

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>Kari Cathryn O’Keeffe, Plaintiff, Appellee, and Cross-Appellant, v. Timothy Michael O’Keeffe, Defendant, Appellant, and Cross-Appellee</p>	<p>Supreme Court No. 20190379 Cass Co. Court No. 2015-DM-00837</p>
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APPEAL FROM THE ORDER ENTERED ON DECEMBER 1, 2019 and
ORDER GRANTING PLAINTIFF’S MOTION FOR ENFORCEMENT OF
JUDGMENT AND MOTION TO STRIKE IMPROPERLY FILED DOCUMENTS,
DENYING DEFENDANT’S MOTION FOR RELIEF FROM PAYMENT OF
SPOUSAL SUPPORT AND AWARDING PLAINTIFF ATTORNEY’S FEES
FROM CASS COUNTY DISTRICT COURT

EAST CENTRAL JUDICIAL DISTRICT
HONORABLE BRADLEY A. CRUFF, PRESIDING

BRIEF OF DEFENDANT/APPELLANT

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STATEMENT OF THE ISSUES

Issue 1:

[¶1] Whether the district court erred by finding Tim's spousal support obligation was rehabilitative rather than permanent, based on the evidence in the record and Kari's burden as set forth in *Markegard v. Willoughby*, 2019 ND 170, 930 N.W.2d 108?

Issue 2:

[¶2] Whether the district court erred by awarding attorney fees to Kari?

STATEMENT OF THE CASE

¶3 Plaintiff/Appellee/Cross-Appellant Kari Cathryn O’Keeffe (hereinafter “Kari”) filed for divorce on July 27, 2015 by the filing of a Summons and Complaint in Cass County, North Dakota. (Index Nos. 1 and 2). Kari and Defendant/Appellant/Cross-Appellee Timothy Michael O’Keeffe (hereinafter “Tim”) executed a Marital Termination Agreement on November 18, 2015, which was notarized and filed with the court. (Index No. 16; app. 8). The Marital Termination Agreement was later merged into the Judgment of the court entered on November 25, 2015. (Index No. 24). Thereafter Kari and Tim entered into a Stipulation for Amended Judgment, which was filed with the court on December 24, 2015. (Index No. 30). An Amended Judgment was entered on December 30, 2015. (Index No. 36; app. 25). The Amended Judgment provides at paragraph 16 that Tim pay spousal support as follows:

Spousal Support. Tim shall pay as and for spousal support to Kari the amount of \$5,000 per month beginning November 1, 2015, and continuing on the first day of each month thereafter for a period of 120 months. The amount and duration of spousal support shall be non-modifiable by either party. The spousal support shall terminate upon the death or remarriage of Kari. It is intended that the support payable to Kari in accordance herewith shall be includable in Kari’s gross income pursuant to Section 71 of the Internal Revenue Code and shall be deduct [sic] by Tim pursuant to Section 215 [sic] of the Internal Revenue Code.

The spousal support obligation is subject to immediate income withhold pursuant to Section 14-05-25.2 of the North Dakota Century Code. All spousal support payments shall be paid to the North Dakota State Disbursement Unit, PO Box 7280, Bismarck ND, as trustee for remittance to Kari. Said payments shall be made in such form as required by the State Disbursement Unit.

(App. 32-33).

¶4 On February 28, 2019, Tim served Kari with a Motion to Terminate Spousal Support and his affidavit and exhibits in support thereof. (Index. Nos. 60, 47-59; app. 39-

69). Kari filed her Response and Brief in Opposition to Tim's Motion on March 13, 2019. (Index. No. 61, 62). Tim submitted a Reply Brief on March 19, 2019. (Index. No. 64). Kari submitted a Supplemental Brief on March 29, 2019. (Index. No. 66).

¶5 A hearing was scheduled for April 5, 2019 and oral arguments were presented to the court, and the court requested proposed Findings from the parties and took the matter under advisement. (Transcript of Proceedings, April 5, 2019 [hereinafter Tr. 1] at p. 28-29). On May 23, 2019 Cindy Keller, Judge Cruff's Court Reporter, contacted counsel via email and indicated that Judge Cruff wanted an evidentiary hearing, "limited to the values of the assets and debts agreed to by the parties at the time of the divorce." (Index. No. 95; app. 70). An Order for hearing was issued on May 29, 2019 (Index. No. 72; app. 71) and oral arguments were presented at the hearing on August 9, 2019. (Transcript of Proceedings, August 9, 2019 [hereinafter Tr. 2]). The court's Order denying Tim's motion was issued December 1, 2019. (Index No. 121; app. 72). An Order Granting Plaintiff's Motion for Enforcement of Judgment and Motion to Strike Improperly Filed Documents, Denying Defendant's Motion for Relief from Payment of Spousal Support and Awarding Plaintiff Attorney Fees was entered on December 2, 2019. (Index No. 122; app. 85). Notices of Entry of both Orders were entered on December 2, 2019. (Index No. 123, 125).

