

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30925

JANELLE PEERY,

Appellant,

v.

CURTIS PEERY,

Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Rachel R. Rasmussen
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant, Janelle Peery, shall be referred to as “Janelle.” Appellee, Dr. Curtis Peery, shall be referred to as “Curtis.” The Second Judicial Circuit Court, Lincoln County, shall be referred to as the “Circuit Court.” The Circuit Court’s Memorandum Decision and Order on Motions dated October 8, 2024, and Addendum to 10/08/2024 Memorandum Decision and Order on Motions dated October 17, 2024, shall be referred to collectively as the “Decision.” The settled record transmitted by the Circuit Court shall be referenced as “SR” followed by the page number assigned by the Circuit Court.

JURISDICTIONAL STATEMENT

Janelle seeks review of the Decision issued on October 8, 2024, and October 17, 2024. Janelle timely filed a Notice of Appeal on November 27, 2024. (SR 810). This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

There are two issues in this appeal.

- i. *Whether the Circuit Court abused its discretion in granting Curtis’s Motion to Modify Alimony.*

The Circuit Court granted the Motion to Modify Alimony upon finding Curtis had established a change in circumstances.

Leedom v. Leedom, 2020 S.D. 40, 947 N.W.2d 143
Moore v. Moore, 2009 S.D. 16, 763 N.W.2d 536

- ii. *Whether the Circuit Court clearly erred in denying Janelle’s Motion for Contempt.*

The Circuit Court denied the Motion for Contempt upon finding Curtis was not able to pay alimony and did not willfully violate his obligation to pay alimony.

Coffey v. Coffey, 2016 S.D. 96, 888 N.W.2d 805, 813

STATEMENT OF THE CASE

Curtis and Janelle were married in 1994. (SR 34). In June 2019, Curtis and Janelle entered a stipulation and agreement for divorce, which was later accepted by the circuit court and incorporated into a Judgment and Decree of Divorce ("*Judgment*"). (SR 34–47, 51–54). As part of the Judgment, Curtis agreed to pay alimony to Janelle. (SR 35). In June 2024, Curtis filed a Motion to Modify Alimony ("*Motion to Modify Alimony*"), alleging he was unable to pay alimony as required in the Judgment and stopped paying alimony soon thereafter. (SR 75–76, 204, 889–90). Janelle opposed the Motion to Modify Alimony and filed a Motion for Contempt ("*Motion for Contempt*"). (SR 201, 204–221). The Circuit Court, the Honorable Rachel Rasmussen, granted the Motion to Modify Alimony and denied the Motion for Contempt after a hearing on the motions. (SR 621–22, 805). Janelle now appeals. (SR 810).

STATEMENT OF THE FACTS

Curtis and Janelle were married in 1994. (SR 34). At the time of their marriage, Curtis was in his second year of medical school at the University of South Dakota, and Janelle had recently graduated from the University of South Dakota with a degree in dental hygiene. (SR 832, 992). After their marriage, Janelle worked full time as a dental hygienist while Curtis finished medical school and began a five-year medical residence in general surgery. (SR 831, 992–93).

Curtis completed his medical residence in Sioux Falls, while Janelle continued to work as a dental hygienist. (SR 992–93). After Curtis finished his residency, the couple moved to Des Moines, Iowa, for two years, where Curtis worked as faculty at a residence

program and Janelle continued to work as a dental hygienist. (SR 831–32, 993). In May 2004, Curtis and Janelle moved back to Sioux Falls, where Curtis began working as a surgeon at Sanford Hospital (“*Sanford*”) (then Sioux Valley Hospital). (SR 832, 994).

Curtis and Janelle have four children together. (SR 832). Shortly before Janelle gave birth to the couple’s third child, Curtis and Janelle mutually decided that Janelle would resign from her work as a dental hygienist and stay at home full time to care for the children and the home. (SR 901–02, 993–94). Janelle did so. (SR 901–02, 993–94). Janelle worked full-time for six years before she and Curtis decided that she would stay at home full-time. (SR 901). Since their third child was born, Janelle has not returned to work outside the home. (SR 901–02, 993).

