845 (N.D. 1966).....	20
<u>Hager v. Hager</u> , 539 N.W.2d 304, 305 (N.D. 1995).....	27
<u>Huffman v. Huffman</u> , 477 N.W.2d 594, 596 (N.D. 1991).....	23
<u>Koch v. Williams</u> , 456 N.W.2d 299 (N.D. 1990)	28
<u>Kosobud v. Kosobud</u> , 2012 ND 122, ¶ 6, 817 N.W.2d 384.....	27
<u>Lipp v. Lipp</u> , 355 N.W.2d 817, 819 (N.D. 1984)	28
<u>Mahoney v. Mahoney</u> , 1997 ND 149, ¶ 24, 567 N.W.2d 206	21, 49
<u>Meyer v. Meyer</u> , 2004 ND 89, ¶ 21, 679 N.W.2d 273.....	44
<u>Muehler v. Muehler</u> , 333 N.W.2d 432, 434 (N.D. 1983)	28
<u>Olson v Olson</u> , 520 N.W.2d 572, 574 (N.D. 1994).....	49
<u>Rebel v. Rebel</u> , 2016 ND 144, ¶ 8, 882 N.W.2d 256	40
<u>Reinecke v. Griffeth</u> , 533 N.W.2d 695, 698 (N.D. 1995).....	39
<u>Riehl v. Riehl</u> , 1999 ND 107, ¶ 8, 595 N.W.2d 10.....	20
<u>Rothberg v. Rothberg</u> , 2007 ND 24, ¶ 6, 727 N.W.2d 771.....	21, 28
<u>Ruff v. Ruff</u> , 78 N.D. 775, 52 N.W.2d 107 (1952).....	20
<u>Schatke v. Schatke</u> , 520 N.W.2d 833 (N.D. 1994).....	49
<u>Schmitz v. Schmitz</u> , 1998 ND 203, 586 N.W.2d 490.....	39
<u>Schulte v. Kramer</u> , 2012 ND 163, ¶ 10, 820 N.W.2d 318.....	27
<u>Sommer v. Sommer</u> , 2001 ND 191, ¶ 9, 636 N.W.2d 423.....	20, 49
<u>Stock v. Stock</u> , 2016 ND 1, ¶ 18, 873 N.W.2d 38.....	34, 45, 46
<u>Toni v. Toni</u> , 2001 ND 193, ¶ 11, 636 N.W.2d 396.....	23, 24
<u>Van Klootwyk v. Van Klootwyk</u> , 1997 ND 88, ¶ 13, 563 N.W.2d 377.....	27
<u>Wheeler v. Wheeler</u> , 548 N.W.2d 27, 30 (N.D. 1996).....	21, 22, 23, 39

STATUTES AND RULES

N.D.C.C. § 14-05-24.1.....20, 24, 26
N.D. R. Civ. P. 52(a).....27

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the District Court erred in modifying Thomas's spousal support obligation.

STATEMENT OF THE CASE

[¶2] Thomas accepts Kathleen’s Statement of the Case with a minor change. At ¶ 7 of Appellant’s Brief, it states, “On August 7, 2017, Thomas made a Motion to Terminate Spousal Support supported by an affidavit and exhibits. See id. At 40-53.” However, Thomas notes that on August 7, 2017 he also filed a Brief in support of his Motion to Terminate Spousal Support (Index # 16, Appellee’s Appendix p.5), which Kathleen failed to mention in ¶ 7 of Appellant’s Brief. Kathleen also failed to provide Thomas’s Brief to the Court in her Appendix, so Thomas has provided it to this Court in his Appendix.

STATEMENT OF THE FACTS

[¶3] The parties had been married for 30 years prior to the divorce, and during the marriage, Kathleen worked various jobs, and had not worked outside the home for seven years. See Appellant's Appendix at 57.

[¶4] Thomas and Kathleen executed a Marital Termination Agreement stipulating the terms of their divorce, which was approved by the District Court and incorporated into the District Court's Judgment on December 1, 2011. See id. at 21–34.