¶6 Tim filed his Notice of Appeal (Index. No. 141; app. 88) and Order for Transcript (Index. No. 142) on December 3, 2019. Kari filed her Notice of Cross-Appeal on December 6, 2019 (Index. No. 143). The clerk filed the Certificate of Appeal on December 31, 2019. (Index. No. 160).

STATEMENT OF THE FACTS

[¶7] Kari and Tim were married on January 3, 1997 in Fargo, North Dakota. (Index. No. 1). During the marriage Kari and Tim had two children, both of whom were minors at the time of divorce in 2015. *Id.* The parties' oldest child had attained the age of majority as of the time of the Motion to Terminate Spousal Support. During the marriage, Tim was employed as an attorney at O'Keeffe, O'Brien, Lyson & Foss, Ltd. (f/k/a Kennelly & O'Keeffe, Ltd.). (Index No. 1, 47; app. 39). Kari held an Elementary Education Bachelor of Arts degree, though she never had a full-time classroom teaching job. (Index No. 47; app. 43). Rather, Kari worked throughout the marriage at various retail stores before becoming employed as a licensed insurance agent with State Farm for approximately 10 years of the parties 18-year marriage. *Id.* Kari left her employment with State Farm in or around 2009, and thereafter worked for a short time at Sanford, was self-employed as a representative of Rodan & Fields, and worked part time at the time of divorce at a clothing store in the West Acres Mall. *Id.* She subsequently became an Assistant Manager at that clothing store. *Id.*

[¶8] Kari and Tim resolved all of their issues outside of court at the time of the divorce. All of the assets accumulated over 18 years of marriage were divided in a way that both parties acknowledged was equitable. (Index No. 16; app. 18-21). The parties had real property, business interests, various retirement and financial accounts, and other personal property. *Id.* The parties agreed that in order to equalize the property division, Tim would pay Kari the sum of \$400,000 plus interest amortized over a period of 10 years. (Index. No. 16; app. 21). Additionally, the parties agreed that Tim would pay Kari spousal support in the amount of \$5,000 per month for a period of 120 months. (App. 17-18). The parties'

agreement and subsequent Judgment is silent as to whether Tim's spousal support obligation was considered "rehabilitative" or "permanent." The parties agreed that neither could modify the amount or duration of the award, and specified that it would terminate upon Kari's remarriage or death. (Index No. 16; app. 17).

[¶9] Kari began habitually cohabitating in a relationship analogous to marriage with a man, Scott College, sometime prior to January 20, 2016, and continued to reside with Mr. College at the time of Tim's Motion to Terminate Spousal Support. (Index No. 47; app. 40-69). Kari and Mr. College are engaged to be married. (Index No. 47; app. 42, 61-62). Notably, Tim submitted a lengthy Affidavit and exhibits citing these facts. (App. 40-69). Kari did not submit any evidence, by affidavit or otherwise to dispute any of these facts. Kari conceded that she habitually cohabitated with Mr. College in a relationship analogous to marriage for more than one year. (Tr. 1, p. 16). Kari argued instead that (1) the non-modification language of their stipulation and Amended Judgment precludes the court from applying N.D.C.C. § 14-05-24.1(3); or (2) the non-modification language satisfies the "unless otherwise agreed by the parties in writing" exception in § 14-05-24.1(3); or (3) the spousal support is rehabilitative and thus precluded from termination despite her cohabitation. (Index. No. 62).

