

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 AWARDED PLAINTIFF ATTORNEY’S FEES, FROM CASS COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT, HONORABLE BRADLEY A. CRUFF, PRESIDING

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

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Law and Argument

¶1 Timothy Michael O’Keeffe (Tim) argues that this Court should reverse the district court’s decision that the non-modifiable spousal support he agreed to pay Kari Cathryn O’Keeffe (Kari) was rehabilitative in nature because he claims, it was permanent in nature. Because that determination is a finding of fact, to succeed here Tim must demonstrate that the finding was clearly erroneous. See, Markegard v. Willoughby, 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. Here, the district court applied the correct law, there was ample evidence to support the finding and it would simply be wrong to determine that a mistake had been made. Clearly, he cannot meet that burden.

¶2 Tim further argues that the district court’s award of minimal attorney’s fees to Kari in the sum of \$1,509 was error. 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 that 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 meet that burden.

¶3 While the trial court ultimately reached the correct conclusion in denying Tim’s Motion, the trial court did error when it found that the support provision in the O’Keeffe Judgment did not meet the requisite requirement to avoid termination as required by N.D.C.C. § 14-05-24.1.

¶4 Therefore, while this Court should affirm the determination of the court denying Tim's request for termination and awarding minimal attorney's fees, this Court should reverse the determination as to whether the parties' agreed upon contractual provision met the N.D.C.C. § 14-05-24.1 exception regarding written agreements.

¶5 Kari and Tim agreed in writing to define the duration and amount of the support. The validity of such a provision was established in Toni v. Toni, 2001 ND 193, 636 N.W.2d 396.

¶6 **I. The district court erred as a matter of law when it determined that the parties' agreement which 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.**

¶7 Subsection 3 of N.D.C.C. § 14-05-24.1 is not ambiguous and clearly states an exception to the general rule that habitual cohabitation for one year or more terminates spousal support. The applicable portion of the statute reads as follows:

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 cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.

N.D.C.C. § 14-05-24.1(3). (**emphasis added**). The plain language of the statute constrains the application of the statute when the parties have agreed to other terms in writing.

¶8 Paragraph 3 of Tim's Reply Brief misinterprets Kari's argument. Rather, instead of including an agreement addressing one reason for termination, the Stipulation provided an affirmative statement because it is **unequivocally clear that the amount and duration of spousal support was nonmodifiable. The support could only be terminated in defined instances.** Those incidents include the expiration of ten (10) years and/or remarriage. (**emphasis added**). The spousal support provision in Kari and Tim's

Stipulation included that the clear language that the duration was \$5,000 per month and the duration ten years unless Kari passed away or remarried before the expiration of ten (10) years. (App. 32-33). It cannot be more clear.

¶9 Paragraph 5 of Tim's Brief attempts to convince this Court that Toni is distinguishable, but he is incorrect as Toni is instead similar and therefore instructive herein. This Court in Toni did conclude the decision was narrow because "Sheila's motion was brought under N.D.C.C. § 14-05-24 to modify the spousal support award based on a material change of circumstances". Similarly, Tim's motion was brought under N.D.C.C. § 14-05-24. The difference is only that Tim requested termination and in Ms. Toni requested modification. The fact that one payor requested termination and one requested modification does not render Toni unpersuasive here.

¶10 To accept Tim's argument, this Court would have to ignore the plain language of the parties' Stipulation.

¶11 Next, like in Toni, Kari and Tim's agreement was clear and unequivocal. In Toni, the parties agreed "[t]he court shall be divested of jurisdiction to modify in any manner whatsoever the amount and term of the spousal support awarded to Sheila immediately upon entry of the judgment and decree herein." Toni, 2001 ND 193 at ¶4. Here, Kari and Tim provided similar language when they stated "[t]he amount and duration of spousal support shall be nonmodifiable by either party." (App. 32-33). It is obvious that the use of the term nonmodifiable equates to a lack of jurisdiction to change the same.

¶12 Unlike in Toni, Kari and Tim's agreement provides more specificity in that it includes that both parties are prohibited from modifying the amount and duration of spousal support which is an agreement in writing that is not consistent with the statute.