After moving back to Sioux Falls, Curtis became a very successful and well-respected bariatric surgeon at Sanford, which allowed Curtis, Janelle, and their children to live a comfortable lifestyle. (SR 994–95). Curtis also supplemented his income from Sanford by doing independent work as an expert consultant on bariatric issues. (SR 838). He has travelled across the United States and even overseas to provide consulting and services to other physicians. (SR 950–51).

In 2019, after twenty-five years of marriage, Curtis and Janelle decided to separate. (SR 3–5, 9–12). At that time, Janelle had not worked outside the home for nearly two decades. (See SR 901). Janelle also had not kept up with required education and training for her dental hygienist degree. (SR 1028). At that time, Curtis was still working at Sanford and making between \$650,000.00 and \$750,000.00 annually. (SR 838).

Curtis and Janelle obtained counsel and agreed to mediate the terms of the divorce. (SR 995). In June 2019, with the assistance of counsel, the parties entered a stipulation and agreement for divorce providing for the division of marital assets, child support, and alimony. (SR 34–47). The parties agreed that Curtis would pay Janelle alimony of \$19,250.00 until the marital home sold, after which time Curtis would pay Janelle alimony of \$13,500.00 for six years. (SR 35). After six years of these alimony payments, the parties agreed that Curtis would pay Janelle \$7,000.00 for an additional nine years, at which time alimony payments would cease. (SR 35). At the time alimony would cease, Curtis and Janelle would both be approximately 65 years old. (SR 905). The parties also agreed that Curtis would pay \$500.00 a month to a Roth IRA of Janelle's choosing for 10 years to provide for her retirement. (SR 35–36). The parties agreed that Curtis's alimony obligation terminated upon the death of either party, Janelle's remarriage or cohabitation, if Janelle's share of IP Profits allocated to her by the divorce settlement reached \$1,000,000.00, and in no other circumstances.¹ (SR 36).

In separating the parties' assets, the parties agreed Curtis would distribute \$465,697.00 from his Sanford retirement account to Janelle. (SR 41). The parties further agreed to split the assets from the sale of the marital home. (SR 42). Finally, Curtis agreed to pay child support in the amount of \$1,500.00 to Janelle until the couple's youngest child reached the age of 18. (SR 38). On June 18, 2019, the Circuit Court entered the Judgment incorporating the parties' stipulation and agreement for divorce. (SR 51–54).

¹ None of those enumerated reasons for termination of alimony have occurred. (SR 906–07).

From 2019 to 2022, Curtis continued to work at Sanford and made all his alimony payments. (SR 889–90). Curtis’s salary also increased. In 2021, he made \$834,000.00, consisting of \$720,000.00 from Sanford and \$118,000.00 from independent consulting work. (SR 911). In 2022, Curtis made \$872,000.00, consisting of \$787,788.00 from Sanford and \$88,500.00 from independent consulting. (SR 915, 839).

Curtis paid alimony of \$19,500.00 to Janelle from June 2019 to January 2020, when the marital home sold. (SR 90). Starting in February 2020, Curtis began paying Janelle \$13,500.00 in alimony in compliance with the Judgment. (SR 90). Janelle did not work during this period, cared for her children still at home, and lived off the alimony payments from Curtis. (SR 997, 1029).

In 2022, Curtis decided to leave his lucrative career at Sanford and move to Texas. (SR 87, 838–40). Curtis gave several reasons for his decision. (SR 838). He explained he had been dissatisfied with working at Sanford for several years and needed to make a change for his mental health.² (SR 838, 849). Curtis also stated he had social reasons for moving to Texas. (SR 838). His brother lived in Texas, and he had cousins in Texas. (SR 838). Curtis’s and Janelle’s four children all lived in Sioux Falls. (SR 934, 991). Curtis was not fired by Sanford and resign from Sanford voluntarily. (SR 924).