[¶10] The district court, in its December 1, 2019 Order, concluded N.D.C.C. § 14-05-24.1 applied and that the non-modification clause in the Amended Judgment did not satisfy the "unless otherwise agreed by the parties in writing" exception of the statute. (Index No. 121; app. 75-76). However, the court concluded that the spousal support awarded to Kari was rehabilitative rather than permanent, and therefore denied Tim's Motion to Terminate. (Index. No. 121; app. 76-82). Notably, in the December 1, 2019 Order the court concluded

that Tim did not act unreasonably in bringing his motion and did not engage in any acts that prolonged the proceeding or increased the costs for either party. (Index. No. 121; app. 82-83). Further, the court concluded that Tim's request to limit the values of the marital estate and the request to compel the mediator's attendance were moot. Index No. 121; app. 83-84). The court concluded that Kari had not demonstrated a need for Tim to pay her attorney fees, and accordingly denied the same. (Index No. 121; app. 82-84).

[¶11] However, the following day, on December 2, 2019 the court issued its Order Granting Plaintiff's Motion for Enforcement of Judgment and Motion to Strike Improperly Filed Documents, Denying Defendant's Motion for Relief from Payment of Spousal Support and Awarding Plaintiff Attorney's Fees. (Index No. 122; app. 85-86). This Order was prepared and submitted by Kari's counsel on August 14, 2019. (Index No. 107). Despite the court's findings and Order on December 1, 2019, the court indicated in its December 2, 2019 Order (prepared months earlier by Kari's counsel) that Tim's conduct unnecessarily increased the parties' fees and awarded Kari attorney fees in the amount of \$1,590. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

[¶12] A district court's findings of fact in its decision regarding modification or termination of spousal support will be reversed on appeal only if they are clearly erroneous. *See Markegard v. Willoughby*, 2019 ND 170, ¶ 6, 930 N.W.2d 108, 110 (*citing Varty v. Varty*, 2019 ND 49, ¶ 6, 923 N.W.2d 131). 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, on the basis of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Additionally, statutory interpretation is a question of law, which is

fully reviewable on appeal. *Id.* (citing *Bindas v. Bindas*, 2019 ND 56, ¶ 10, 923 N.W.2d 803).

II. THE DISTRICT COURT ERRED IN FINDING TIM'S SPOUSAL SUPPORT OBLIGATION WAS REHABILITATIVE RATHER THAN PERMANENT, BASED ON THE EVIDENCE IN THE RECORD AND KARI'S BURDEN AS SET FORTH IN MARKEGARD V. WILLOUGHBY, 2019 ND 170, 930 N.W.2D 108.

[¶13] Section 14-05-24.1, N.D.C.C., authorizes the district court to order and modify spousal support and also governs termination of support under certain circumstances, stating:

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 cohabitating 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.

(*emphasis added*). The North Dakota legislature amended Section 14-05-24.1 in 2015 to modify the language in the current subsection 1, and added subsections 2, 3, and 4. 2015 N.D. Sess. Laws. Ch. 124, § 1. Previously, N.D.C.C. § 14-05-24.1 simply provided:

Taking 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.

(*emphasis added*). The current version of the statute became effective on August 1, 2015. *Id.* This Court in *Bindas v. Bindas*, 2019 ND 56, 923 N.W.2d 803 held that divorce agreements entered into after August 1, 2015 were governed by the current version of § 14-05-24.1. That is, upon a showing of habitual cohabitation, courts are required to terminate a spousal support award unless one of the exceptions apply, i.e., (1) there is a writing to the contrary, or (2) the support award is rehabilitative spousal support. Following *Bindas*, the Court provided further clarification to the two exceptions in its holding in *Markegard*, 2019 ND 170, 930 N.W.2d 108, including clarity as to the parties' relative burdens of proof in cases requesting termination pursuant to N.D.C.C. § 14-05-24.1.

- A. ***Tim satisfied his burden of demonstrating that Kari was habitually cohabitating in a relationship analogous to marriage; therefore, Kari bears the burden of demonstrating that one of the exceptions outlined in N.D.C.C. § 14-05-24.1 apply.***

[¶14] The party moving for termination of spousal support has the initial burden to prove cohabitation justifying termination. *Markegard*, 2019 ND 170, ¶ 16, 930 N.W.2d 108, 112 (*citing Varty v. Varty*, 2019 ND 49, ¶ 6, 923 N.W.2d 131). If that initial burden is met, the party opposing the motion has the burden to prove one of the exceptions applies. *Id.* (*citing Cermak v. Cermak*, 1997 ND 187, ¶ 6 n.1, 569 N.W.2d 280).

[¶15] Kari conceded that she had been cohabitating in a relationship analogous to marriage for more than a year. (Tr. 1, p. 16). Tim, as the moving party, satisfied his burden to prove cohabitation justifying termination. The burden then shifted to Kari to prove that either (1) there was a writing to the contrary which would continue the support despite her cohabitation; or (2) the spousal support award was rehabilitative rather than permanent.

