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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kari Cathryn O'Keeffe, Plaintiff, Appellee, and Cross-Appellant, v. Timothy Michael O'Keeffe, Defendant, Appellant, and Cross-Appellee	Supreme Court No. 20190379 Cass Co. Court No. 2015-DM-00837

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

REPLY BRIEF OF DEFENDANT/APPELLANT

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ARGUMENT

[¶1] This Court should affirm the district court's decisions in part and reverse in part. The district court correctly concluded N.D.C.C. § 14-05-24.1 applied because the parties did not otherwise agree in writing. Although the district court correctly came to this conclusion, it incorrectly concluded its award of spousal support was rehabilitative rather than permanent. The evidence in this record does not support this conclusion, and Kari O'Keeffe failed to meet her burden to provide evidence that any exception in N.D.C.C. § 14-05-24.1 applied. Finally, the district court acted arbitrarily in awarding attorney fees to Kari when it concluded, in an order issued one day earlier, that Kari was not entitled to an attorney fee award.

[¶2] First, to clarify a number of statements in Appellee/Cross-Appellant Brief, Appellant Tim O'Keeffe provides the following clarifications:

1. Paragraph 15 of Appellee's Brief states that "Tim's first formal request for relief from his obligations did not find its way to the Court until after the filing of his Notice of Appeal." This is incorrect. Tim's initial motion, brief, and affidavit requested the Court terminate his spousal support obligation as of February 28, 2019. App. p. 45; Dkt. #46, ¶ 25. This Court has authority to terminate spousal support as of the date of the motion, not necessarily as of the date of the court's order on the motion. *See Markegard v. Willoughby*, 2019 ND 170, ¶ 20, 930 N.W.2d 108 ("The district court has discretion in setting the date the spousal support obligation terminates); *Glass v. Glass*, 2017 ND 17, ¶ 10, 889 N.W.2d 885. In fact, this Court has said that there should be retrospective termination of spousal support when the paying spouse is not in default of their payments when they file a motion to terminate spousal support. *Nugent v. Nugent*, 152 N.W.2d 323, 329 (N.D. 1967).

2. Paragraph 21 of Appellee's Brief refers to a number of facts which are not in this record, including that "Kari was the primary caregiver to the children which allowed Tim to devote the time necessary to advance in his career," citing to Appendix Page 7. This information is not in the record. It is not clear to what Kari refers in support of this statement.

3. Paragraph 21 also states "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." There is no information in this record stating that Kari had "set aside" any dream, and Kari's own assertion that she was qualified to teach full time contradicts her position that spousal support was rehabilitative rather than permanent. By her own argument, Kari was already qualified to pursue full-time employment and was not in need of rehabilitation.

4. In Paragraph 22, Kari cites to the Internal Revenue Service Code; however, she fails to cite to any relevant regulation or case law. Further, Kari never raised any issue as to tax benefits to either party to the district court. *Paulson v. Paulson*, 2011 ND 159, ¶ 9, 801 N.W.2d 746 (noting this Court does not consider issues raised for the first time on appeal).

5. Paragraph 23 states that Scott College, Kari's live-in fiancé, has no interest in the home where they reside, citing to Appendix Page 44. There is no evidence in this record, nor in either Appellee's or Appellant's Appendix Page 44 indicating that Scott has no interest in the home. However, there is ample, undisputed evidence that Scott has been residing in the home since at least January 2016. *See* App. p. 40-69.

6. Paragraph 27 of Appellee's Brief also paraphrases the district court's request for information at the August 9, 2019 hearing, citing the transcript at page 3. To be clear, the court said:

> I have to figure out the parties' intent at the time of their divorce and so that brings into play the parties' marital estate. As you well know, spousal support and property settlement go hand-in-hand. . . there was no 8.3 Property and Debt Listing that was filed . . . I thought this would be a fairly simple exercise where the parties would agree these were the values that we used at the time of the divorce. . . . How can you make a spousal support decision without knowing the value of the marital estate and whether those assets are income producing and things of that nature.

Tr. 2, pp. 3-4.

7. In Paragraph 35, Kari states that she "met her burden." However, Kari did not provide any evidence in support of her position, making it unclear as to how she met any applicable burden in this matter.

8. Paragraph 43 of Appellee's Brief states:

> 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.

Kari cites to Transcript 1, Page 15 to support this statement. However, there is no evidence or testimony from Kari on these issues in the April 5, 2019 Transcript. In fact, the entirety of the April 5, 2019 hearing was oral argument from counsel, and the parties agreed they were not submitting evidence at the hearing. *See* Tr.1, p. 4.