Curtis reached out to his contacts in Texas to inquire about job opportunities there and obtained what he believed would be a promising job opportunity with Bariatric Experts. (SR 840–42). Curtis signed a contract with Bariatric Experts that provided he would receive a salary of \$420,000.00 in 2023, about half his salary at Sanford at the

² No medical or counseling records were introduced as evidence at trial as to Curtis’s mental health. (See SR 823–24).

time. (SR 576, 839, 841). However, Curtis believed his salary at Bariatric Experts would increase over time. (SR 87, 842–43). Curtis moved to Texas in January 2023 and began working for Bariatric Experts. (SR 839, 874). He did not take time off between his work at Sanford and his work at Bariatric Experts. (SR 874). In 2023, Curtis formed a consulting entity called First Creek Surgical Solutions, PLLC, for his independent consulting work in Texas. (SR 87, 839).

Unfortunately, Curtis's employment at Bariatric Experts was less than ideal. Curtis believed that his physician partner at Bariatric Experts was threatened by his presence there. (SR 845). Bariatric Experts would not allow Curtis to perform general surgeries and discouraged him from doing consulting work. (SR 843–44). Bariatric Experts also refused to advertise Curtis's practice. (SR 844). Due to this friction, Curtis and Bariatric Experts entered a separation agreement in December 2023, less than a year after he started working there. (SR 583, 849). In 2023, Curtis's income was \$575,545.00, consisting of \$420,000.00 from Bariatric Experts and the remainder from independent consulting work and a few weeks of employment at Sanford. (SR 119, 866–67). Curtis continued to pay alimony in compliance with the Judgment in 2023. (SR 889–90).

Upon his separation from Bariatric Experts, Curtis looked for work elsewhere and inexplicably decided to join an existing solo practitioner, Dr. Keli McCalman ("*Dr. McCalman*"), at her practice called Inspire Bariatrics in McKinney, Texas. (SR 87, 588–600, 856, 941–42). Curtis and Dr. McCalman negotiated an agreement ("*Agreement*") in which he and Dr. McCalman would share the overhead expenses of Inspire Bariatrics. (SR 88, 590–91, 600). Curtis's portion of the overhead expenses were estimated to be \$22,000.00 a month, and he knew that at the time he entered the Agreement. (SR 88,

585). Under the terms of the Agreement, Curtis would not generate any income from his work at Inspire Bariatric until after his overhead expenses were paid, and he would not share in any of the profits generated by Dr. McCalman. (SR 88, 590–91, 939). At the time he entered the Agreement, Curtis knew that he was not likely to generate any income during his first year of practice at Inspire Bariatrics. (SR 88, 852–53, 859). However, he was hopeful that his practice would become profitable after 12 months. (SR 88). Curtis testified, however, that it could take as long as three or four years to be profitable in private practice. (SR 88). It bears repeating that Curtis made \$787,788.00 at his final year at Sanford before voluntarily separating from employment there. (SR 915, 839). Curtis presented no evidence that his position at Inspire Bariatrics was the most lucrative position for him or that he was unable to find work elsewhere that would have provided him a guaranteed salary. (*See* SR 856, 962).

As Curtis predicted, he has not made a profit at Inspire Bariatrics since joining in March 2024 and consequently has struggled to pay \$22,000.00 to Inspire Bariatrics for overhead in compliance with the Agreement, \$13,500.00 in alimony to Janelle in compliance with the Judgment, and for his living expenses. (SR 88, 880–82). To help cover his expenses, Curtis took out a \$200,000.00 line of credit and also borrowed against a \$100,000.00 life insurance policy in his name. (SR 88, 90). Curtis also took on extra work and reduced his living expenses to try to make ends meet. (SR 88–89). While at Inspire Bariatrics, Curtis has worked 50 hours a week between clinic hours and his independent consulting. (SR 89). He also reduced his personal expenses from moving from a two-bedroom apartment to a one-bedroom apartment in March 2024. (SR 88, 893). However, despite his efforts, he testified he is not capable of continuing to make

alimony payments due to the reduction in his income and financial obligations to Inspire Bariatrics. (SR 90).