[¶16] The district court correctly found, based upon this Court’s holdings in *Bindas* and *Markegard*, that the language in the parties’ Marital Termination Agreement and subsequent Amended Judgment did not constitute a “writing to the contrary.” Specifically, the parties’ Agreement provides in pertinent part:

The amount and duration of spousal support shall be non-modifiable by either party. The spousal support shall terminate upon the death or remarriage of Kari.

[¶17] This Court in *Markegard* concluded that a written spousal support agreement entered into after the 2015 statutory amendment must expressly provide for continued spousal support to a cohabitating spouse or N.D.C.C. § 14-05-24.1(3) would apply mandating termination of spousal support. *Markegard*, 2019 ND 170, ¶ 12, 930 N.W.2d 108, 112. The district court in this case properly found that because Tim and Kari’s agreement did not contain language stating that the spousal support would continue even if Kari was cohabitating, the court was not precluded from terminating support under the statute (Index No. 121, app. 76), i.e., the non-modification language did not satisfy the “writing to the contrary” exception in N.D.C.C. § 14-05-24.1(3).

B. Tim’s spousal support obligation was permanent in nature rather than rehabilitative.

[¶18] Having found that the first exception does not apply, the district court then turned its analysis to whether the spousal support provided in the parties’ Agreement was rehabilitative or permanent. Kari had the burden to prove the support was rehabilitative in order to demonstrate one of the exceptions outlined in N.D.C.C. § 14-05-24.1 applied. Kari failed entirely to meet her burden, and the district court erred in finding the support to be rehabilitative.

[¶19] Courts have authority to interpret spousal support awards which are not specifically labeled as permanent or rehabilitative. *Greenwood v. Greenwood*, 1999 ND 126, ¶¶ 8-10, 596 N.W.2d 317. This Court has also noted that spousal support provisions in a judgment awarding the recipient support until he or she dies or remarries is “language appropriate for permanent support, but not for rehabilitative support.” *Id.* at ¶ 10. If a judgment does not specify the type of spousal support, the correct result may be a determination the award is permanent. *Id.* at ¶ 10. In defining the difference between rehabilitative and permanent spousal support, this Court has said:

“Rehabilitative spousal support is awarded to equalize the burdens of divorce or to restore an economically disadvantaged spouse to independent status by providing a disadvantaged spouse an opportunity to acquire an education, training, work skills, or experience to become self-supporting.” *Williams*, 2015 ND 129, ¶ 10, 863 N.W.2d 508 (*quoting Wagner v. Wagner*, 2007 ND 33, ¶ 8, 728 N.W.2d 318). Permanent spousal support may be appropriate when there is a substantial income disparity and a substantial disparity in earning power that cannot be adjusted by property division or rehabilitative support. *Stephenson*, 2011 ND 57, ¶ 27, 795 N.W.2d 357. Additionally, permanent spousal support may be appropriate to ensure parties equitably share the decrease in their standards of living. *Id.* Rehabilitative spousal support is preferred, but permanent spousal support may be necessary to maintain a spouse who cannot be adequately retrained to independent economic status. *Williams*, at ¶ 10.

Innis-Smith v. Smith, 2018 ND 34, ¶ 22, 905 N.W.2d 914.

[¶20] The Amended Judgment in this case is silent as to whether the spousal support award was intended as rehabilitative or permanent. Kari presented no evidence, either at the April 5, 2019 hearing or at the August 9, 2019 hearing regarding this issue. Kari did not submit an affidavit in support of her position that the support was rehabilitative in nature. Rather, Kari’s counsel argued that the case did not turn on whether or not the support was rehabilitative (Tr. 1, p. 15), and that it was unnecessary for the court to reach that issue. (Tr. 1, p. 16-17, 22). The *Markegard* opinion was issued on June 27, 2019, and

clearly articulates Kari's burden to demonstrate the support was rehabilitative in order to invoke one of the exceptions in N.D.C.C. § 14-05-24.1. Even after being made aware of her burden during the August 9, 2019 hearing (Tr. 2, p. 13), Kari continued to present no evidence to substantiate her position. Kari failed entirely to meet her burden to present any relevant evidence indicating the spousal support awarded was intended by either party, or the district court, to be rehabilitative.