[¶5] The Marital Termination Agreement contained the following provision regarding spousal support, which was also incorporated into the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment:

Plaintiff will pay Defendant spousal support in the amount of \$3,175 per month for eight years and \$1,500 per month for four years. There will be spousal support for a total of twelve years (144 months). Spousal support will be payable on the first of each month until Defendant dies or remarries, whichever happens first. Spousal support will not increase but may be reduced because of, but not limited to, the following:

1. Plaintiff's income is reduced at no fault of his own;[.]

See id. at 13–14.

[¶6] On August 7, 2017, Thomas made a motion to terminate spousal support asking that the District Court terminate his spousal support obligation in its entirety because he was separated from his employment on May 5, 2017 and was unable to secure new employment. See id. at 40–53, Doc. ID #16. Thomas stated that he was earning \$2,520 per month in unemployment, but that his earning

capacity had “gone down as a result of the massive oilfield reductions,” and that his reduction in income “occurred through no fault of his own.” See id. at 52.

[¶7] Kathleen filed an Objection to Modification of Spousal Support and an Affidavit stating that she still had a need for spousal support because she was unable to work due to medical reasons. Kathleen disputed that the decrease in Thomas’s income was not “at no fault of his own.” Id. at 57. She stated that she could not afford to lose the spousal support due to her health issues, which had left her unable to work since December and which required elbow and hernia surgeries. See id. at 57–58. Further, she stated that Thomas carried a CDL license with hazardous and double and triple axle credentials, and that he had trained workers, so he had more experience than most. See id. at 58. Finally, Kathleen stated that her need has increased through the years and requested that the District Court dismiss Thomas’s motion and award her reasonable attorney’s fees. See id.

[¶8] Thomas filed a Reply to Kathleen’s objection, the Affidavit in support thereof stating that he had recently obtained employment with Calfrac Well Services Corp. (“Calfrac”) in Williston, ND, on August 22, 2017. See id. at 67. Thomas’s stated that he was earning \$10,695.72 per month at the time the judgment was entered, and his paystub, which he submitted as an exhibit, indicated that he was, in August of 2017, earning \$32.00 per hour: \$27.00 an hour as a base, plus a \$5.00 per hour premium for living and working in the Williston area. See id. at 66–70. Thomas noted that Kathleen “failed to provide

evidentiary proof” of her medical conditions and her need for spousal support. See id. at 67. Thomas noted that while he did possess a CDL license, he had never been employed as a truck driver and, therefore, had let his “hazmat” certification expire. See id. Thomas also stated that Kathleen sold the house awarded to her in the divorce, from which she should have netted about \$100,000. See id. He again requested that the District Court grant his motion to terminate spousal support. See id. at 64.

[¶9] Kathleen filed a renewed objection to Thomas’s proposed spousal support modification requesting a hearing on the matter. See id. at 73–74. Kathleen attempted to set a hearing on the motion to modify the spousal support, scheduled for November 13, 2017. See id. at 72. The hearing was continued due to unavailability of Thomas’s counsel. See id. at 77–79. The hearing was ultimately rescheduled for March 21, 2018. See id. at 80.

[¶10] A hearing was held on March 21, 2018 on the Motion to Terminate Spousal Support before Honorable Josh B. Rustad, Judge of the District Court in Williams County, North Dakota.

[¶11] At the hearing, the timeline regarding Thomas’s employment was established as follows: Thomas left Sun Well Services in June 2012 and went to Magna Energy (“Magna”). See Tr. at 11:2-23, 53: 13-16. Magna was purchased by Ranger Energy in January of 2017 and, in May of 2017, Ranger terminated Thomas’s position of safety manager, along with all other management positions that had been associated with Magna. See Tr. at 12:1-8; 14:7-18. Thomas

received a severance payment from Ranger of \$21,752 (Tr. 16:18-17:15), but Thomas used most of this money to pay to Kathleen six more spousal support payments in full (Tr. 18:17-19:18). He found employment with Calfrac in August of 2017. See Tr. at 23:2-7. Although Thomas testified that he made \$22.50 per hour, plus a five dollar “Williston differential” (Tr. at 23:8-13), Exhibit 4 (Appellant’s App. at 70–71) indicates that he made \$27.00 per hour, plus the \$5.00 bonus. This would give Thomas an annual income of \$66,560 (\$32/hr x 40hrs x 52 weeks) excluding any possible overtime. Thomas testified that he worked at Calfrac until November 26, 2017 (Tr. at 23:18-19) and grossed roughly \$24,380.00 in that time frame, including non-guaranteed overtime (Tr. at 55:9-56:17). Kathleen extrapolated the \$24,300 figure so that Thomas’s annual income (based on the same rate of overtime he worked in the first three months) was \$90,000. Thomas then took a job at American Well Service making a salary of \$75,000.00 per year, where he was still employed at the date of the hearing. (Tr. at 23:20-25, 24:1-13).

