

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kari Cathryn O’Keeffe,)	
)	
Plaintiff, Appellee,)	
and Cross-Appellant,)	
)	
vs.)	Supreme Court No. 20190379
)	District Court No. 09-2015-DM-837
Timothy Michael O’Keeffe,)	
)	
Defendant, Appellant,)	
And Cross-Appellee.)	

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 APPELLEE AND CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

Patti J. Jensen, #04328
GALSTAD, JENSEN & McCANN, PA
411 2nd Street Northwest, Suite D
PO Box 386
East Grand Forks MN 56721
Telephone: (218) 773-9729
Facsimile: (218) 773-8950
Email: pjensen@gjmlaw.com

**ATTORNEY FOR APPELLEE AND
CROSS-APPELLANT**

Table of Contents

Page/Paragraph

Table of Contents	2
Table of Authorities	3
Statement of Issues Presented for Review	¶1
Issue 1: Whether the district court properly found Kari’s spousal support was rehabilitative rather than permanent in nature	¶1
Issue 2: Whether the district court properly awarded conduct based attorney’s fees to Kari.	¶2
Issue 3: Whether the district court erred as a matter of law when it determined that the parties’ agreement that the spousal support awarded to Kari was nonmodifiable as to amount and duration failed to meet the exception “unless otherwise agreed by the parties in writing” of Subsection 3 under N.D.C.C. § 14-05-24.1.	¶3
Statement of the Case	¶4
Statement of the Facts	¶20
Argument and Statement of Authority	¶30
Issue 1: The district court’s determination that the nonmodifiable spousal support the parties agreed upon in their Stipulation was rehabilitative was a product of a proper view of the applicable law, supported by the evidence and a mistake in result has not been made	¶30
Issue 2: The district court did not err by awarding Kari attorney’s fees incurred in this proceeding	¶59
Issue 3: The district court erred as a matter of law when it determined that the parties’ agreement that awarded nonmodifiable spousal support to Kari failed to meet the exception “unless otherwise agreed by the parties in writing” of Subsection 3 under N.D.C.C. § 14-05-24.1	¶70
Conclusion	¶90
Certification	¶91
Request for Oral Argument	¶92

Table of Authorities

<u>Cases</u>	<u>Paragraph</u>
<u>NORTH DAKOTA CASES</u>	
<u>Amsbaugh v. Amsbaugh</u> , 2004 ND 11, 675 N.W.2d 601	61
<u>Bindas v. Bindas</u> , 2019 ND 56, 923 N.W.2d 803	71, 79, 84, 87
<u>Carr v. Carr</u> , 300 N.W.2d 40 (N.D. 1980)	39
<u>Christian v. Christian</u> , 2007 ND 196, 742 N.W.2d 819	41, 47, 63
<u>Christianson v. Christianson</u> , 2003 ND 186, 671 N.W.2d 801	37
<u>Dieterle v. Dieterle</u> , 2013 ND 71, 830 N.W.2d 571	40
<u>Fischer v. Fischer</u> , 139 N.W.2d 845 (N.D. 1966)	37
<u>Fox v. Fox</u> , 1999 ND 68, 592 N.W.2d 541	38, 41, 52
<u>Friesner v. Friesner</u> , 2019 ND 30, 921 N.W.2d 898	62, 63
<u>Greenwood v. Greenwood</u> , 1999 ND 126, 596 N.W.2d 317	38
<u>Heinle v. Heinle</u> , 2010 ND 5, 777 N.W.2d 590	66
<u>Heley v. Heley</u> , 506 N.W.2d 715 (N.D. 1993)	41
<u>Hoverson v. Hoverson</u> , 2013 ND 48, 828 N.W.2d 510	41
<u>Innis-Smith v. Innis-Smith</u> , 2018 ND 34, 905 N.W.2d 914	41
<u>Kelly v. Kelly</u> , 2011 ND 167, 806 N.W.2d 133	67
<u>Kienzle v. Selensky</u> , 2007 ND 167, 740 N.W.2d 393	72
<u>Klein v. Klein</u> , 2015 ND 236, 869 N.W.2d 750	40
<u>Lindberg v. Lindberg</u> , 2009 ND 136, 770 N.W.2d 252	36-37
<u>Lizakowski v. Lizakowski</u> , 2019 ND 177, 930 N.W.2d 609	61
<u>Markegard v. Willoughby</u> , 2019 ND 170, 930 N.W.2d 108	31, 35, 71, 80, 85, 87
<u>Marschner v. Marschner</u> , 2001 ND 4, 621 N.W.2d 339	53

<u>McDowell v. McDowell</u> , 2001 ND 176, 635 N.W.2d 139	41
<u>Mertz v. Mertz</u> , 2015 ND 13, 858 N.W.2d 292	37
<u>Neppel v. Neppel</u> , 528 N.W.2d 371 (N.D. 1995)	41
<u>Overland v. Overland</u> , 2008 ND 6, 744 N.W.2d 67	36, 37
<u>Pearson v. Pearson</u> , 2009 ND 154, 771 N.W.2d 288.....	36, 37, 41
<u>Reiser v. Reiser</u> , 2001 ND 6, 621 N.W.2d 348	66
<u>Rudh v. Rudh</u> , 517 N.W.2d 632 (N.D. 1994)	64
<u>Ruff v. Ruff</u> , 78 N.D. 775, 52 N.W.2d 107 (1952)	37
<u>Rustad v. Rustad</u> , 2013 ND 185, 838 N.W.2d 421.....	40
<u>Sack v. Sack</u> , 2006 ND 57, 711 N.W.2d 157.....	37
<u>Schoenwald v. Schoenwald</u> , 1999 ND 93, 593 N.W.2d 350.....	41
<u>Schultz v. Schultz</u> , 2018 ND 259, 920 N.W.2d 483	44
<u>Shields v. Shields</u> , 2003 ND 16, 656 N.W.2d 712	41
<u>Sommers v. Sommers</u> , 2003 ND 77, 660 N.W.2d 586	54
<u>Stock v. Stock</u> , 2016 ND 1, 873 N.W.2d 38.....	40
<u>Striefel v. Striefel</u> , 2004 ND 210, 689 N.W.2d 415	39
<u>Thompson v. Thompson</u> , 2018 ND 21, 905 N.W.2d 772.....	40
<u>Toni v. Toni</u> , 2001 ND 193, 636 N.W.2d 396.....	74-77, 83, 88
<u>Varty v. Varty</u> , 2019 ND 49, 923 N.W.2d 131.....	31
<u>Wagner v. Wagner</u> , 2007 ND 33, 728 N.W.2d 318.....	36, 39
<u>Wanttaja v. Wanttaja</u> , 2016 ND 14, 873 N.W.2d 911	63
<u>Williams v. Williams</u> , 2015 ND 129, 863 N.W.2d 508	40
<u>Willprecht v. Willprecht</u> , 2020 ND 77, 2020 WL 1671620	40, 66

YanJun Zuo v. Yuanyuan Wang, 2019 ND 211, 932 N.W.2d 36042, 56

NORTH DAKOTA CENTURY CODE

North Dakota Century Code § 14-05-2361, 64, 66

North Dakota Century Code § 14-05-24.1..... 3, 19, 24, 54, 70, 73-74, 76, 79, 80, 83, 86

North Dakota Century Code § 14-09.1-0611

NORTH DAKOTA RULES

North Dakota Rule of Appellate Procedure91

North Dakota Rules of Court 8.111

Statement of Issues Presented for Review

- ¶1 **Issue 1:** Whether the district court properly found Kari’s spousal support was rehabilitative rather than permanent in nature.