[¶21] Despite Kari's failure, the district court concluded that the parties' agreement as it relates to spousal support was rehabilitative. (Index. No. 121; app. 76-82). In doing so, the district court examined the (1) duration of the award, (2) the parties' ages, earnings, and earning disparity at the time of the divorce, (3) whether the award was intended to equalize the burdens of divorce, (4) the type of property awarded to each, and (5) the specific language in the parties' agreement. *Id.*

I. An award of limited duration is not dispositive of whether it is rehabilitative or permanent.

[¶22] In interpreting spousal support awards which are not specifically labeled as permanent or rehabilitative, the Court can look to the duration of the award. *E.g., Peterson v. Peterson*, 2010 ND 165, ¶ 18, 788 N.W.2d 296; *Weir v. Weir*, 374 N.W.2d 858, 866 (N.D. 1985). However, a limited duration of an award, i.e., an award with a sunset clause rather than lasting for the recipient's lifetime, is not necessarily dispositive. In fact, when N.D.C.C. §14-05-24.1 was modified in 2015, the language in subsection 1 was modified to include the words "for a **limited time**," replacing the prior verbiage "for **any period of time**." N.D.C.C. § 14-05-24.1 (*emphasis added*); 2015 N.D. Sess. Laws. Ch. 124, § 1. A plain reading of the statute must lead to the conclusion that providing for a spousal support award for a limited period of time after 2015 cannot lead to the assumption that the same

was intended as rehabilitative. *See e.g., Innis-Smith*, 2018 ND 34, ¶ 22, 905 N.W.2d 914 (affirming a permanent spousal support award).

[¶23] A review of pertinent North Dakota cases further leads to the conclusion that any award of limited duration is not necessarily dispositive of its rehabilitative or permanent nature. *See e.g., Markegard*, 2019 ND 170, ¶ 17, 930 N.W.2d 108 (terminating a 36 month spousal support award because the recipient failed to demonstrate it was rehabilitative); *Peterson v. Peterson*, 2010 ND 165, ¶ 18, 788 N.W.2d 296 (affirming an award of spousal support for a 14-year duration to be a permanent award); *Weir v. Weir*, 374 N.W.2d 858, 866 (N.D. 1985) (affirming a twenty-year permanent spousal support award); *see also Duff v. Kearns-Duff*, 2010- ND 247, ¶¶ 17-18, 792 N.W.2d 916 (affirming a 9-year rehabilitative spousal support award); *Sack v. Sack*, 2006 ND 57, ¶ 1, 711 N.W.2d 157 (affirming a 6-year rehabilitative support award).

[¶24] Because the limited duration of the present award is not dispositive of its nature, the Court must look to the parties' specific language and the evidence in the record to determine that the district court erred in finding Tim's spousal support obligation was rehabilitative.

2. *The specific language in the parties' Agreement demonstrates that the spousal support was permanent.*

[¶25] Kari and Tim's agreement contains the following language:

Tim shall pay as and for spousal support to Kari the amount of \$5,000 per month beginning November 1, 2015, and continuing on the first day of each month thereafter for a period of 120 months. **The amount and duration of spousal support shall be non-modifiable by either party. The spousal support shall terminate upon the death or remarriage of Kari.**

(emphasis added).

[¶26] Generally, a district court retains jurisdiction to modify spousal support orders. See N.D.C.C. § 14-05-24.1(1) (providing the court may modify its orders). However, parties may waive all rights and privileges to which they are legally entitled. *Toni v. Toni*, 2001 ND 193, ¶ 10, 636 N.W.2d 396 (citing *Gajewski v. Bratcher*, 221 N.W.2d 614, 628 (N.D. 1974)). Section 14-05-24.1 does not expressly prohibit non-modification agreements. *Toni*, 2001 ND 193, ¶ 17.

[¶27] Absent Kari's cohabitation, the spousal support award would have continued for the stated 120 months, whether she maintained the same education, work experience, or employment status she had at the time of the divorce, improved the same, or experienced financial decline. Absent Kari's cohabitation, the spousal support award would have continued for the stated number of months, whether she became homeless and/or financially destitute, or whether she became a multi-millionaire. Simply stated, the language in the parties' agreement, particularly the term and amount of spousal support, was not dependent or contingent upon, nor was it designed to allow Kari an opportunity to rehabilitate herself. It would have continued even if she attained independent wealth, and similarly, it would have terminated at 120 months even if she was financially destitute at that time.