[¶12] Thomas testified and provided evidence that he currently had approximately \$12,965.44 in the bank in both savings and checking accounts. See Tr. at 26:18-20, 29:6-9; Appellant’s App. at 88–94. The District Court also received evidence and heard testimony that Thomas had an IRA valued at \$29,653.31, even after taking a \$25,000 IRA distribution in 2016. See Tr. at 30:11-25, 54:8-19; Appellant’s App. at 88–90, 95.

[¶13] In presenting evidence regarding his monthly expenses, Thomas provided

bills for Montana-Dakota Utilities (Appellant's App. at 105), Verizon Wireless (Appellant's App. at 106–107), and Midco (Appellant's App. at 108) which were in the name of Tammy Otteson, Thomas's girlfriend with whom he resided. These documents were admitted over Kathleen's objection. See Tr. at 43:1-24. Thomas testified that he pays seventy percent of the Montana-Dakota Utilities bill (Tr. at 43:1-24), one-third of the Verizon bill (Tr. at 44:12-24), and seventy percent of the Midco bill (Tr. at 45:6-22), Ms. Ottenson was responsible for the rest.

[¶14] On May 11, 2018, the District Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment. See id. at 157–163. The District Court found that Thomas was terminated from his \$132,000.00 per year position with Magna Energy Services in May of 2017 through no fault of his own when Ranger Energy Services purchased Magna and shortly thereafter eliminated all of Magna's management team; that Thomas obtained employment benefits from June to August of 2017; that he obtained “an hourly position at Calfrac, where he made \$4,680 gross per month” in August of 2017; that he “obtained a salaried position at America [sic] Well Service as a safety director, where he currently earns \$75,000 per year;” and that “Plaintiff's income reduction occurred through no fault of his own” and that he “is unable to provide spousal support at the current level mandated by the Judgment.” Id.

[¶15] The District Court further found “that Defendant failed to prove that she is unable to work and provide for herself, even if it be in a light duty capacity” and

“that Defendant failed to show a need for spousal support to continue at current levels.” Id. at 158, 160.

[¶16] The District Court concluded that the spousal support modification clause in the Marital Termination Agreement “made the ‘material change’ threshold inapplicable to this spousal support modification.” Id. at 161. The District Court also concluded that “Plaintiff became unemployed and had reduced income through no fault of his own, thus meeting the criteria for the spousal support reduction clause in the parties’ marriage termination agreement.” Id. at 162. The District Court also stated:

This Court rejects Defendant’s argument that Plaintiff should have had the foresight to stay at his position at Calfrac instead of moving to a new position at American Well Service. Also this issue is irrelevant to the issues at hand, as it was not the move from Calfrac to American Well Service that caused Plaintiff’s financial distress but his release from Ranger in May of 2017.

Id. at 162–163.

[¶17] Finally, the District Court concluded, “[A]lthough Plaintiff was not required to show a material change in financial circumstances to obtain a reduction in spousal support due to the marriage termination agreement, he did in fact make such a showing.” Id. at 163.

[¶18] The Amended Judgment terminated the spousal support obligation in its entirety. See id. at 164. Also, on May 16, 2018, the District Court vacated the Amended Judgment entered at Doc. ID # 93. See id.

[¶19] On May 16, 2018, the District Court issued a second Amended Judgment

which, instead of terminating Thomas's spousal support obligation in its entirety, reduced Thomas's spousal support obligation to \$500.00 per month. See id. at 165–166. This appeal followed.

LAW AND ARGUMENT

A. The District Court correctly concluded that the parties' stipulated divorce dispensed with the burden on the party seeking modification of the spousal support award to establish a material change in circumstances.