Yes, the district court’s determination that the non-modifiable spousal support that the parties agreed upon in their Stipulation was rehabilitative was a product of a proper view of the applicable law, supported by the evidence and a mistake in result has not been made.

- ¶2 **Issue 2:** Whether the district court properly awarded conduct based attorney’s fees to Kari.

Yes, the district court properly required Tim to reimburse Kari for a portion of her attorney’s fees after analyzing the financial disparity between the parties’ income, their available resources and Tim’s conduct which unnecessarily increased the litigation expenses.

- ¶3 **Issue 3:** Whether the district court erred as a matter of law when it determined that the parties’ agreement that the spousal support awarded to Kari was nonmodifiable as to amount and duration failed to meet the exception “unless otherwise agreed by the parties in writing” of Subsection 3 under N.D.C.C. § 14-05-24.1.

Yes, based on the parties’ agreed upon contractual provision in a Stipulation establishing spousal support that was non-modifiable in duration and amount, the district court erred in not finding that such provision met the “unless otherwise agreed by the parties in writing” exception of N.D.C.C. § 14-05-24.1.

Statement of the Case

¶4 Timothy O’Keeffe (Tim) agreed to pay and Kari O’Keeffe (Kari) agreed to accept spousal support that was deemed nonmodifiable as to duration and amount when the parties dissolved a marriage of over eighteen (18) years.

¶5 As the Statement of the Case authored by Tim is largely correct, Kari provides only the information that was omitted from Tim’s Statement.

¶6 Tim correctly stated an Amended Judgment was entered by Stipulation on December 24, 2015. (A.App 3). He failed to note the Stipulation was signed by counsel, not by the parties. He also failed to state the reason the Stipulation was necessary in regard to the method of collection of the nonmodifiable spousal support that he agreed to pay Kari. The Judgment was modified to include the necessary notice to the parties’ regarding collection of the support via a wage withholding order. An Order was entered in accordance with the Stipulation and hence, the Amended Judgment. (A.App. 3, 5 and App. 25).

¶7 The case was idle from November 25, 2015, when the Judgment was entered, until February 28, 2019, when Tim brought a Motion to Terminate his obligation to pay nonmodifiable spousal support to Kari for ten (10) years. (App. 39-69).

¶8 Tim also correctly stated that following the initial hearing on his Motion, based upon the district court’s direction, each party submitted proposed Findings of Fact, Conclusions of Law and Order. (A.App. 6). He correctly noted the district court requested the second hearing to address the issue of property distribution and valuation of the property awarded to each in the divorce. (App. 70). No Rule 8.3 Statement was filed prior to entry of the Judgment and Amended Judgment.

¶9 Tim's Statement of the Case falls short in that it did not discuss the prehearing Motion in Limine which he filed prior to the second hearing. The facts related to his filing of the Motion are important in light of his claim of error regarding the award of conduct based attorney's fees to Kari. The district court's order made it clear the award of fees was conduct based and related to Tim's improper filing of confidential documents. (App. 85).

¶10 On July 17, 2019, in support of a prehearing Motion in Limine, Tim filed an Affidavit with an attached spreadsheet that had been authored by his attorney that he utilized in the mediation process as a demonstration of his position. In his Motion, he claimed the spreadsheet represented the parties' opinion as to values of the marital property and estate. (A.App. 17). Tim's position that the spreadsheet contained Kari's opinions as valuations was in error.

¶11 For obvious reasons, including the clear mandates of N.D.R.Ct. 8.1 and N.D.C.C. § 14-09.1-06, Kari filed her Response objecting to Tim's request to introduce confidential mediation documents. (A.App. 19). Tim filed the inadmissible and confidential documents in the public record prior to the court's determination as to admissibility. Tim went even further and attempted to compel the mediator, Robert Schultz, to attend the hearing in his attempt to have confidential and inadmissible evidence considered by the court. (A.App. 25). As a result of Tim's conduct, it was necessary for Kari to file a Motion to Strike and also sought an award of attorney's fees. (A.App. 37). The request for fees was supported by an Affidavit of Counsel. (A.App. 39). As the Court properly denied Tim's Motion, the document improperly filed remains in the record but is now filed as confidential. (App. 86).

¶12 Enforcement motions were subsequently filed by Kari due to Tim's failure to comply with his obligations under the Judgment. On July 24, 2019, Kari filed her Motion to Enforce the Judgment and For an Award of Fees. (A.App. 24). In support of that Motion, Kari provided an Affidavit that revealed as of June 17, 2019, Tim's spousal support arrearage had grown to \$20,209.07. (A.App. 26).

¶13 On December 1, 2019, following two (2) hearings, submission of numerous briefs and pre-hearing motions, Tim's Motion to Terminate his nonmodifiable spousal support obligation was denied. (App. 83). Kari was also granted an award of attorney's fees due to Tim's noncompliance and related conduct. (A.App. 86).

¶14 At no time prior to the district court's denial of his Motion, did the district court grant Tim any interim relief that would have justified his deliberate refusal and failure to comply with his obligation to pay nonmodifiable spousal support to Kari. Rather, Tim without any authority, took matters into his own hands.

¶15 Tim's first formal request for relief from his obligation to pay support did not find its way to the Court until after the filing of his Notice of Appeal when he sought a stay order from the district court. (App. 88). He filed the Motion to Stay on December 3, 2019. (A.App. 41). Kari opposed the Motion and sought an award of attorney's fees. (A.App. 42).

¶16 On December 11, 2019, as Tim's non-compliance continued, Kari brought a Motion seeking a finding of contempt. (A.App. 44). By the time she brought that Motion, Tim's arrears had increased to the substantial sum of \$52,994.63. (A.App. 50).

¶17 On December 26, 2019, the district court denied Tim's Motion to Stay. (A.App. 51). The district court found Tim did not show he was likely to succeed on the

merits of his appeal; Tim did not show irreparable injury would befall him if the stay was denied; Kari demonstrated substantial harm would occur if the stay was granted; and Tim did not show that the public interest would be harmed. (A.App. 52).