[¶28] Neither Kari nor Tim had the ability, pursuant to their agreement, to petition the Court for *modification* of the term or amount of the spousal support. The agreement however did not contemplate cohabitating nor did Tim waive his right under N.D.C.C. § 14-05-24.1 to *terminate* spousal support upon Kari's cohabitation. Modification and termination are two separate legal terms, which is made clear in their definitions. The definition of "modify" is "[t]o make more moderate or less sweeping; to reduce in degree

or extent; to limit, qualify, or moderate.” Black’s Law Dictionary (10th Ed. 2014). Modify is synonymous to alter, change, make over, remodel, revamp, revise, rework or vary. Merriam-Webster’s Thesaurus, <https://www.merriam-webster-com/thesaurus/modify>. The definition of “terminate” is “[t]o put an end to; to bring an end.” Black’s Law Dictionary (10th Ed. 2014). Terminate is synonymous to close, complete, conclude, end, finish, cease, discontinue, and quit. Merriam-Webster’s Thesaurus, <https://www.merriam-webster.com/thesaurus/terminate>. The two terms are not synonymous.

[¶29] Further, the district court correctly found that the language in the parties’ Agreement terminating the spousal support upon death or remarriage supports it being permanent. (Index 121; app. 81). In *Greenwood*, 1999 ND 126, ¶¶ 2, 10, 596 N.W.2d 317, the parties agreed to spousal support until the recipient died or remarried. *Id.* at ¶ 2. Further, the agreement divested the recipient spouse or her right to petition for increase of the spousal support for a period of ten years. *Id.* The Court held, “the long-term, permanent nature of the award is also reflected in the language by which [recipient] waived her right to any increase for ten years after the divorce. *Id.* at ¶ 10. Similarly, Tim and Kari’s agreement to waive their right to modify the term or amount of spousal support, reflects the Agreement’s permanent nature.

3. *The evidence in the record demonstrates that the spousal support was permanent.*

[¶30] Based on the marital termination agreement and the entire record, the spousal support in this matter was not rehabilitative. At the time of divorce, Kari was 40 years old and Tim was 42 years old. (Index No. 16; app. 9). Kari’s net monthly income was \$5,106.00, which included the spousal support payment from Tim, while Tim’s net monthly income was \$17,683.00. (Index. No. 16; app. 13). While Kari did not submit any

evidence or argument on this issue, Tim did submit an Affidavit, the facts contained therein were referenced by the district court in its December 1, 2019 Order. At the time of divorce, Kari already had significant work and educational experience. (Index No. 47; app. 43). She had worked for approximately 10 years as a licensed insurance agent and had the ability to renew her licensure to gain employment in that field again. *Id.* She held an Elementary Education Bachelor of Arts degree from Jamestown College and had previously fulfilled substitute teaching jobs. *Id.* It would have taken her less than two years to take additional classes to obtain proper credentials to hold a teaching position. *Id.* When she worked full time as a licensed insurance agent, Kari was earning approximately \$34,000 per year. *Id.* Kari already had a college education; she had job experience both in education and extensive experience in the insurance industry; and she had a 10-year work history and skills. She had the ability at the time of the divorce to be self-supporting. Certainly, any additional courses needed to obtain proper credentials or re-licensure would have been fulfilled in far less time than 120 months. Those facts support a finding that the spousal support award in this matter was not rehabilitative.

[¶31] The district court noted Kari’s argument that the support awarded to her was intended to equalize the burden of divorce by increasing her earnings. (Index. 121; app. 80). The district court found, “[e]ven if Kari seeks and attains higher education, absent an unanticipated event, this income disparity and earning power gap will persist for the duration of their respective careers.” *Id.* This finding supports exactly the opposite result reached by the district court.

[¶32] In *Innis-Smith*, 2018 ND 34, 905 N.W.2d 914, the Court reiterated the definition of permanent spousal support and upheld the district court’s award of the same under facts

similar to those in the present case. In *Innis-Smith*, husband was awarded income producing property and had significantly higher earning ability than that of wife. *Id.* at ¶ 23. Wife in that case had the ability to earn up to \$30,000 per year, while husband earned net income of \$919,120 per year. *Id.* The Court affirmed the district court's award of permanent support, holding that "[p]ermanent spousal support may be appropriate when there is a substantial income disparity and a substantial disparity in earning power that cannot be adjusted by property division or rehabilitative support." *Id.* at ¶ 22.