[¶20] N.D.C.C. § 14-05-24.1 authorizes a district court to award spousal support and provides, "[t]aking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for any period of time. The court may modify its spousal support orders." A court must apply the Ruff-Fischer guidelines when deciding the amount and duration of a spousal support award. Sommer v. Sommer, 2001 ND 191, ¶ 9, 636 N.W.2d 423; see Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952); Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966). Factors to consider under the Ruff-Fischer guidelines include:

the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Sommer at ¶ 9, (quoting Riehl v. Riehl, 1999 ND 107, ¶ 8, 595 N.W.2d 10).

[¶21] To modify spousal support, a material change in circumstances must exist to justify the modification. Mahoney v. Mahoney, 1997 ND 149, ¶ 24, 567 N.W.2d 206. The party seeking the modification bears the burden of showing a material change in circumstances warranting a modification of spousal support. Wheeler v. Wheeler, 548 N.W.2d 27, 30 (N.D. 1996). "A material change is a change that substantially affects the financial abilities or needs of the parties **and** that was not contemplated by the parties at the time of the original decree." Rothberg v. Rothberg, 2007 ND 24, ¶ 6, 727 N.W.2d 771 (emphasis added).

[¶22] In this case, Thomas's separation from Ranger was a change that did in fact significantly and materially affected his financial ability to pay necessary living expenses in addition to spousal support (he went from making \$132,000 to nothing). Notwithstanding, Thomas and Kathleen expressly contemplated that Thomas might suffer a reduction in income when they drafted their marriage termination agreement and its included spousal support clause. Therefore, Wheeler is inapplicable.

[¶23] A "trial court should be more reluctant to modify an original decree which is based upon an agreement of the parties than one based upon the court's findings." Huffman v. Huffman, 477 N.W.2d 594, 596 (N.D. 1991); see Toni v. Toni, 2001 ND 193, ¶ 11, 636 N.W.2d 396.; Wheeler at 30.

[¶24] However, the parties' Marriage Termination agreement is the source of the modifiability (or non-modifiability) of the parties' spousal support agreement,

not the caselaw that construes N.D.C.C. § 14-05-24.1 (the statutory authority for courts to grant spousal support). Kathleen contends that Toni is inapplicable, as its narrow holding goes to the non-modifiability of the Tonis' support agreement. However, Toni is in fact applicable, as it confirms the ability of parties to a marriage termination contract to define its terms rather than have a court impose terms upon them. Here, Thomas and Kathleen entered into an agreement that stated that spousal support could not be increased but might be decreased if Thomas suffered a decrease in income through no fault of his own. If this Court found the Tonis' agreement enforceable, then it must find Thomas and Kathleen agreement similarly enforceable. To not enforce Thomas and Kathleen's spousal support clause would, in fact, modify the decree based on the agreement of the parties.

[¶25] Here, the parties' agreement said that spousal support could not be increased but may be decreased if Thomas suffered a decrease in income through no fault of his own. The clause did not address the materiality of the income reduction, and the materiality provisions of the relevant caselaw does not apply, thus Thomas could, under the spousal support clause, validly seek a reduction for any no-fault reduction in his income, no matter how small. It would then be up to the Court to determine the amount of any spousal support reduction.

B. The District Court’s finding that Thomas established a material change in circumstances was supported by the record and was not erroneous.

[¶26] Notwithstanding Section A, *supra*, the District Court found, and the evidence supports, that Thomas, in fact, made a proper showing of a material change in circumstances under the caselaw construing N.D.C.C. § 14-05-24.1 when Ranger terminated Thomas’s safety manager position, along with the rest of Magna’s former management team, such as to obtain a modification of spousal support.

[¶27] A district court's determination of changed circumstances justifying a modification of spousal support is a finding of fact, which will only be set aside on appeal if it is clearly erroneous. Schulte v. Kramer, 2012 ND 163, ¶ 10, 820 N.W.2d 318; Hager v. Hager, 539 N.W.2d 304, 305 (N.D. 1995). Under N.D.R.Civ.P. 52(a), a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire record this Court is left with a firm conviction that a mistake has been made. Van Klootwyk v. Van Klootwyk, 1997 ND 88, ¶ 13, 563 N.W.2d 377. A district court's choice between two permissible views of the weight of the evidence is not clearly erroneous. Kosobud v. Kosobud, 2012 ND 122, ¶ 6, 817 N.W.2d 384. On appeal, we do not reweigh conflicts in the evidence, and we give due regard to the district court's opportunity to judge the credibility of the witnesses. Id.