In June 2024, Curtis filed the Motion to Modify Alimony. (SR 75–76). Curtis argued that he has suffered a reduction in income since moving to Texas and this reduction in income was a “change in circumstances” permitting modification of alimony. (SR 77–84). Up until the Motion to Modify Alimony was filed, Curtis paid Janelle \$13,500.00 a month in alimony, in compliance with the Judgment. (SR 890). However, in July 2024, he violated the Judgment and did not send Janelle any alimony. (SR 204, 889–90). In August and September 2024, Curtis only sent Janelle \$3,500.00 in alimony in violation of the Judgment. (SR 205). While Curtis reduced his alimony payments to Janelle after the Motion to Modify Alimony was filed, he continued to pay \$22,000.00 to Inspire Bariatrics in compliance with the partnership agreement. (SR 945). At the time Curtis brought the Motion to Modify Alimony, the Judgment required Curtis to pay \$13,500.00 in alimony for the next 19 months, at which time alimony would be reduced to \$7,000.00 a month for the next nine years. (SR 35, 90).

At the time Curtis willfully reduced his alimony payments to Janelle, he had \$1,500,000.00 in assets. (SR 968–69). These assets consisted of two investment properties in Sioux Falls with \$370,000.00 in equity between them; interest in a trust worth \$87,500.00; over \$900,000.00 in liquid retirement accounts, and \$58,000.00 in other investing accounts. (SR 965–68).

Janelle responded by filing the Motion for Contempt based on Curtis’s failure to pay alimony in compliance with the Judgment and requested that the Court order Curtis to comply with the Judgment. (SR 201, 204–05). Janelle also opposed the Motion to

Modify Alimony. (SR 214–21). She argued Curtis’s voluntary choice to leave his profitable career at Sanford and accept a job with no guaranteed income was not sufficient grounds for modification of alimony. (SR 214–21). She also argued that her need for support had not changed since the Judgment was entered, as required to show a change in circumstances permitting modification of alimony. (SR 214–21). A motions hearing was held on September 27, 2024, in which Curtis and Janelle testified. (SR 203, 822).

At the hearing, Curtis admitted that he had voluntarily left Sanford to seek employment in Texas. (SR 930). However, he stated he made the change in good faith and did not change jobs to reduce his alimony obligation. (SR 847–48). Curtis acknowledged he knew his work at Bariatric Experts would pay half of his salary at Sanford, but he believed he had the potential to earn more over time. (SR 87, 842–43). Likewise, he stated that he accepted the job at Inspire Bariatrics in good faith. (See SR 863–65). Curtis testified that he believed his practice at Inspire Bariatrics would eventually be profitable, and the \$22,000.00 he agreed to pay for overhead expenses was very reasonable in his line of work. (SR 94, 863–65). Notwithstanding, Curtis admitted that he will probably never make as much as a self-employed practitioner as he did while working at Sanford, in part because of his age. (SR 90). Curtis is currently 55 years old. (SR 87). Curtis testified he had looked for work elsewhere before entering the Agreement with Inspire Bariatrics to some extent, but that he had not applied to any hospital systems in Sioux Falls or Minneapolis. (SR 962).

Janelle testified that her standard of living had not changed since the divorce was entered. (SR 997–98). She stated that she lived a comfortable lifestyle on her alimony

payments, which was commensurate with the comfortable lifestyle she lived while she and Curtis were still married. (SR 997–98). Janelle also produced bank record showing that she spent between \$14,000.00 and \$18,000.00 a month. (SR 1001, 1010–13). This spending consisted of mortgage payments, car payments, medical insurance, phone bills for Janelle and her children, approximately \$1,700.00 to a country club in Sioux Falls, approximately \$2,000.00 for food and restaurants for herself and her daughter, and other consumer spending. (SR 1001–1012, 1031–36). Janelle testified that she and her family had been members of the country club since they moved to Sioux Falls decades ago, and their children had grown up there. (SR 1033–34).