¶18 In addition to the above recitation, as Tim claims the district court erred in determining Kari's nonmodifiable spousal support was rehabilitative rather than permanent, it was expected the parties would file a Joint Rule 8.3 Statement following the second hearing based upon the Court's instructions. However, that did not occur. Rather, it was necessary for Kari to file a separate Rule 8.3 Statement along with an explanation for the separate filing. (A.App. 54, 56).

¶19 Tim being disappointed with the district court's decision, filed this appeal. (App. 88). Being satisfied with the result but concerned with the district court's finding that a written agreement signed by the parties calling for nonmodifiable spousal support as to duration and amount did not meet the requirements of an "agreement otherwise" in accordance with N.D.C.C. § 14-05-24.1, Kari brought a cross appeal on that single issue. (App. 7, Docket No. 144).

Statement of the Facts

¶20 The parties were married on the 3rd day of January 1997, in Fargo, North Dakota, and after eighteen (18) years of marriage were divorced on November 25, 2015. (A.App. 7). During their eighteen (18) years of marriage, Kari and Tim supported each other in their careers while raising a family. (A.App. 7). Kari was born in 1975 and is now forty-four (44) years of age; Tim was born in 1973 and is now forty-six (46) years of age. (A.App. 6). The parties are in good health. (App. 80).

¶21 Kari and Tim had two (2) children who were minors at the time of divorce. (A.App. 7). During the marriage, Kari was the primary caregiver to the children which allowed Tim to devote the time necessary to advance in his career as an attorney at O’Keeffe, O’Brien, Lyson & Foss, Ltd. (A.App. 7). In addition to his practice, at the time of divorce, Tim owned an interest in a busy title company. (App. 20-21). Although qualified to teach full time with her Elementary Education Bachelor of Arts degree from Jamestown College, Kari set aside her dream and instead worked various part-time jobs. Her time was devoted to the children’s needs, the home and Tim. (App. 39-43). Kari improved her skills and gained knowledge in various fields of the workforce. (App. 43-44). Throughout the marriage, Kari held various positions in retail, was a licensed insurance agent with State Farm, worked for Sanford, and was self-employed as a representative for Rodan and Fields. (App. 43). Even though Kari worked part-time, and her earnings were minimal, she worked hard at what she did and eventually obtained an assistant management position at a retail store. (App. 43).

¶22 The marriage failed, the parties agreed that irreconcilable differences existed, and a divorce was unavoidable. (App. 10). The divorce was not easy for the entire

family, but both Kari and Tim attempted to limit the amount of court intervention by resolving the issues through mediation. (App. 8). Even though Tim made significantly more than Kari, the parties settled on the division of all assets, property, business interests, accounts, and personal property but the disparity of earnings was addressed by way of nonmodifiable spousal support. (App. 8). In addition to the assets awarded to Kari, Tim agreed to pay a \$400,000 payment to Kari that would include interest amortized for a period of ten (10) years. (App. 77). In order to lessen the financial burdens of the divorce to Kari, Tim agreed to pay Kari \$5,000 per month for one hundred twenty (120) months in spousal support. (App. 17). **The parties agreed that duration and amount of support was unequivocally \$5,000 per month for one hundred twenty (120) months unless Kari died or remarried and that it could not be modified in duration or amount by either party.** (App. 17) (emphasis added). As the Judgment was entered prior to the recent reforms to the Internal Revenue Service Code regarding taxability of spousal support, Tim has the advantage of the deduction of the support and Kari must report the same as income. Their agreement was incorporated into the November 25, 2015, Judgment and was modified in the December 30, 2015, Amended Judgment only as it related to collection. It stated:

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 of the Internal Revenue Code. (emphasis added).

(App. 72). As clearly identified and intended by the parties' agreement, spousal support was not modifiable in amount or duration by either party. (App. 17).

¶23 Despite the parties' agreement to nonmodifiable nature of the support clause, on February 28, 2019, Tim claimed otherwise and brought the Motion to Terminate. (App. 39). Tim claimed that in 2016, after the divorce, Kari began a new relationship with a man by the name of Scott College (Scott) and started to cohabit with him in a relationship analogous to marriage. (App. 40). Kari did not rebut that evidence. (App. 40-41). Kari is not remarried to anyone and does not plan to remarry. (App. 42). She lives in and pays for the house that was purchased while the divorce was pending. (App. 40). Scott has no interest in the same. (App. 44).

¶24 Tim claimed that N.D.C.C. § 14-05-24.1 supported his Motion and he attempted to persuade the district court the spousal support he agreed to give to Kari was not rehabilitative, and his agreement to pay support for one hundred twenty (120) months without modification of the duration or amount did not satisfy the exemption contained in Subsection (3) of the statute. (App. 43-45). Tim argued his spousal support obligation should be terminated because Kari had been habitually cohabiting in a relationship analogous to marriage with Scott. (App. 40). Kari argued her spousal support was rehabilitative in nature and their agreement was nonmodifiable which met the exception contained in Subsection (3) of the statute. (A.App. 8-9). The district judge agreed the support was rehabilitative in nature but disagreed that the exception applied.

¶25 On April 5, 2019, a hearing was held on Tim's Motion to Terminate Spousal Support. (Tr. 1., Page 3). At that hearing, the district court heard oral argument from the attorneys and took the matter under advisement. (Tr.1, Page 5-28). The both attorneys were

ordered to submit proposed Findings, Conclusions and Orders on April 22, 2019. (Tr. 1, Page 28-29). The district court then ordered an evidentiary hearing which was held on August 9, 2019. (App. 72).

¶26 Tim then filed a Motion in Limine asking the district court to admit documents prepared by mediator Robert Schultz. (App. 86). This is the Motion that resulted in an award of attorney's fees to Kari. Contrary to the clear mandates of the North Dakota Rules, Tim's counsel filed an Affidavit attaching inadmissible documents and served a motion to compel Mr. Schultz's attendance at the August 9, 2019, hearing. (App. 86). Because of this inappropriate conduct, which led to an unnecessary increase in the parties' fees, Kari asked for an award of attorney's fees. (A.App. 37).

¶27 On August 9, 2019, the district judge explained from the bench that the reason he requested more information about the parties' marital estate was that the record was lacking sufficient information for him to determine the parties' intent as to whether the spousal support was rehabilitative or permanent at the time of their divorce.

¶28 (Tr. 2, Page 3). At the close of the hearing, the parties were ordered to submit a Rule 8.3 statement as one had not been previously filed. (Tr. 2, Page 20-21). Additional briefs were submitted along with separate Rule 8.3 Statements. (A. App. 34-60). The Court refused to allow Mediator Schultz to testify and he was excused. (Tr. 2, Page 20-22). Despite that Tim insisted that the filing of documents authored by his counsel and Mr. Schultz at mediation was proper. (Tr. 2, Page 18-19).