[¶28] Once a trial court finds a material change in circumstances exists, it must examine the reason for the material change to determine if modification of support is warranted. See Rothberg, at ¶ 6; see also Koch v. Williams, 456 N.W.2d 299 (N.D. 1990) (holding "[d]epending upon the cause of the change, a trial court may modify an award of child support when a material change in financial circumstances is demonstrated"); Lipp v. Lipp, 355 N.W.2d 817, 819 (N.D. 1984) (explaining that "[t]he reason for changes in income must be examined . . . as well as the extent that the changes were contemplated at the time of the agreed decree"); Muehler v. Muehler, 333 N.W.2d 432, 434 (N.D. 1983) (holding "[a] determination that a change in circumstances has occurred is not an end in itself but triggers the further inquiry to determine what brought about the change").

[¶29] As seen in Appellant's Appendix, Thomas submitted 19 exhibits to the District Court that showed his financial position, and Kathleen submitted 20. The District Court had plenty of financial information from the parties to make a proper spousal support determination.

[¶30] The District Court found that Thomas went from making \$132,000 a year (\$11,000 per month) to zero, then he collected unemployment of \$2,520 per month, and his spousal support amount owed to Kathleen was \$3,125 per month. His unemployment compensation was \$650 less than what he needed to pay spousal support to Kathleen in full and then have no money remaining toward any other necessary expenses. This was clearly a material change that

affected Thomas's financial ability to pay spousal support, which occurred through no fault of his own. Notably, Kathleen even admitted at the hearing that Thomas's position was terminated by Ranger through no fault of his own (Tr. at 78:22-79:5).

[¶31] Thomas testified that he worked at Calfrac until November 26, 2017 (Tr. at 23:18-19) and grossed roughly \$24,380.00 in that time frame, including non-guaranteed overtime. Thomas's hourly rate was \$32.00 an hour (\$27 plus a \$5 Williston living differential). Therefore, his annual base rate was \$66,560 (32*40*52). Thomas stated that he left CalFrac for American Well so he could go back to a salaried position at a higher base rate than at CalFrac (instead of relying on CalFrac's non-guaranteed overtime) and go back to his role of safety manager, which he had been throughout his career. (Tr. at 55:9-56:17). It's important to note that the figure of \$90,000 that the District Court adopted was speculative, as it was based on non-guaranteed overtime extrapolated from Thomas's three months at CalFrac. (Tr. At 55:20-56:7).

[¶32] The Court found that Thomas's subsequent jobs at \$90,000 and \$75,000 a year (\$7,500 and \$6,250 per month) ameliorated his financial situation somewhat. However, the reductions from \$132,000 to \$90,000 (or to \$75,000) still qualified as material changes that affected Thomas's financial ability to pay spousal support of \$3,125 per month to Kathleen. All of this is supported by the Exhibits filed by Thomas in support of his Motion to Terminate Spousal Support (Appellant's Appendix ## 42, 43 and 50). The finding that Thomas

had a material change in circumstances was not erroneous. There could not have been a more material change as Thomas went from earning \$132,000 a year to earning nothing. This was the obvious impetus to him seeking a reduction in spousal support. And at the time of the hearing, Thomas was only making an annual salary of \$75,000 (a 43.2% reduction in income).

[¶33] Further, even if the court had based Thomas's reduction in income based on the \$90,000 figure as Appellant argues (as opposed to \$0 income at the time of filing or the \$75,000 at the time of hearing), this is still a material reduction in income of 31.8% $((\$132,000 - \$90,000) / \$132,000)$.

[¶34] An award amount is clearly erroneous where the amount unduly burdens the payor spouse by leaving the spouse in a nearly impossible financial position. Stock v. Stock, 2016 ND 1, ¶ 18, 873 N.W.2d 38.

C. The District Court's conclusion that the relevant job change was Thomas's separation from Ranger was supported by the record and was not erroneous.