9. Kari goes on to state "[w]hat better evidence that the support was meant to be rehabilitative in nature than a return to school" in Paragraph 50. However, there is no evidence in this record that Kari intended to return to school at the time of the divorce. As indicated by the evidence Tim presented, Kari was qualified to return to the workforce

immediately or within a short time period after the divorce. App. p. 43-45. This Court interprets agreements based upon parties' intent at the time of the agreement which is later incorporated into a judgment, not by what happened after. *See generally Greenwood v. Greenwood*, 1999 ND 126, ¶ 10, 596 N.W.2d 317.

I. The district court correctly concluded N.D.C.C. § 14-05-24.1 applied and the parties did not otherwise agree in writing.

[¶3] Kari argues the following provision in the parties' marital termination agreement, later incorporated into the judgment, includes an agreement not to terminate spousal support upon her cohabitation in a relationship analogous to a marriage for one year or more:

> 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. p. 32 (emphasis added). As provided by N.D.C.C. § 14-05-24.1:

> 1. 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.
> 2. Subsections 2 and 3 do not apply to rehabilitative spousal support.

[¶4] This Court should note the above paragraph includes no language either specifically noting any agreement relating to N.D.C.C. § 14-05-24.1 nor is there any language specifically divesting the district court of jurisdiction to terminate spousal support. Kari heavily relies on *Toni v. Toni* to argue these parties entered into a binding non-modification agreement which did not only apply to amount and duration, as stated by the plain

language, but also applied to termination of spousal support. 2001 ND 193, 636 N.W.2d 396.

[¶5] This Court should first note that *Toni* is distinguishable on several different levels, the first being that the *Toni* court itself concluded its decision was a narrow one. *Id.* at ¶ 22. Next, the language of the *Toni* agreement was clear and unequivocal in the parties' intent to divest the district court of jurisdiction over spousal support by stating, "The court shall be divested of jurisdiction to modify in any manner whatsoever the amount and term of spousal support." *Id.* at ¶ 21. The final and most important distinguishing issue from *Toni* is simple – the relevant statute changed. This Court should instead look to its very recent opinions in *Bindas* and *Markegard* to conclude the district court appropriately interpreted the statute and case law to conclude Tim and Kari did not agree to divest the court of jurisdiction over spousal support nor did they otherwise agree N.D.C.C. § 14-05-24.1 would not apply.

[¶6] In Justice Crothers' concurrence in *Bindas*, joined by Justices Jensen and VandeWalle, he writes to clarify what he describes as one that could be construed as a perverse result under the current law. *Bindas v. Bindas*, 2019 ND 56, ¶ 27, 923 N.W.2d 803. As Justice Crothers notes:

> [I]f a spousal support provision like that used in the Bindas' divorce was executed after N.D.C.C. § 14-05-24.1(3) became effective, the absence of language stating spousal support continues even if the receiving party cohabitates would require, rather than preclude, termination of spousal support.

Id. Shortly after deciding *Bindas*, in *Markegard* this Court echoed Justice Crothers' concurrence and concluded a spousal support agreement entered into after the 2015 statutory amendment must provide for continued spousal support to a cohabitating spouse

or N.D.C.C. § 14-05-24.1(3) would require termination of spousal support. *Markegard*, 2019 ND 170, ¶ 12, 930 N.W.2d 108. Here, there is no language indicating the parties agreed to divest the district court of jurisdiction over termination of spousal support.

[¶7] The parties' agreement also does not include any language indicating they agreed to waive any rights under the current statutes. Despite this Court's statements in both recent opinions requiring a statement on spousal support and cohabitation, Kari argues the parties waived their rights under N.D.C.C. § 14-05-24.1. A waiver must be "a voluntary and intentional relinquishment and abandonment of a known existing right, advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed." *Steckler v. Steckler*, 492 N.W.2d 76, 79 (N.D. 1992). Unlike *Toni*, where the parties specifically stated the district court was divested of jurisdiction, the parties here agreed not to seek modification based in the amount or duration but did not agree to any divestment of jurisdiction to terminate based on cohabitation. Even if the district court was divested of its jurisdiction to <u>modify</u> spousal support, the legislature has created clear and unambiguous statutory authority for the courts to <u>terminate</u> spousal support based on cohabitation alone, which did not previously exist, as provided in N.D.C.C. § 14-05-24.1(3) and *Bindas*, 2019 ND 56, ¶ 27, 923 N.W.2d 803. *See also Cermak v. Cermak*, 1997 ND 187, ¶ 9, 569 N.W.2d 280 (concluding spousal support obligations could not be terminated based upon cohabitation alone). Accordingly, Tim did not waive his right to terminate spousal support either upon Kari's death or remarriage, nor did he waive his claim to request the district court terminate spousal support pursuant to N.D.C.C. § 14-05-24.1. The district court properly concluded the parties did not agree to waive the application of N.D.C.C. § 14-05-24.1.