¶29 The court made findings from which it concluded the spousal support awarded to Kari was rehabilitative and not permanent. Those findings correctly included that even if Kari were to achieve higher education, the income disparity and earning power

gap would persist. (A.App. 80), that the life expectancy of a women in the United States is eighty (80) years old and the award of spousal support would only cover one-fourth ($\frac{1}{4}$) of the remainder of Kari's life expectancy. (A.App. 80), that at the time the spousal support ends, Kari would not be eligible for any type of retirement benefit, social security, Medicare, or would be able to withdraw from her retirement funds without penalty. (A.App. 80).

Argument and Statement of Authority

¶30 **Issue 1: The district court's determination that the non-modifiable spousal support the parties agreed upon in their Stipulation was rehabilitative was a product of a proper view of the applicable law, supported by the evidence and a mistake in result has not been made.**

¶31 A district court's determination of whether spousal support is rehabilitative or permanent is a finding of fact. Markegard v. Willoughby, 2019 ND 170, ¶17, 930 N.W.2d 108. The district court's findings of fact in its decision modifying spousal support should not be reversed on appeal unless clearly erroneous. See, Markegard, 2019 ND 170 ¶6, 930 N.W.2d 108 (citing Varty v. Varty, 2019 ND 49, ¶6, 923 N.W.2d 131). A finding of fact will only be found 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, the reviewing court is left with a definite and firm conviction a mistake has been made. Id. It cannot be credibly asserted that there was no evidence in the record to support the court's finding and the court properly analyzed and applied the law and there is insufficient support to lead this Court to a definite and firm conviction a mistake was made.

¶32 The district court properly concluded from the record that the spousal support Tim agreed to pay was rehabilitative when it determined the award to Kari was to equalize the burdens of divorce and that the evidence presented in the record outweighed the possibility of it being permanent spousal support. Tim's contention otherwise is simply wrong.

¶33 On November 18, 2015, a Marital Termination Agreement was signed by the parties. Not only was Tim represented by experienced legal counsel, he is also a lawyer licensed to practice in the State of North Dakota. The parties' intentions were that the spousal support be nonmodifiable both as to duration and amount. They went further to

define the duration as one hundred twenty (120) months unless Kari passed away or remarried. She has done neither. (A.App. 5).

¶34 Although the provision did not state the term rehabilitative, the evidence is clear that it was intended as such. If that was not the case, the provision would have noted that Kari's support was permanent.

¶35 In Markegard, this Court made clear that it is the moving parties' burden when seeking a termination of spousal support. In this case it was Tim's burden to prove that Kari had cohabited in a relationship analogous to marriage for at least one (1) year. Markegard, 2019 ND 170, ¶17, 930 N.W.2d 108. Once this burden is met, then the burden shifted to Kari to prove an exception applies. Id. As Kari met her burden, the inquiry should have stopped there. However, as the district judge incorrectly determined their agreement did not meet the exception, the court found it necessary to define the type of support.

¶36 Although the spousal support issue was not contested, it is instructive to review this Court's determination when error is claimed in contested cases. A district court must consider the Ruff-Fischer guidelines in setting both the amount and duration of the support. Wagner v. Wagner, 2007 ND 33, ¶6, 728 N.W.2d 318. See also, Overland v. Overland, 2008 ND 6, ¶16, 744 N.W.2d 67; Pearson v. Pearson, 2009 ND 154, ¶6, 771 N.W.2d 288; and Lindberg v. Lindberg, 2009 ND 136, ¶28, 770 N.W.2d 252.

¶37 Further, spousal support awards must be made in consideration of the needs of the requesting spouse and the needs and ability to pay of the supporting spouse. Christianson v. Christianson, 2003 ND 186 ¶17, 671 N.W.2d 801; Overland, 2008 ND 6, ¶16, 744 N.W.2d 67; Pearson, 2009 ND 154, ¶6, 771 N.W.2d 288; Lindberg, 2009 ND 136, ¶28, 770 N.W.2d 252. This Court has disposed of the disadvantaged spouse doctrine

in determining spousal support and reemphasized “the importance of a comprehensive analysis under the Ruff-Fischer guidelines.” Mertz v. Mertz, 2015 ND 13, ¶ 9, 858 N.W.2d 292 (quoting Sack v. Sack, 2006 ND 57, ¶ 12, 711 N.W.2d 157); 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). The Ruff-Fischer guidelines include the following factors:

[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.

Mertz, 2015 ND 13, ¶38, 858 N.W.2d 292.

¶38 It is within the court’s authority to interpret spousal support awards that are not specifically labeled as rehabilitative or permanent. Greenwood v. Greenwood, 1999 ND 126, ¶¶ 8-10, 596 N.W.2d 317. When justified by the facts, rehabilitative support is preferred over permanent spousal support. Fox v. Fox, 1999 ND 68, ¶21, 592 N.W.2d 541.

¶39 In older cases addressing “alimony”, it has been stated that alimony functions as the way of rehabilitating the party disadvantaged by the divorce instead of a continuation of the right of one spouse to be supported by the other during marriage. See, Carr v. Carr, 300 N.W.2d 40 (N.D. 1980). In more recent cases, this Court has explained the purpose of rehabilitative spousal support is to equalize the burdens of divorce or to restore an economically disadvantaged spouse to independent status. Wagner, 2007 ND 33, ¶8, 728 N.W.2d 318. See also, Striefel v. Striefel, 2004 ND 210, ¶16, 689 N.W.2d 415.

¶40 Most recently, in Willprecht v. Willprecht, 2020 ND 77, ¶ 42, 2020 WL 1671620, this Court stated, “Child support is for the care and maintenance of the minor

child, and spousal support is intended to equalize the burdens of the divorce.” See, Stock v. Stock, 2016 ND 1, ¶23, 873 N.W.2d 38. Additionally, in Thompson v. Thompson, 2018 ND 21, ¶31, 905 N.W.2d 772, 780, this Court stated, “[r]ehabilitative 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 v. Williams, 2015 ND 129, ¶10, 863 N.W.2d 508 (citation omitted). Finally, in Klein v. Klein, 2015 ND 236, ¶8, 869 N.W.2d 750, 753, this Court quoted the following in its decision:

Rehabilitative spousal support is awarded to equalize the burden of divorce or to restore an economically disadvantaged spouse to independent status by providing that spouse an opportunity to acquire an education, training, work skills, or experience to become self-supporting.

Rustad v. Rustad, 2013 ND 185, ¶18, 838 N.W.2d 421 (quoting Dieterle v. Dieterle, 2013 ND 71, ¶31, 830 N.W.2d 571).