Janelle also explained that, since the divorce, alimony and child support payments from Curtis was her sole source of income. (SR 997). After Curtis stopped paying alimony, Janelle was forced to withdraw \$39,000.00 from her IRA to cover her living expenses, incurring tax penalties. (SR 1016). Janelle testified that if the Motion to Modify Alimony was granted, she would have to deplete her retirement account to maintain her standard of living. (SR 1019–20).

The Circuit Court issued the Decision granting the Motion to Modify Alimony and Denying the Motion for Contempt. (SR 612–621). As to the Motion for Modify Alimony, the Circuit Court found that Curtis knew that he would not have sufficient income to support his alimony obligations when he entered the Agreement with Inspire Bariatrics. (SR 614). The Court also found that Curtis had not liquidated any assets to make his alimony payments. (SR 614). The Court further found that Curtis had “tightened his belt” upon moving to Texas and his living conditions had suffered, while Janelle had maintained the same lifestyle since the time of Judgment. (SR 613–15).

Finally, the Circuit Court noted that Janelle's monthly expenses of \$16,000.00 to \$18,000.00 tended to exceed her income of \$16,000.00 a month from alimony payments and child support, "which may contribute to her current budget issues and debts." (SR 615).

Based on its review, the Circuit Court held Curtis had established a "change in circumstances" through showing reduced ability to pay and lack of necessity on Janelle's part for support. (SR 617–621). As to Curtis's ability to pay, the Circuit Court found Curtis's testimony about his financial struggles and reduce income was credible that he did not "voluntarily" reduce his income. (SR 617). It further found Curtis's income and earning capacity was insufficient to pay alimony in the amount required by the Judgment. (SR 617–18).

As to Janelle's financial necessity, the Circuit Court acknowledged that the law required it to consider "[1] increases in the actual expenses of the recipient and [2] changes in the recipient's non-support income." (SR 618). However, the Circuit Court made no findings as to either of these facts. (SR 618–20). Instead, the Circuit Court found Janelle's testimony "supports her desire to maintain her current lifestyle," but "her testimony and submitted evidence do not support a credible claim of necessity" to maintain that lifestyle. (SR 619). The Court then stated the expenses in Janelle's budget—including for her country club membership, cell phone payments for her adult children, and other consumer spending—were not "necessities." (SR 619). Upon concluding Curtis had established a change in circumstances based on his ability to pay and Janelle financial necessities, the Court granted the Motion to Modify Alimony. (SR 620–22, 805). The Court issued an order directing that Curtis's alimony payments be

reduced to \$6,000.00 per month until so set to terminate as set forth in the Judgment. (SR 621–22, 805).

As to the Motion for Contempt, the Circuit Court found that the Judgment was enforceable. (SR 620-21). The Circuit Court further found that Curtis was not able to comply with the Judgment because of his reduced income. (SR 620-21). In doing so, the Circuit Court rejected Janelle’s argument that Curtis could comply with the Judgment if he liquidated some of his substantial assets. (SR 620-21). The Circuit Court found Curtis’s reduction in income was not “willful,” and so he did not willfully refuse to comply with the Judgment. (*See* SR 620-21). Upon finding that Curtis was not able to comply with the Judgment and his noncompliance was not willful, the Circuit Court denied the Motion for Contempt. (SR 620–21, 810). Janelle now appeals the Decision. (SR 810).

STANDARD OF REVIEW

“A circuit court’s decision regarding whether to modify an alimony award is . . . reviewed for abuse of discretion.” *Leedom v. Leedom*, 2020 S.D. 40, ¶ 11, 947 N.W.2d 143, 147. “An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” *Johnson v. Miller*, 2012 S.D. 61, ¶ 7, 818 N.W.2d 804, 806. Further, the Supreme Court “reviews a circuit court’s findings of fact under the clearly erroneous standard and reviews conclusions of law de novo.” *Id.*

This Court also reviews “a trial court’s findings as to contempt under a clearly erroneous standard.” *Taylor v. Taylor*, 2019 S.D. 27, ¶ 15, 928 N.W.2d 458, 465. Under this standard, “[t]he trial court’s findings of fact are presumptively correct and the burden is upon appellant to show error.” *Id.* This Court will “declare a finding of fact clearly

erroneous only if [it is] definitely and firmly convinced that a mistake has been made.”
Brockley v. Ellis, 2023 S.D. 52, ¶ 13, 996 N.W.2d 508, 512.