II. The district court erred by concluding its award of spousal support was rehabilitative instead of permanent.

[¶8] The district court correctly concluded that N.D.C.C. § 14-05-24.1 applied; however, the district court erred in interpreting its judgment to conclude the spousal support award was rehabilitative rather than permanent. Kari relies on *Yanjun Zuo v. Yuanyuan Wang*, 2019 ND 211, ¶ 20, 932 N.W.2d 360 to argue the spousal support award would "help her re-establish herself in the job market." However, to clarify, the district court in *Yanjun Zuo* specifically concluded that spousal support award was rehabilitative and awarded to allow the recipient "sufficient time to pursue a career and/or additional schooling here to better her station in life." *Id.* Notably, the district court here made no similar findings in its initial award specifically identifying the spousal support as rehabilitative and there was no clear contemplation that Kari would pursue a career and/or additional schooling to better her station in life.

[¶9] Further, both Kari and the district court relied on case law noting a party is not required to deplete her property distribution to live. *Fox v. Fox*, 1999 ND 68, ¶ 24, 592 N.W.2d 541. However, based upon the district court's initial award of spousal support and the relatively large nature of the marital estate, there is no indication it would be error to conclude the support was permanent rather than rehabilitative based on the property distribution. In *Schiff v. Schiff*, this Court affirmed a district court's denial of spousal support because there was a substantial property division, the marital estate was large, and the wife was capable of meaningful employment. 2013 ND 142, ¶¶ 10-11, 835 N.W.2d 810. Like in *Schiff*, Kari was capable of working, worked during the marriage, and received a substantial property award. *Id.*

[¶10] However, here, unlike *Schiff* or *Fox* or any other cases citing the depletion language, the issue is not whether the denial of spousal support was appropriate. Instead, the issue is whether the support award was permanent or rehabilitative. Although there is support that the district court could have erred if it initially denied a spousal support award to Kari in 2015, the district court clearly erred here by determining the type of award based upon its concern that Kari would now be required to rely on her property division to live. This reliance ignores the facts at the time of entry of judgment and requires reversal of the district court's decision.

III. The district court arbitrarily awarded attorney fees to Kari.

[¶11] To clarify another error in Appellee's Brief, the district court's two orders did not mirror "one another in their findings for Kari's needs and Tim's ability to pay." Appellee's Brief at ¶ 68. Notably, in its December 1, 2019 Order, the district court concluded Kari had not demonstrated a need for Tim to pay her attorney fees and accordingly denied her repeated requests for attorney fees throughout litigation of Tim's initial motion. App. 83-84. In its later order awarding Kari attorney fees, the district court made no findings as to need or ability to pay. Curiously, despite Kari's counsel drafting the order the court eventually entered awarding attorney fees, the district court also cited no authority warranting an award of fees based on conduct. *See* Index No. 107.

[¶12] The district court's December 1 and December 2, 2019 Orders contradict one another, and the district court acted arbitrarily in awarding attorney fees after finding both that Kari had failed to demonstrate a need and that Tim had not unnecessarily brought the motion. App. 82-83; *Friesner v. Friesner*, 2019 ND 30, ¶ 20, 921 N.W.2d 898. As repeatedly referenced by Kari in her response brief, an award of attorney fees under

N.D.C.C. § 14-05-23 generally 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. For example, Kari cites to *Christian v. Christian*, 2007 ND 196, ¶ 18, 742 N.W.2d 819 to support her conclusion that the district court "need not restate specific findings in its paragraphs addressing attorney fees." However, in *Christian*, the district court's paragraph on attorney fees followed a seven-page order, not a six-paragraph proposed order which fails to reference its previous order concluding the motion regarding mediation was moot, not frivolous. *See id.*

[¶13] The district court found Kari had not demonstrated a need for an award of attorney fees. App. 82-83. This was error, and the district court acted arbitrarily in entering its December 2, 2019 Order, which contradicted its prior order, awarded attorney fees to Kari.

CONCLUSION

[¶14] The Court should determine that the district court clearly erred in finding the spousal support award contained in the parties' Amended Judgment to be rehabilitative although it correctly concluded N.D.C.C. § 14-05-24.1 applied. 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 previous order.

Dated this 4th day of May, 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 Reply Brief, hereby certifies the Appellants' Reply Brief is in compliance with N.D.R.App.P. 32 and contains 12 pages.

Dated this 4th day of May, 2020.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Kari Cathryn O'Keeffe, Plaintiff/Appellee, v. Timothy Michael O'Keeffe, Defendant/Appellant.	Supreme Court No. 20190379 Cass County District Court Civil No: 09-2015-DM-00837 **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Tricia A. Fossen, being first duly sworn, deposes and says that on May 4, 2020, she served the following documents:

REPLY BRIEF OF DEFENDANT/APPELLANT

via email upon the following:

Patti Jensen
pjensen@gjmlaw.com

/s/ Tricia A. Fossen
Tricia A. Fossen

Subscribed and sworn to before me this 4th day of May, 2020.

/s/ Deanna Storey
Notary Public