¶41 This Court has stated on more than one occasion it prefers rehabilitative support over permanent spousal support. See, Pearson v. Pearson, 2009 ND 154, ¶7, 771 N.W.2d 288; Heley v. Heley, 506 N.W.2d 715 (N.D. 1993) (“[w]e prefer temporary rehabilitative support to remedy... disadvantage, and indefinite permanent support is appropriate only if a spouse ‘cannot be adequately restored to independent economic status.’”); Fox, 1999 ND 68, ¶21, 592 N.W.2d 541 (citing Neppel v. Neppel, 528 N.W.2d 371, 374 (N.D. 1995)) (“[w]e prefer rehabilitative over permanent spousal support.”). The term “temporary” has been used in addition to rehabilitative support to describe both rehabilitative support and other types of spousal support of short periods of duration has

been defined to be as short as a couple of years and as long as the years up to and until the age of retirement. See, *Hoverson v. Hoverson*, 2013 ND 48, ¶¶6, 13, 828 N.W.2d 510 (where the court used “temporary” to describe spousal support awarded for a period of two years); *Schoenwald v. Schoenwald*, 1999 ND 93, ¶¶10-12, 593 N.W.2d 350 (where the court described the spousal support awarded as “temporary” and not permanent when it was to be paid by the obligor until he retired). In *Shields v. Shields*, 2003 ND 16, ¶13, 656 N.W.2d 712, this Court stated:

Permanent support is appropriate when the economically disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities and development she lost during the course of the marriage.

Rehabilitative spousal support, on the other hand, 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. There are two approaches to awarding rehabilitative support. One is the “minimalist doctrine” which has as its objective rehabilitating the recipient for minimal self-sufficiency. We have rejected this doctrine in favor of the more “equitable” approach to determining rehabilitative spousal support, which attempts to provide education, training, or experience that will enable the recipient to achieve “adequate” or “appropriate” self-support while improving her employment skills. (emphasis added).

(citing *McDowell v. McDowell*, 2001 ND 176, ¶12, 635 N.W.2d 139). Further,

rehabilitative and permanent spousal support are distinguished as follows:

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. 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. Additionally, permanent spousal support may be appropriate to ensure parties equitably share the decrease in their standards of

living. 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. (emphasis added).

Innis-Smith v. Innis-Smith, 2018 ND 34, ¶22, 905 N.W.2d 914. As stated in Christian v. Christian, 2007 ND 196, ¶13, 742 N.W.2d 819, “**each spousal support determination is fact specific.**” (emphasis added). In Christian, this Court was persuaded to affirm the granting of permanent spousal support when one spouse was found to have suffered serious health problems and long absences from the workforce in addition to frequent moves that prevented the options of working or returning to school. Id. at ¶10. That is obviously not the case here. Kari’s support is nonmodifiable for a duration sufficient to equalize the impact of the divorce.

¶42 In Yanjun Zuo v. Yuanyuan Wang, 2019 ND 211 ¶¶20-21, 932 N.W.2d 360, 365, reh’g denied (Sept. 20, 2019), this Court affirmed an award of \$1,750 per month in spousal support for a period of ten (10) years because, in part, one spouse would have to locate employment to work toward self-sufficiency.

¶43 Evidence in the record regarding Kari and Tim’s stations in life, earnings from employment, and value and nature of the assets awarded to each supports the district court’s proper determination that the nonmodifiable spousal support agreed upon was intended to be rehabilitative as it was awarded to equalize the burden of divorce by increasing Kari’s earnings. (Tr. 1, Page 15).

¶44 Kari and Tim were married from 1997-2015; over eighteen (18) years. This Court has determined that marriages of a duration of only ten (10) years constitute long term marriages. Schultz v. Schultz, 2018 ND 259, ¶13, 920 N.W.2d 483, 487. In Schultz, this Court even included the parties’ cohabitation of one and a half years before their seven

(7) years of marriage and the time until the entry of the final divorce decree which combined was just over ten (10) years. Id.

¶45 At the time of divorce Kari was forty (40) years old and Tim was forty-two (42) years old. (A.App.6). Because the parties' agreement included a joint residential responsibility award, their net incomes were included in the Stipulation for child support purposes. Kari's net monthly income at the time of divorce was \$5,106, which included the \$5,000 payment in spousal support from Tim. (A.App. 7). Without the spousal support, Kari's net income from earnings was determined to be \$106 monthly. Kari worked part-time as a store clerk at Evereve and relied on spousal support from Tim to meet her minimal living expenses. (App. 43).

¶46 On the other hand, Tim at the time of divorce was owner of the progressive law firm of Kennelly & O'Keeffe and shareholder and owner of Kennelly & O'Keeffe, Ltd. and F/M Title. (App. 39). Even with the spousal support considered, Tim earned three (3) times the amount that Kari did as he earned a net monthly income of \$17,683. (App. 80).

¶47 Unlike in Christian, where permanent spousal support was appropriate, in this case, Kari is able to work, is in good health and is not disabled. Kari did not leave her educational pursuits to the wayside, but instead chose to postpone them while working part-time to raise a family and focus on her marriage. Kari had no health problems or disabilities which prevented her from working fulltime, but of course her earnings were much less than Tim's and hence the rehabilitative support.

¶48 Further and importantly, a portion of the assets awarded to Tim were income producing. He was awarded his interest in a law firm as well as a title company. (App. 18-21). That is another fact which supports the court's findings.

¶49 Tim's assertions that the court's findings and resulting order were clearly erroneous is misplaced.

¶50 Because the spousal support was rehabilitative and there was a definitive end to the support, Kari made efforts to advance her knowledge and experience in order to become better self-supporting in anticipation of her increased earnings ending after one hundred twenty (120) months. (Tr. 1, Page 15). Kari was working part time and had intended to return to school and complete her education. (Tr. 1, Page 11, 15). What better evidence that the support was meant to be rehabilitative in nature than a return to school.

¶51 Tim continues to practice law as an owner and partner at Kennelly & O'Keeffe and continues to earn substantially more than Kari. (App. 81). Tim has a greater earning ability in the foreseeable future. (App. 81). Kari received a \$400,000 property payment to be paid by Tim throughout the course of ten (10) years, but as the district court stated, "she is not required to consume her property settlement to even the income inequality between the parties." (App. 81).

¶52 This Court has stated on numerous occasions that a divorced spouse is not required to deplete their property distribution for living expenses. In Fox, this Court reminded us that, "We have often said, however, a disadvantaged spouse is not required to deplete her property distribution in order to live." Fox, 1999 ND 68, ¶24, 592 N.W.2d 541.

¶53 This Court's decision in Marschner v. Marschner, 2001 ND 4, 621 N.W.2d 339, is also helpful herein. This Court stated, "Property distribution and spousal support

are overlapping issues and are to be considered together. The property division, viewed in a vacuum, may appear equitable, but when the denial of spousal support is included in the analysis, it is not equitable.” Id. at ¶19 (internal citations omitted) (holding although the farming operation had not been very profitable due to the depressed economy, the husband was still awarded an income producing asset that was likely to improve in the future and it should be possible to award the wife spousal support in addition to her share of the marital estate).