[¶33] Here, it is true that there was a substantial income disparity at the time of Tim and Kari's divorce and a substantial disparity in earning power. The district court's own conclusion, in and of itself, demonstrates that the spousal support awarded to Kari is permanent in nature rather than rehabilitative. The district court did not find the disparity was likely to continue for the term of the award or that Kari would be able to sufficiently rehabilitate herself during the term of the award so as to alleviate the disparity in earnings. Rather, the district court found this disparity to be permanent in nature. Therefore, the district court erred in finding that the spousal support was rehabilitative.

III. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES TO KARI.

[¶34] Notably, in the December 1, 2019 Order, the district court concluded that Tim did not act unreasonably in bringing his motion and did not engage in any acts that prolonged the proceeding or increased the costs for either party. (Index. No. 121; app. 82-83). Further, the court concluded that Tim's request to limit the values of the marital estate and the request to compel the mediator's attendance were moot. *Id.* The court concluded that Kari had not demonstrated a need for Tim to pay her attorney fees, and accordingly denied the same. *Id.* at 83-84.

[¶35] However, the following day, on December 2, 2019 the court issued its Order Granting Plaintiff's Motion for Enforcement of Judgment and Motion to Strike Improperly Filed Documents, Denying Defendant's Motion for Relief from Payment of Spousal Support and Awarding Plaintiff Attorney's Fees. (Index No. 122; app. 85-86). This Order was prepared and submitted by Kari's counsel on August 14, 2019. (Index No. 107). Despite the court's findings and Order on December 1, 2019, the court indicated in its December 2, 2019 Order (prepared months earlier by Kari's counsel) that Tim's conduct unnecessarily increased the parties' fees and awarded Kari attorney fees in the amount of \$1,590. The district court's December 1 and December 2, 2019 Order contradict and it was an error for the district court to have awarded attorney fees after finding that Kari had failed to demonstrate a need for the same.

[¶36] An award of attorney fees under N.D.C.C. § 14-05-23 requires the district court to make specific findings relating to Tim's ability to pay and Kari's need. *Datz v. Dosch*, 2014 ND 102, ¶ 23, 846 N.W.2d 724. The district court found that Tim had the ability to pay, but that Kari had not demonstrated a need for an award of attorney fees. (Index. No. 121; app. 82-83). An award of fees may be made if a party unnecessarily increased the fees or brought forth a frivolous motion. *See Datz*, 2014, ND 102, ¶23, 846 N.W.2d 724; *Allmon v. Allmon*, 2017 ND 122, ¶ 26, 894 N.W.2d 869. The trial court found that none of those circumstances existed, and properly denied Kari's request for fees in its December 1, 2019 Order. (Index. No. 121; app. 83). It was an error for the district court to then enter its December 2, 2019, which contradicted its prior order, and which awarded attorney fees to Kari.

CONCLUSION

[¶37] The Court should determine that the trial court clearly erred in finding the spousal support award contained in the parties' Amended Judgment to be rehabilitative. Additionally, the Court should determine that the trial court clearly erred in awarding attorney fees to Kari when such award was contradictory to the district court's findings that Tim had neither acted in bad faith, nor done any act to increase the cost of litigation to either party.

[¶38] For all of the foregoing reasons, Tim requests that the Court REVERSE the decision of the district court and terminate Tim's spousal support obligation because North Dakota law requires the Court do so pursuant to N.D.C.C. § 14-05-24.1. It is undisputed that Kari is cohabitating in a relationship analogous to marriage for more than one year. Tim met his burden of proof pursuant to this Court's holding in *Markegard*. Kari failed entirely to present any evidence to demonstrate that one of the exceptions outlined in N.D.C.C. § 14-05-24.1 existed, and from the evidence in the record, it is clear that the spousal support was not intended as rehabilitative. Tim would request that the Court terminate his spousal support obligation effective March 1, 2019 and require Kari to reimburse him for all spousal support payments made between March 1, 2019 and the date of this Court's Judgment.

[¶39] Further, Tim would request that the Court REVERSE the decision of the district court ordering him to pay attorney fees to Kari in the amount of \$1,509.00 and require that Kari reimburse him in that amount.

Dated this 13th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as attorney for Timothy Michael O’Keeffe, Defendant/Appellant and Cross-Appellee in the above matter, and as the author of the Appellant’s brief, hereby certifies the Appellants’ Brief is in compliance with N.D.R.App.P. 32 and contains 23 pages.

Dated this 13th day of March, 2020.

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