[¶35] It is abundantly clear and supported by the record that Thomas's no-fault termination from Ranger in May of 2017, along with the remainder of the Magna management team, was the event that caused Thomas's financial difficulty. In May of 2017, he went from earning \$132,000 per year to zero. Shortly thereafter, Thomas began collecting unemployment benefits in the amount of \$2,520 per month (annualized to \$30,240). He executed his Affidavit in support of his Motion on June 29, 2017 (*See* Appellant's Appendix

#51). He filed his Motion to Terminate Spousal Support on August 4, 2017 (See Appellant's Appendix #42). Thomas then found work at CalFrac (possible annualized earnings of \$90,000, which included speculative overtime) and then at American Well (annualized earnings of \$75,000).

[¶36] Therefore, just by the timing of the filings, it is clear that the event that caused Thomas's financial distress was his separation from Ranger in May of 2017. It was not clearly erroneous for the District Court to have found so and such a finding was supported by the record.

[¶37] Also, but for Thomas's termination from Ranger (along with the remaining Magna management team), he would not have had to collect unemployment, would not have had to take the job at CalFrac, and would not have switched to American Well. If Thomas was never terminated from Ranger, he would be making \$132,000 a year, not \$75,000. If Thomas was never terminated from Ranger, he would have continued paying \$3,175 in spousal support as he always had, and which had totaled \$227,000 at the time of hearing. To suggest otherwise is specious.

[¶38] Additionally, Kathleen states in her Appellant's Brief that Thomas obtaining a new position at CalFrac (and then at American Well) should not disadvantage her. However, Thomas is at a loss to understand what this means. Thomas's new job meant that he might have some money to pay spousal support and could not disadvantage her any more than Thomas's separation from Ranger (when he went from making \$132,000 to nothing).

D. The District Court’s findings to reduce the spousal support award were adequate and were supported by the record.

[¶39] In Schmitz v. Schmitz, 1998 ND 203, 586 N.W.2d 490, the Court stated,

Findings of fact should be stated in a manner reflecting the factual basis of the district court's decision. Wheeler, 548 N.W.2d at 30. We will not remand for clarification of findings of fact when, through inference or deduction, we may discern the district court's rationale. Id.; Alvarez v. Carlson, 524 N.W.2d 584, 591 (N.D. 1994). We will rely on implied findings of fact when the record enables us to clearly understand the district court's factual determinations, and the basis for its conclusions of law and judgment. Wheeler, at 30; Reinecke v. Griffeth, 533 N.W.2d 695, 698 (N.D. 1995).

Schmitz at ¶ 6.

[¶40] The district court made findings on the Ruff-Fischer guidelines that were supported by the record. The district court is not required to make specific findings on each factor, but it must explain the rationale for its decision. Rebel v. Rebel, 2016 ND 144, ¶ 8. The Ruff-Fischer guidelines include:

[T]he respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Rebel at ¶ 8.

[¶41] In its Findings of Fact (Appellant’s Appendix #157, ¶¶ 4-28) the District Court analyzed Thomas’s financial condition; found that Kathleen was 55

years old; analyzed her financial circumstances; found that she presented evidence of medical visits, but provided the District Court with no documentation of her claimed illnesses; found that she failed to prove that she was unable work; and found that she was voluntarily delaying needed surgeries.

[¶42] These findings were supported by the testimony at the hearing. Kathleen testified that: she has not applied for disability (Tr. at 84:2-8); that she could not work even a light duty job because she “cannot wear pants” (Tr. at 84:9-15); that she had no documentation that said that she couldn’t work (Tr. at 84:15-20); that (despite the fact that she was unable to work even a light-duty job) she went to casinos on a regular basis after receiving the \$65,000 from her son on the sale of the house (Tr. at 92:2-93:14); that she had spent \$17,000 in two months from this sum without being able to explain what she spent it on (Tr. at 96:6-97:4); that she had depleted the \$65,000 to \$12,000 (Tr. at 98:2-21); and that it was her choice to put off her hernia surgery (Tr. at 99:18-23).

[¶43] These statements and findings by the District Court were sufficient to comply with the Ruff-Fischer guidelines.

[¶44] The District Court also analyzed Thomas’s ability to pay spousal support and Kathleen’s needs. Meyer v. Meyer, 2004 ND 89, ¶ 21, 679 N.W.2d 273. The Court found that Kathleen failed to show a need for spousal support to continue at current levels.