¶54 This Court’s statements in Sommers v. Sommers, 2003 ND 77, ¶15, 660 N.W.2d 586, 591, is also instructive:

Under N.D.C.C. § 14-05-24.1, a trial court in a divorce case may require one party to pay spousal support to the other party for any period of time. A determination on spousal support is treated as a finding of fact which will not be set aside on appeal unless clearly erroneous. The trial court may consider the standard of living of the parties in a long-term marriage and the need to balance the burden created by the separation when it is impossible to maintain two households at the pre-divorce standard of living. Questions of property division and spousal support cannot be considered separately or in a vacuum, but ordinarily must be examined and dealt with together, especially when there is a large difference in earning power between the spouses. **A disadvantaged spouse is not required to deplete a property distribution in order to live.** Spousal support awards must be made in consideration of the disadvantaged spouse’s needs and of the supporting spouse’s needs and ability to pay. (emphasis added).

Sommers, 2003 ND 77, ¶15, 660 N.W.2d 586.

¶55 As the district court stated in its order, the life expectancy of a woman in the United States is approximately eighty (80) years of age and therefore the one hundred twenty (120) months of spousal support covers only a mere one quarter (¼) of the remainder of Kari’s life expectancy. (App. 80). The agreed upon duration is eight (8) years shy of the length of the parties’ marriage. The spousal support award does not continue

after the one hundred twenty (120) months and at that time Kari will, in addition to the loss of support from Tim, not be eligible for any type of retirement benefit, social security, Medicare, or be allowed to withdraw from her retirement funds without penalty. (App. 80).

¶56 Similar to the logic of the award in the case of Yanjun Zuo, the spousal support that Tim agreed to pay Kari for one hundred twenty (120) months will help her re-establish herself in the job market and more importantly, will help equalize the burden of the divorce by increasing her earnings for the remainder of her lifetime when Tim was awarded an interest in an income producing law firm. Yanjun Zou, 2019 ND 211, ¶20, 932 N.W.2d 360.

¶57 The district court properly determined that Kari's spousal support was rehabilitative in nature. Tim has failed to show that the district court's finding were induced by an erroneous view of the law. He has himself referenced the evidence in the record that supports the finding. On the record, this Court could not be left with a firm and definite conviction that a mistake has been made.

¶58 While it is clear that Tim is disappointed and would prefer to avoid further payments, he has simply failed to provide any convincing argument that the judge's decision was clearly erroneous. A litigant's disappointment does not equal to clear error.

¶59 **Issue 2: The district court did not err by awarding Kari attorney's fees incurred in this proceeding.**

¶60 While the district court denied Kari's Motion for an award of attorney's fees, in general relative to Tim's underlying Motion, the Court did award Kari a minimal amount based upon the fact that Tim's conduct unnecessarily increased her fees. The award related specifically to the fact that Tim filed improper and inadmissible documents with the Court. (App. 86). The Court specifically found that Tim had the ability to pay and,

“Further, as it relates to his noncompliance and submission of inadmissible evidence, his conduct has unnecessarily increased the parties’ fees.” (App. 86). Tim, a licensed attorney represented by an experienced family law practitioner could not have been without the knowledge that both a rule and a statute exists prohibiting the use of mediation materials and that they are deemed confidential. His action necessitated a motion to strike. Having to file the motion to strike required Kari to incur unnecessary fees.

¶61 Pursuant to N.D.C.C. § 14-05-23, the district court has considerable discretion in awarding attorney fees in a divorce action, and the decision should not be reversed absent abuse of discretion. Lizakowski v. Lizakowski, 2019 ND 177, ¶18, 930 N.W.2d 609, 614. Although the district court and this Court have concurrent jurisdiction to award attorney fees, it is established that the district court is in a better position to consider factors relevant to an award of attorney fees. Amsbaugh v. Amsbaugh, 2004 ND 11, ¶44, 675 N.W.2d 601. Further, both N.D.C.C. § 14-05-23 and this caselaw recognizes that district courts in domestic cases possess greater freedom in awarding attorney fees. Id. at ¶25.

¶62 For Tim to be successful on his claim of error, he must show that the district court acted in an arbitrary, unconscionable, or unreasonable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. Friesner v. Friesner, 2019 ND 30, ¶20, 921 N.W.2d 898. Clearly, he cannot.

¶63 The guiding principle for an award of attorney fees in a divorce action is one party’s need and the other party’s the ability to pay. Friesner, 2019 ND 30, ¶20, 921 N.W.2d 898. It is proper for a district court to consider “the property owned by each party, their relative incomes, [and] whether property is liquid or fixed assets.” Id. at ¶26 (citing

Wanttaja v. Wanttaja, 2016 ND 14, ¶31, 873 N.W.2d 911). A district court that does not restate specific findings in its paragraph addressing attorney fees does not abuse its discretion. Christian, 2007 ND 196, ¶18, 742 N.W.2d 819.

¶64 Generally, district courts retain jurisdiction under N.D.C.C. § 14-05-23 to award attorney fees in divorce cases while an appeal is pending. See, Rudh v. Rudh, 517 N.W.2d 632, 637 (N.D. 1994). N.D.C.C. § 14-05-23, provides in pertinent part:

During any time in which an action for separation or divorce is pending, the court, upon application of a party, may issue an order requiring a party to pay such support as may be necessary for the support of a party and minor children of the parties and for the payment of attorney fees.

N.D.C.C. § 14-05-23.

¶65 While Tim correctly relies upon the principle that need and ability to pay are considerations in awards of attorney's fees, he ignores the clear finding of the trial judge that referenced the fact that his conduct unnecessarily increased both parties' fees and that the award of fees was therefore, conduct based. In addition to the issue of need and ability to pay, this Court has authorized the district courts to award conduct based attorney's fees. That is, fees may be awarded when one party's action in litigation unnecessarily increased the fees of the other. That is precisely what happened here.

¶66 In Willprecht, 2020 ND 77, ¶45, 2020 WL 1671620, this Court addressed the issue of attorney's fees in family law matters. It stated as follows:

The district court has discretion to award attorney's fees in divorce proceedings under N.D.C.C. § 14-05-23. See Heinle v. Heinle, 2010 ND 5, ¶32, 777 N.W.2d 590. The district court's decision will not be reversed on appeal unless the court abused its discretion. Id. We have explained the district court must balance the requesting party's need for attorney's fees against the other party's ability to pay. Id. "The court should consider the property owned by each party, their relative incomes, whether property is liquid or fixed assets, and

whether the action of either party unreasonably increased the time spent on the case.” *Id.* (quoting *Reiser v. Reiser*, 2001 ND 6, ¶15, 621 N.W.2d 348). (emphasis added).