Tim fails to recognize that the provision prohibits Kari from seeking an increase in the amount or duration of the support. It is a provision that was bargained for and that each understood and that they jointly asked the district judge to approve their Stipulation and enter a Judgment based upon it.

¶13 By this very language, the agreement was nonmodifiable and consistent with Toni, and entering the Judgment that renders spousal support nonmodifiable does not violate the public policy of North Dakota. Toni, 2001 ND 193 at ¶17. Further, Toni established agreements by divorcing parties to make spousal support nonmodifiable which are adopted by the trial court do not violate N.D.C.C. § 14-05-24.1. Id. at ¶20. This is exactly what occurred in this case.

¶14 Tim argues at Paragraph 5 that he believes the most important distinguishing fact from Toni is that the statute changed prior to the entry of their Judgment. He is correct and the same supports Kari's position. Toni was decided prior to the parties entering into their agreement and the relevant statute had already been changed.

¶15 Finally, unlike in Toni, where only one of the parties was represented by counsel, here both Kari and Tim were represented by their counsel (App. 3) and Tim is a licensed and experienced lawyer himself. Tim cannot credibly argue that his choice to pay nonmodifiable support was not an informed decision on his part.

¶16 The district court misapplied the law when it did not find that Kari and Tim's spousal support provision met the exception in Subsection 3 of the N.D.C.C. § 14-05-24.1 statute. In Bindas v. Bindas, 2019 ND 56, 923 N.W.2d 803, this Court determined the parties' written agreement satisfied the exception of N.D.C.C. § 14-05-24.1 (3) and

did not support termination of Ms. Bindas' spousal support award even upon a finding of cohabitation. Id. at ¶16. The spousal support provision in Bindas read as follows:

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 Mari 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.

Id. at ¶13. The difference between the spousal support provision in Bindas and the one included by Tim and Kari is the term "nonmodifiable" language. That renders Tim's argument misguided. (App. 32-33).

¶17 Tim largely depends upon the recently decided cases of Bindas and Markegard. However, neither case involved nonmodifiable support. The spousal support provision in Markegard read as follows:

Beginning on the first of the month upon entry of Judgment in this matter and for twelve (12) consecutive months in trial, Brian shall pay to Kimberlee \$4,000 each month for spousal support. Upon the conclusions 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 at ¶2.

¶18 In 2015, N.D.C.C. § 14-05-24.1 was amended and since then, Bindas and Markegard are the only cases decided by this Court which explore support termination due to cohabitation. However, neither of those cases involved the nonmodifiable spousal support. Tim's reliance on the same is like comparing apples to oranges; rather than applies to apples.

¶19 Thus, although the cases may be persuasive in a case wherein the support was modifiable; that is not the case here. They are not on point and Tim's reliance upon them is not appropriate. Accepting Tim's argument would have the practice impact of requiring a reversal of Toni. Given the statutes plain language, it is clear the legislature did intend for divorcing parties to define the term of spousal support.

¶20 When they made a voluntary choice to prohibit changes in the future, Kari was prevented from later arguing for a longer duration or an increased amount just as Tim was prevented from arguing that Kari's support would be reduced in amount or duration. The parties' themselves determined the duration of support. Had the parties intended that the support would terminate upon cohabitation, they would have included it.

¶21 Because they intentionally agreed otherwise mere cohabitation does not terminate Tim's obligation. Any other result would be contrary to this Court's precedence and would require reversal of Toni. In this instance, the district court was divested of jurisdiction to modify Kari and Tim's spousal support because they set the parameters which included that the support was nonmodifiable by either of them in amount or duration.

¶22 Contrary to Tim's assertions, the parties did in fact include language waiving each of their rights under N.D.C.C. § 14-05-24.1. In order for a waiver to be effective, "it 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). The agreement between Kari and Tim was voluntary. They both intentionally relinquished and abandoned a known existing right; that is, to have the ability to later modify the spousal support provision. Absent their included language, which rendered their agreement

nonmodifiable, both parties would have been able to enjoy that right. Instead, their agreement specified neither would have the ability to modify the spousal support provision regarding amount and duration. (App. 32-33).