ARGUMENT AND ANALYSIS

I. The Circuit Court abused its discretion in granting the Motion to Modify Alimony.

A. There was no “change in circumstances” because Curtis had the “financial ability to pay” and Janelle’s necessities had not changed.

SDCL 25-4-41 gives South Dakota courts continuing jurisdiction to modify an alimony award. SDCL 25-4-41. The South Dakota courts apply a “change of circumstances” test to determine whether to grant a motion to modify alimony. *Leedom*, 2020 S.D. 40, ¶ 20, 947 N.W.2d at 149. “The change in circumstances refers to a change in the *necessities* of the recipient and the *financial ability* of the obligor. . . *since the time of divorce.*” *Id.* (emphasis in original). In considering these elements, “[b]oth income and expenses of the parties must be considered,” and courts “may evaluate . . . the intentional reduction of gross income; an inquiry into earning potential when a party is under- or unemployed; [and] the intentional inflation of expenses.” *Barton v. Barton*, 2012 S.D. 44, ¶ 15, 815 N.W.2d 553, 558. In ruling on a motion to modify alimony, courts “must be wary of an alimony obligor’s efforts to minimize his or her ability to pay through under- or unemployment” and “conduct by the alimony recipient to maximize his or her unmet needs through speculative expenses.” *Moore v. Moore*, 2009 S.D. 16, ¶ 15, 763 N.W.2d 536, 540. Finally, in considering whether there is a change in circumstances to support a modification, this Court has repeatedly affirmed that “[t]he role of the trial courts in modification proceedings is not to relieve a party of his or her bad bargain.” *Id.*; *Olson v. Olson*, 1996 S.D. 90, ¶ 11, 552 N.W.2d 396, 399 (same).

Here, Curtis has neither shown that he is unable to meet his alimony obligations nor that Janelle's need for support has changed since the date of Judgment. Because Curtis has not established either of these elements, he has not met his burden to show a change of circumstances to allow modification of his alimony obligation, and the Circuit Court abused its discretion in granting the Motion to Modify Alimony.

First, Curtis has not shown that he is unable to pay alimony to Janelle in compliance with the Judgment. This Court has held that as long as an obligor has sufficient assets to make payments, there is not a change in circumstances. *See, e.g., Lampert v. Lampert*, 388 N.W.2d 899, 902–03 (S.D. 1986) (finding the circuit court acted within its discretion in denying husband's motion to modify alimony when husband's income was reduced by 41% due to a health condition, but the husband had not shown he was unable to pay alimony and still made significantly more money than his wife); *Gunn v. Gunn*, 505 N.W.2d 772, 774–75 (S.D. 1993) (finding the circuit court acted within its discretion in denying a husband's motion to modify his alimony obligation upon finding the parties' financial circumstances had not changed because husband—although now retired—still had sufficient assets to pay alimony and wife—even though she was now employed—had health problems that hindered her ability to continue to work); *Jameson v. Jameson*, 1999 S.D. 129, ¶¶ 15–18, 600 N.W.2d 577, 581–82 (holding the circuit court abused its discretion by reducing husband's alimony obligation when husband voluntarily retired and had sufficient assets to pay alimony and wife's need for alimony had not changed). In other words, “[a] decrease in earning, by itself, does not show a change of circumstances.” *Id.* ¶ 16, 600 N.W.2d at 581. The obligor seeking a modification must also show he or she does not have sufficient resources to continue to pay alimony as set

forth in a judgment. *See id.* (stating an “obligor spouse who claims inability to pay must produce complete and detailed evidence of his financial position showing an inability to pay”).