¶67 An award of fees is appropriate when “**a party’s actions have unreasonably increased the time spent on a case.**” (emphasis added). *Kelly v. Kelly*, 2011 ND 167, ¶34, 806 N.W.2d 133. **A court also has inherent authority to award attorney’s fees as a sanction for a litigant’s misconduct.”** *Id.* at ¶35. (emphasis added).

¶68 Tim argues that there were two (2) orders issued on two (2) separate days and they are contradictory. His statement is misguided and ignores the fact that his inappropriate conduct was the basis for the award of fees to Kari. The two (2) orders mirrored one another in their findings for Kari’s needs and Tim’s ability to pay. The order awarding fees was specifically conduct based. While the court did not find that Tim’s underlying Motion was without justification, it did find that his filing of inadmissible documents in the record lacked justification.

¶69 Tim did not and cannot show that the trial court acted in an arbitrary, unconscionable, or unreasonable manner, or that its decision is not the product of a rational mental process leading to a reasoned determination.

¶70 **Issue 3: The district court erred as a matter of law when it determined that the parties’ agreement that awarded nonmodifiable spousal support to Kari failed to meet the exception “unless otherwise agreed by the parties in writing” of Subsection 3 under N.D.C.C. § 14-05-24.1.**

¶71 A district court’s interpretation of a statute is a question of law and fully reviewable upon appeal. *Markegard*, 2019 ND 170, ¶6, 930 N.W.2d 108 (citing *Bindas v. Bindas*, 2019 ND 56, ¶ 10, 923 N.W.2d 803).

¶72 If a stipulation is incorporated into a judgment, “the agreement is interpreted and enforced as a final judgment and not as a separate contract between the parties.”

Kienzle v. Selensky, 2007 ND 167, ¶10, 740 N.W.2d 393, 396. If the language of the judgment is ambiguous, the district court is given great weight to construct its own decree, unless the court misapplies the law in interpreting the judgment. Id. Further, extrinsic evidence of the parties' intent may only be considered if after an examination of the judgment wherein a stipulation is incorporated, the stipulated language is ambiguous, and the incorporating court's intent cannot be determined. Id.

¶73 While the legislature has authored a statute that contemplates termination of spousal support upon habitual cohabitation for more than one (1) year in a relationship analogous to marriage, that directive is not absolute. Rather it has no application if the parties agree otherwise in writing. N.D.C.C. § 14-05-24.1(3). The parties in this case agreed otherwise when they defined the spousal support as nonmodifiable as to duration and term.

¶74 Nineteen (19) years ago in Toni v. Toni, 2001 ND 193, ¶20, 636 N.W.2d 396, this Court, after significant analysis of out of jurisdiction positions, determined **nonmodifiable spousal support agreements entered into by divorcing parties and adopted by the district court do not violate N.D.C.C. § 14-05-24 or public policy.** (emphasis added). As discussed in Toni, peaceful settlements of disputes in divorce matters are encouraged and because of this, there exists a judicial bias in favor of the adoption of a stipulated agreement of the parties. Id. at ¶10.

¶75 In Toni, the parties, Conrad and Sheila, entered into a Custody and Property Settlement Agreement which addressed all divorce issues. Id. at ¶3. The parties' agreement included a provision which stated that Conrad would pay Sheila the sum of \$5,000 per month until the death of either party, Sheila's remarriage, or until the payment due on April

1, 2002, has been made. Id. at ¶4. The spousal support provision prohibited modification of the support. Id. The trial court granted the divorce finding the parties' entire agreement to be "a fair, just and equitable settlement," which was incorporated in its provisions into the divorce decree. Id. at ¶5.

¶76 Later, Sheila moved to modify spousal support under N.D.C.C. § 14-05-24 and the trial court dismissed her motion and stated that "the parties entered into a binding contract which was incorporated into the judgment and..." Id. at ¶7. On appeal, the North Dakota Supreme Court affirmed the trial court's decision to dismiss Sheila's motion emphasizing that public policy favors prompt and peaceful resolution of divorce disputes. Id. at ¶1, 10. It was the first time that the Court was "confronted with a contractual settlement case that was adopted by the trial court and incorporated into the divorce decree, that called for nonmodifiable support." Id. at ¶11. This Court logically noted that N.D.C.C. § 14-05-24 does not expressly prohibit non-modification agreements and that if the legislature intended to prevent parties from entering into these types of spousal support agreements that they had the opportunity to expressly prohibit them. Id. at ¶17.

¶77 The public policy question was a party's freedom to contract on terms not specifically prohibited by statute. This Court relied on the fact that parties to a spousal support agreement are grown-ups and free to bargain with their own legal rights. Id. at ¶18. That is exactly what Kari did, she gave up the right to seek permanent support for the certainty that for one hundred twenty (120) months, the support would be guaranteed at the rate of \$5,000 per month. Likewise, Tim gave up the right to argue to a court that Kari was not entitled to support. The Court further looked to the policy reasons identified by the American Academy of Matrimonial Lawyers (AAML) cited in a Michigan case where the

AAML stated the following logic for validating agreement to waive future modification of spousal support awards:

The AAML comments that “[r]ecognizing and enforcing” the parties’ waiver of modification “does no violence to public policy, and is consistent with the reasonable expectancy interests of the parties.” The AAML also offers five public policy reasons why courts should enforce duly executed nonmodifiable alimony arrangements: (1) Nonmodifiable agreements enable parties to structure package settlements, in which alimony, asset divisions, attorney fees, postsecondary tuition for children, and all related matters are all coordinated in a single, mutually acceptable agreement; (2) finality of divorce provisions allows predictability for parties planning their post-divorce lives; (3) finality fosters judicial economy; (4) finality and predictability lower the cost of divorce for both parties; (5) enforcing agreed-upon provisions for alimony will encourage increased compliance with agreements by parties who know that their agreements can and will be enforced by the court.

¶78 This Court has recently decided two (2) cases that involved the issue of spousal support termination and cohabitation. Tim relied on each of them but again, his assertions are misguided. Neither recent case is determinative herein as neither case involved permissible nonmodifiable support.

¶79 In Bindas v. Bindas, 2019 ND 56, ¶16, 923 N.W.2d 803, 807; reh’g denied (March 21, 2019), a trial judge entered an Order terminating support. But, this Court determined that the district court’s decision was clearly erroneous. The district court granted a request for termination of spousal support accepting Mr. Bindas’ position that the parties’ Judgment failed to meet an exception noted at Subsection (3) of the statute. Instead, this Court concluded that the parties’ written agreement satisfied the “[u]nless otherwise agreed to by the parties in writing” exception to Subsection 3 of N.D.C.C. § 14-05-24.1, which did not require termination of Ms. Bindas’s spousal support even upon a finding of cohabitation. Id. In Bindas, the parties had agreed that Mr. Bindas would pay

spousal support to Ms. Bindas in the amount of \$3,200 per month until she was sixty-two (62) years old and that it would continue until the death of either party, until Ms. Bindas remarried, or the payment on February 1, 2023, had been made. Id. at ¶2.