¶23 There is no requirement, as Tim insists, that the parties spousal support provision mirror the language in Toni to be considered a waiver. The freedom to contract, as reiterated in Toni, allows parties to use their own language and that is exactly what Kari and Tim did. They specifically included nonmodifiable language constituting a waiver to their right to modify the agreement regarding amount and duration. Although the legislature in its amendments to N.D.C.C. § 14-05-24.1 provided the authority for district courts to terminate spousal support based upon cohabitation, it also allowed for an exception where it would not apply if the parties otherwise agreed in writing. And, that is exactly the route that Tim and Kari choose to take. See Cermak v. Cermak, 1997 ND 187, ¶9, 569 N.W.2d 280 (where the court held spousal support obligations were not to be terminated based upon cohabitation alone). The legislature did not specify the exact language that was required to otherwise agreed nor did it specify what language would be determined ineffective.

¶24 It is clear from case law this Court never considered remarriage and cohabitation as synonymous, which would reasonably explain why the North Dakota legislature purposely included remarriage and cohabitation in separate subsections of N.D.C.C. § 14-05-24.1. See Cermak v. Cermak, 1997 ND 187, ¶9, 569 N.W.2d 280, Klein v. Klein, 2016 ND 153, ¶5, 882 N.W.2d 296, Pearson v. Pearson, 2000 ND 20, ¶16, 606 N.W.2d 128; Woodward v. Woodward, 2013 ND 58, ¶9, 830 N.W.2d 82.

¶25 Spousal support would only terminate after one hundred twenty (120) months; Kari's death; or Kari's remarriage. Because the O'Keeffe's duration provision specified when spousal support would terminate, termination in effect could not be modified by the parties.

¶26 There are public policy reasons that support enforcement of parties' waiver of modification were set forth in Toni and none that support Tim's argument. Parties should be able to rely upon negotiated settlements and they should be allowed broad authority to do so to encourage resolution of issues without the need for court intervention. They also include the need for predictability for parties in planning post-divorce lives, and increased compliance with agreements by parties who know their agreements can and will be enforced. Toni, 2001 ND 193 at ¶19.

¶27 Here, Kari and Tim were permitted to determine the future modifiability of their spousal support agreement which included amount and duration. In turn, this allowed each of them to move forward with their individual lives in a way that was in accordance with their agreements. Both parties were represented by counsel and understood what the impact of their waiver of the right to modify when they agreed to the nonmodifiable spousal support provision.

¶28 The district court erred as a matter of law when it concluded that the parties failed to meet the "unless otherwise agreed" exception to N.D.C.C. § 14-05-24.1. Kari and Tim signed a legally binding contractual agreement which included a nonmodifiable spousal support provision which was adopted by the district court. Their provision is not a violation of public policy or N.D.C.C. § 14-05-24.1 and it satisfies the "unless otherwise agreed to in writing" exception in Subsection 3 of N.D.C.C. § 14-05-24.1.

Conclusion

¶29 Kari respectfully requests this Court affirm the district court's Order denying Tim's Motion finding Kari's spousal support was rehabilitative in nature. She also asks that this Court affirm the award of attorney's fees. Kari respectfully requests this Court reverse the district court's finding the parties' agreement in writing did not satisfy the requirements of the statute as it erred as a matter of law.

Certificate of Compliance

¶30 I certify that this Brief in in compliance with North Dakota Rule of Appellate Procedure 32 and consists of twelve (12) pages.

DATED this 18th day of May 2020.

/s Patti J. Jensen

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AFFIDAVIT OF SERVICE


Re: Kari Cathryn O’Keeffe vs. Timothy Michael O’Keeffe
Supreme Court No. 20190379

The undersigned, a person not less than eighteen (18) years of age and not a party to this proceeding, being first duly sworn upon oath, hereby states a copy of the attached:

• **Reply Brief of Appellee and Cross-Appellant**

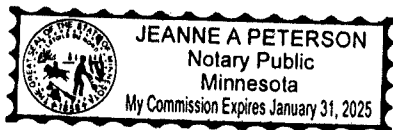
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Subscribed and sworn to before me, a Notary Public, on this 18th day of May 2020, by Jill Stanislawski, at East Grand Forks, Minnesota.





Notary Public, State of Minnesota
My Commission Expires: 1-31-2025