

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kari Cathryn O’Keeffe,)
)
)
 Plaintiff/Appellee/) Supreme Court No.: 20190379
 Cross-Appellant.) District Court No. 092015-DM-837
)
 v.)
)
 Timothy Michael O’Keeffe,)
)
 Defendant/Appellant)
 Cross-Appellee.)

KARI CATHRYN O’KEEFFE APPELLEE AND CROSS-APPELLANT
PETITION FOR REHEARING

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 FEES

EAST CENTRAL JUDICIAL DISTRICT
HONORABLE BRADLEY A. CRUFF, PRESIDING

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I. STATEMENT OF THE CASE

[¶1] It is with all due respect to this Supreme Court, that Appellee and Cross-Appellant, Kari Cathryn O’Keeffe (“Kari”), files this Petition for Rehearing pursuant to N.D.R.App.P. 40. Kari adopts, restates, and incorporates by reference, her Brief of Appellee and Cross-Appellant on file with the Supreme Court (hereinafter, “Court”).

[¶2] This divorce cause of action between Kari and Tim O’Keeffe (“Tim”) arose on July 27, 2015. The law in effect on that day was N.D.C.C. § 14-05-24.1 which read, “Taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for any period of time. The court may modify its spousal support orders.” (Emphasis supplied.)

[¶3] On August 1, 2015, N.D.C.C. § 14-05-24.1 went into effect and reads in relevant part as follows:

1. Taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for a limited period of time in accordance with this section. The court may modify its spousal support orders.

...

3. Unless otherwise agreed to by the parties in writing, upon an order of the court based upon a preponderance of the evidence that the spouse receiving support has been habitually cohabitating with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.

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

[¶4] The parties obtained a default Judgment based upon their Marital Termination Agreement. The spousal support provision provided, “The amount and duration of spousal support shall be non-modifiable by either party”. (app. 32).

[¶5] This Court in O’Keeffe v. O’Keeffe, 2020 ND 201, reversed the lower court’s ruling and concluded that Kari’s non-modifiable spousal support was “permanent” and therefore, should be terminated. This Court further held that the parties agreement did not satisfy the

requirement of N.D.C.C. § 14-05-24.1(3), which allows parties to otherwise agree in writing that the provisions of N.D.C.C. § 14-05-24.1(3) do not apply. Kari implores this Court to consider the arguments in this Petition and restore her vested and carefully negotiated rights. Alternatively, Kari requests this Court reconsider its decision and remand the case to the lower court to develop a proper record.

II. LAW AND ARGUMENT

[¶6] The applicable law in this case is that which was in effect when the cause of action arose on July 27, 2015. See e.g., Smith v. Baumgartner, 2003 ND 120, ¶¶ 11-12, 665 N.W.2d 12. Neither party has argued this point to the lower court or this Court, but that does not change the fact that the incorrect law was applied in this matter. For purposes of this Petition for Rehearing, Kari will limit her arguments as they apply to N.D.C.C. § 14-05-24.1, *as amended*.

A. The Court misapprehended the applicable standard of review.

[¶7] Bargaining. Negotiating. Compromising. Making peace. The time it takes to come to an agreement, the emotions tweaked, and the level of compromise parties are willing to go to for closure, is all behind the scenes. After the agreement is signed, the lower court has scant facts available with which to approve the parties' agreement and enter a judgment. When parties enter into a Marital Termination Agreement, how the matters of property, debt and support are interrelated and intertwined remain private.

[¶8] With no evidence before it, the lower court interpreted Kari and Tim's Judgment. The lower court issued an Order and did not issue "findings of fact." No evidence was presented to the lower court, making factual findings impossible. The lower court interpreted the parties' Judgment to mean that Kari's spousal support was in the nature of "rehabilitative" support.

[¶9] This Court found that the lower court’s findings were “clearly erroneous” but the interpretation of a judgment is a question of law and questions of law are fully reviewable on appeal. Slorby v. Slorby, 2009 ND 11, ¶ 4, 760 N.W.2d 89. In reversing the lower court’s interpretation of the Judgment and making its own decision that the non-modifiable spousal support awarded to Kari was permanent, this Court has misapprehended the law in two ways: First, it applied an incorrect standard of review; and second, it departed from its long standing tradition of refusing to reweigh the evidence on appeal. See e.g., Knudson v. Knudson, 2018 ND 199, ¶ 37, 916 N.W.2d 793; Hoverson v. Hoverson, 2015 ND 38, ¶ 6, 859 N.W.2d 390 (N.D. 2015).