¶80 In Markegard, this Court concluded that a written spousal support agreement entered into after the 2015 statutory amendment must expressly provide for continued spousal support to a cohabiting spouse or Subsection 3 of N.D.C.C. § 14-05-24.1 will apply. Markegard, 2019 ND 170, ¶12, 930 N.W.2d 108. The agreement in Markegard regarding spousal support limited the obligor's payments to thirty-six (36) months and stated that the obligation was to last for the duration of the thirty-six (36) months unless the obligee remarried or died. Id. at ¶2. Again, as the provision in Markegard did not deem the support nonmodifiable, it is not instructive herein. In fact, this Court has not yet reviewed a case involving nonmodifiable support as to duration or amount in light of the statutory cohabitation provision.

¶81 The spousal support provision which was adopted by the district court in the Amended Judgment reads 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.

(App. 32). In this case, Kari and Tim agreed otherwise when they agreed to a non-modifiable term of spousal support, definite in duration and amount. The parties specified three (3) instances wherein spousal support would terminate which were: (1) if Kari died; (2) if Kari remarried; or (3) if the one hundred twenty (120) months lapsed. Only if one (1) of these three (3) instances occurred would spousal support terminate.

¶82 Here, the parties' nonmodifiable spousal support agreement was expressed in their Marital Termination Agreement which was adopted by the district court in its Amended Judgment as "fair, just and equitable". (App. 23). The spousal support agreement was nonmodifiable and definite in duration and time, further it was expressly labeled as nonmodifiable. (App. 32).

¶83 Pursuant to the well-established law since the case of Toni, Kari and Tim's contractual nonmodifiable provision regarding spousal support, which was adopted by the district court, is not a violation of N.D.C.C. § 14-05-24.1 or public policy. Further, the spousal support provision in the Amended Judgment satisfies the "unless otherwise agreed to in writing" exception in Subsection 3 of N.D.C.C. § 14-05-24.1.

¶84 Like in Bindas, where the parties' agreement was adopted by the district court and incorporated into the judgment, so was Kari and Tim's entire Marital Termination Agreement. Bindas, 2019 ND 56, ¶13, 923 N.W.2d 803. Additionally, identical to Bindas, where the parties' provision regarding spousal support in their agreement was silent as to whether spousal support would terminate upon Ms. Bindas's cohabitation with another individual, Kari and Tim's spousal support provision too did not explicitly address whether the spousal support obligation would terminate upon Kari's cohabitation with another individual. Id. Unlike in Bindas, where the parties' agreement did not contain a non-modification clause, Kari and Tim's did. Id.

¶85 Unlike in Markegard, where the parties' agreement stated the spousal support obligation would continue unless the obligee remarried or died and did not have a non-modification clause, here, the parties' agreement indicated that the amount and

duration of the spousal support was non-modifiable by either party and expressly stated when the spousal support would terminate.

¶86 This Court's reasoning that Subsection 3 of N.D.C.C. § 14-05-24.1, will apply unless there is an express provision that indicates spousal support to continue to a cohabiting spouse is silent as it relates to a support obligation that is nonmodifiable. Accordingly, neither recent case is on point.

¶87 It is a simple task to demonstrate just why Tim's reliance on Bindas and Markegard is misplaced. It can be demonstrated by a plain comparison of the provisions in each Judgment. In Bindas, the district court adopted the parties' entire agreement which was incorporated into the judgment and the spousal support provision stated:

Commencing the first day of the month after the sale of the homestead, and continuing on or before the first day of each month thereafter until Mari is 62 years of age, Mike shall pay to Mark the sum of Three Thousand Two Hundred Dollars (\$3,200) per month. Mike's spousal support payments shall continue until the death of either party, Mari's remarriage, or until the payment due on February 1, 2023 has been made, whichever occurs sooner.

Bindas, 2019 ND 56, ¶13, 923 N.W.2d 803. In Markegard, the district court entered an order and judgment incorporating the parties' agreement, including the parties spousal support provision which stated:

Beginning on the first of the month upon entry of Judgment in this matter and for twelve (12) consecutive months in total, Brian shall pay to Kimberlee \$4,000 each month for spousal support.

Upon the conclusion of the twelve (12) months, Brian shall thereafter pay to Kimberlee \$3,500 each month, for spousal support, for twenty-four (24) consecutive months.

Brian shall pay this spousal support obligation to Kimberlee for the duration of the thirty-six (36) months upon entry of Judgment, unless she remarries or dies.

Markegard, 2019 ND 170, ¶2, 930 N.W.2d 108. Finally, in Tim and Kari’s case, the district court entered an Order and Judgment and then an Amended Judgment incorporating the parties’ Marital Termination Agreement, including the spousal support provision which stated in relevant part:

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.

(App. 32-33).

¶88 It is undeniable the O’Keeffe provision is enforceable, and the duration of Kari’s spousal support is nonmodifiable. A decision otherwise would require this Court to overrule Toni. A decision affirming the trial court’s order on that issue would require the same and further, would require this Court to invalidate a contractual agreement between parties that stated their clear and unequivocal intent.

¶89 While the district court correctly found that Kari’s nonmodifiable support was rehabilitative and therefore was not subject to termination based upon cohabitation, the court incorrectly found that their agreement in writing did not satisfy the requirements of the statute.

Conclusion

¶90 It is Kari's respectful request that this Court affirm the district court's Findings, Order and Judgment as to its initial awards as well as its Order, which in part, denied Tim's post-trial Motions and found spousal support rehabilitative in nature; and, thereafter affirm the award of attorney's fees to Kari in the amount of \$1,509.

Certification

¶91 I certify that this Brief is in compliance with North Dakota Rule of Appellate Procedure 32 and consists of thirty-six (36) pages.

Request for Oral Argument

¶92 Kari requests oral argument in response to Tim's appeal noting that she is of the opinion, he cannot sustain his burden to show the trial court's decision was clearly erroneous and further cannot sustain his burden to show that the court abused its discretion in requiring him to pay conduct-based attorney's fees to Kari and further, requests oral argument as it relates to her cross appeal.

DATED this 20th day of April 2020.

/s/ Patti J. Jensen

Patti J. Jensen, #04328
GALSTAD, JENSEN & McCANN, PA
411 2nd Street Northwest, Suite D
PO Box 386
East Grand Forks MN 56721
Telephone: (218) 773-9729
Facsimile: (218) 773-8950
Email: pjensen@gjmlaw.com

**ATTORNEY FOR APPELLEE AND
CROSS-APPELLANT**