[¶45] An award amount is clearly erroneous where the amount unduly burdens the payor spouse by leaving the spouse in a nearly impossible financial position. Stock v. Stock, 2016 ND 1, ¶ 18, 873 N.W.2d 38.

[¶46] In the District Court's Findings of Fact, it stated that Thomas's monthly disposable income after paying his monthly bills was \$1,200, which was supported by the record. Therefore, in order to comply with Stock, it is apparent that the District Court was not going to order that Thomas give to Kathleen spousal support in the amount of every single dollar he retained after he paid his bills. There was testimony that Kathleen's monthly health insurance payment was \$494.62. It can be deduced that the District Court came to the amount of \$500 because at least Kathleen's health insurance would be paid.

[¶47] It is also notable that the District Court found that Kathleen had been profligate with her money in the recent past (¶¶ 23 and 24 of the Findings of Fact, Appellant's Appendix #157). This was supported by Kathleen's testimony at the hearing (as stated in ¶ 42, *supra*), where she testified that she went to casinos a few times a month and had depleted approximately \$50,000 in just a couple of months after she sold her house to her son. Her feigned cry for more and continued spousal support should rightfully have fallen on deaf ears. Accordingly, a downward adjustment from the midpoint of \$1,200 and zero (\$600) would have been justified.

[¶48] Therefore, the findings to reduce the spousal support award were adequate and were supported by the record.

[¶49] Kathleen also has addressed the issue that Thomas’s move from CalFrac to American Well (where he went from a position where he possibly could have earned \$90,000 a year including overtime to one where he earned a guaranteed \$75,000 a year in salary) was a voluntary move that reduced his ability to pay spousal support that should not be countenanced. However, in Olson v Olson, 520 N.W.2d 572, 574 (N.D. 1994) (*quoting* Schatke v. Schatke, 520 N.W.2d 833 (N.D. 1994)), in the child support context, this Court stated, “We can also envision situations where the parent accepts new employment at a lower current salary or seeks further education, if the potential for advancement and long-term security are improved.” Sommer v. Sommer at ¶ 20 states, “a voluntary change in employment by the supporting spouse that results in lower income may be a valid basis for a modification of spousal support if the change in employment was reasonable and made in good faith. See Mahoney v. Mahoney, 538 N.W.2d 189, 192-93 (N.D. 1995).”

[¶50] In the instant case, the change in salaries from \$90,000 (based on the receipt of non-guaranteed overtime at the same rate at which he received it in the three months he worked at CalFrac) to \$75,000, while a change, is not a substantial change and is not an attempt by Thomas to “underemploy” himself to avoid paying spousal support to Kathleen.

[¶51] It is also notable that Thomas’s base hourly wage at CalFrac was \$27 an hour with a \$5 wage differential. This translates to an annualized base income of \$56,160 plus the additional \$10,400 in differential pay, totaling \$66,560

excluding overtime. This is \$8,440 less than the salary he received after going to American Well. In this regard, it is common knowledge that during recent oilfield slowdowns the very first areas that companies cut in their cost savings measures are overtime and discretionary benefits such as location-specific wage differentials. It can therefore be argued that Thomas's change from CalFrac to American Well was fiscally prudent.

[¶52] Lastly, it is also clear that Thomas changed positions in order to secure a salaried position in a role with which he was most experienced throughout his career, namely that of Safety Manager.

[¶53] Thus, and notwithstanding the fact that it was Thomas's termination from Ranger that led to his financial hardship (not his change from CalFrac to American Well) his job change was clearly made in good faith. There was absolutely no evidence presented to the contrary.

[¶54] Accordingly, the District Court's Findings of Fact supported its determination to reduce Thomas's spousal support obligation to \$500.

CONCLUSION

[¶55] **WHEREFORE**, Thomas D. Varty respectfully requests that this Court affirm the Amended Judgment of the District Court in its entirety.

Respectfully Submitted this 15th day of November 2018.

Signed,

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WORD COUNT CERTIFICATE

The undersigned certifies that this Brief contains 5506 words, within the limit of 8,000 words for a principal brief pursuant to N.D. R. App. P. 32(a)(8)(A).

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