[¶10] In this case, there is no evidence to reweigh. Extrinsic evidence of the parties’ intent is considered only if, after an examination of the judgment, the stipulated language is ambiguous and incorporating the court’s intent cannot be determined. Helbling v. Helbling, 2019 ND 27, ¶ 6, 921 N.W.2d 652. Although it appears the lower court asked for some evidence, neither attorney introduced evidence in this matter because the issues involved matters of law--interpretation of a judgment and interpretation of a statute. The lower court moved on and was able to interpret the Judgment to determine that the non-modifiable spousal support was rehabilitative. However, if the lower court inappropriately relied on an affidavit not in evidence, or if this Court finds error in the lower court’s interpretation of the Judgment, then the matter should be remanded for the taking of evidence. See e.g., McDonough v. McDonough, 395 N.W. 2d 149, 150. (1986). It is the only fair way to discern what the parties and the lower court intended when this Judgment was entered. To do otherwise deprives the lower court the opportunity to fully hear and decide the case based upon admissible evidence.

[¶11] The Court's decision to terminate Kari's non-modifiable spousal support based upon the extremely limited record does not take into consideration that property division and spousal support are interrelated and intertwined and must be considered together. See e.g., Innis-Smith v. Smith, 2018 ND 34, ¶ 24, 905 N.W.2d 914; Ingebretson v. Ingebretson, 2005 ND 41, ¶ 10, 693 N.W.2d 1.

[¶12] This Court cited nine cases to conclude the non-modifiable spousal support awarded to Kari was permanent rather than rehabilitative. All of the cases cited by this Court are distinguishable in one important way--they all involved a court trial between the parties where the lower court received ample evidence, documents and testimony. The lower court and this Court did not have the record available to it that these cases enjoyed. The lower court should be provided the opportunity to interpret its own Judgment by the taking of extrinsic evidence and having a complete record..

B. This Court misapprehended the holding in Toni v. Toni.

[¶13] Since 2001, this Court has permitted parties to limit the lower court's ability to modify agreements for spousal support. Toni v. Toni, 2001 ND 193, 636 N.W.2d 396. The lower court and this Court stated that the holding in Toni is "narrow" implying that it had limited application to Kari and Tim's case. However, this Court specifically stated in Toni that the holding was "narrow" because of the posture of the case. Toni came to this Court on a motion to modify support after the parties agreed in writing to limit the jurisdiction of the court to modify the terms. The Court in Toni made it clear that its decision was to apply in situations where both parties had full disclosure of assets and liabilities, had independent counsel, and entered into the agreement voluntarily. Toni at ¶ 21. The Toni Court performed a complete analysis of the broad legal question and held that divorcing couples

may limit the court's jurisdiction to modify spousal support. *Id.* ¶ 14. While *Toni* was decided before N.D.C.C. § 14-05-24.1 was amended, it is still valid and applicable law and has been cited by this Court many times for the proposition that parties may agree to waive their statutory rights. People may waive rights and privileges which are conferred by statute and are intended for their benefit. See e.g. *Dixon v. Dixon*, 2018 ND 25, ¶ 12, 905 N.W. 2d 748. Our law recognizes a major public policy of freedom to contract on terms not specifically prohibited by statute. *Markwed v. City of Mandan*, 2010 ND 220, ¶16, 791 N.W. 2d 22.

[¶14] Kari and Tim had the absolute right to waive their statutory rights to modify their agreement for spousal support as to the amount and duration. The amendments to N.D.C.C. § 14-05-24.1 did not change that. Once the parties enter into a written, informed and voluntary agreement to limit the court's jurisdiction to modify the agreed upon support obligation, the inquiry ends there. They agreed that the support would be non-modifiable as to amount and duration. In simple terms--it cannot be changed. A termination is a modification as to the duration of the support.

C. This Court incorrectly stated that Kari and Tim “did not include any language to the contrary” in their agreement which would prevent the Court from terminating spousal support under N.D.C.C. § 14-05-24.1(3). *O’Keeffe* at ¶ 20.

[¶15] Kari and Tim agreed that “The amount and duration of spousal support shall be non-modifiable by either party.” This Court's decision holds Kari and her counsel responsible for knowing how this Court would interpret the statute four years after her agreement with Tim. The Court cites its holding in *Markegard v. Willoughby*, 2019 ND 170, 930 N.W.2d 108, stating that unless parties expressly provide for continued spousal support to a cohabiting spouse, N.D.C.C. § 14-05-24.1(3) will apply. Kari could not have known that

this Court would interpret the statute in this way when she entered into her agreement. To impose a requirement on Kari that she should have known that her agreement should expressly state that her non-modifiable spousal support would continue even if she cohabitates is unfair and flies in the face of the parties plain language. It is also in contravention to the statute's plain language and produces an extreme and unfair result.

D. This Court did not adhere to its rules of statutory interpretation when deciding that Tim and Kari did not agree in writing to limit the court's jurisdiction to modify or terminate spousal support.

[¶16] This Court summarized the rules of statutory interpretation in Gronland v. Gronland, 2015 ND 251, ¶ 8, 870 N.W.2d 217:

When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational. We presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.

[¶17] In construing a statute, words are to be understood in their ordinary sense. N.D.C.C. § 1-02-02. The legislature now requires the court to terminate spousal support if the receiving spouse is cohabitating in a relationship analogous to a marriage for one year or longer, unless the parties otherwise agree in writing. The legislature expressly gave the parties the power to limit how N.D.C.C. § 14-05-24.1(3) would be applied. The legislature was mindful of the power of citizens of North Dakota to enter into contracts which waive their statutory rights. The legislature did not want to interfere with these contracts and chose to exclude those situations where the parties agreed otherwise and obtained a peaceful resolution outside of court. The legislature did not require the parties to expressly state that the spousal support would continue even if one of the parties was cohabitating in a

relationship analogous to a marriage. The legislature generally provided that the parties could otherwise agree to restrict the requirements of N.D.C.C. § 14-05-24.1(3). The fact that Kari and Tim agreed that the spousal support obligation would be non-modifiable is their “agreement otherwise” that N.D.C.C. § 14-05-24.1(3) would not apply. This Court’s interpretation of the statute as applied to this case elevates the form of the agreement over the substance of the agreement--a form Kari could not possibly predict at the time she entered into the agreement and a form with devastating consequences to her. This Court’s decision takes away between \$300,000 and \$400,000 from Kari, without an evidentiary hearing. We doubt that this Court intended such a result. Kari cannot be stripped of her carefully negotiated rights without due process and we respectfully ask this Court to carefully reconsider this before making its decision final.

III. CONCLUSION

[¶18] For the reasons provided herein, Kari requests this Court to restore the case to the calendar for reargument or resubmission as to the areas of law addressed herein. In the alternative, Kari requests that O’Keeffe v. O’Keeffe, 2020 ND 201 be amended and revised to correct the overlooked or misapprehended applicable laws and/or that this matter be remanded to the lower court directing it to have an evidentiary hearing so that it has sufficient evidence to interpret the Judgment.

Respectfully submitted this 30th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff/Appellee/Cross-Appellant, Kari Cathryn O'Keeffe, in the above-captioned matter, and as the author of the Petition for Rehearing, hereby certifies, in compliance with Rules 32 and 40 of the North Dakota Rules of Appellate Procedure, that the Petition for Rehearing, excluding the Certificate of Service, and Certificate of Compliance totals 10 pages.

Dated this 1st day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing was served on the 30th day of September, 2020, by sending via electronic mail via the Supreme Court E-filing Portal to the following:

Tracy J. Lyson
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Clerk of Supreme Court
supclerkofcourt@ndcourts.gov

Dated this 30th day of September, 2020.

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Clerk of Supreme Court
supclerkofcourt@ndcourts.gov

Dated this 1st day of October, 2020.

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