Curtis has failed to satisfy this burden because he was sitting on approximately \$1,500,000.00 in assets at the time he filed the Motion to Modify Alimony. (SR 965–69). Rather than liquidate some of his assets to pay Janelle alimony in compliance with the Judgment (or obtain more lucrative employment), Curtis filed the Motion to Modify Alimony stating his income is insufficient to satisfy the Judgment. (SR 75–76). Moreover, Curtis accepted employment he knew was unlikely to generate any income for over a year and would require him to pay \$22,000.00 a month in overhead expenses. (SR 88, 585). Curtis has been able to make payments of \$22,000.00 to Inspire Bariatrics at the same time he has failed to pay Janelle alimony of \$13,500.00 as required by the Judgment. (SR 204–05, 889–90, 945). On this record, Curtis cannot show he was unable to pay alimony in compliance with the Judgment. He had and has more than sufficient funds and assets to do so. On this basis alone, Curtis has not met his burden to show a change in circumstances.

Additionally, Curtis cannot show a change in Janelle’s necessities as needed to permit modification of alimony. This Court has stated “[w]hen assessing . . . the *recipient’s need* for alimony, the trial court must consider both increases in the [1] *actual expenses* of the recipient and changes in the [2] recipient’s *non-support income*.” *Moore*, 2009 S.D. 16, ¶ 16, 763 N.W.2d at 541. Here, there was neither an increase in Janelle’s expenses nor any change in her non-support income since the date of Judgment. To the contrary, Janelle testified that her lifestyle and daily expenses were the same as they were

at the time of Judgment and during her marriage. (SR 997–98). Further, there is no dispute that Janelle does not have any additional source of income and relies entirely on alimony payments for her daily needs. (SR 997). In short, there is no change in Janelle’s necessities to show a change of circumstances.

Curtis has shown that his standard of living has decreased due to his employment decisions and financial obligations he agreed to assume. (SR 88, 893). But an obligor’s change in circumstances is not the issue here. The Circuit Court must instead consider (1) the obligor’s ability to pay and (2) a change in the recipient’s needs since the date of Judgment to determine whether there has been a change in circumstances. *See Leedom*, 2020 S.D. 40, ¶ 20, 947 N.W.2d at 149. In this case, neither a change in Janelle’s necessities nor Curtis’s reduction in income satisfies Curtis’s burden to show inability to pay or show a change in Janelle’s necessities. By finding Curtis had shown a change in circumstances and granting the Motion to Modify Alimony, notwithstanding these undisputed facts, the Circuit Court abused its discretion.

B. There was not a “change in circumstances” because Curtis voluntarily reduced his income.

Additionally, Curtis cannot show a change in circumstances because he voluntarily reduced his income. In cases concerning a voluntary reduction in income, either through job change or voluntary retirement, this Court has found there is not a change in circumstances sufficient to modify alimony. *Herndon v. Herndon*, 305 N.W.2d 917, 918 (S.D. 1981) (finding a circuit court acted within its discretion in denying a husband’s motion to reduce alimony upon finding husband voluntarily reduced his income by selling his chiropractor business and lack of evidence that husband was unable to work despite medical issues with his hands); *Gunn v. Gunn*, 505 N.W.2d 772, 774–75

(S.D. 1993) (finding the circuit court acted within its discretion by denying a husband's motion to modify his alimony obligation because husband, despite his retirement and health struggles, had sufficient assets to pay alimony and wife's need for alimony had not change since the time of the divorce). In contrast, this Court has held there was a "change in circumstances" when the reduction in the obligor's income was due to an involuntary change, such as illness. *See Paradets v. Paradets*, 461 N.W.2d 135, 137–38 (S.D. 1990) (holding the trial court did not abuse its discretion by terminating husband's alimony obligation upon proof that husband's coronary artery disease prevented him from working).

This case is no different than other cases in which an obligor voluntarily reduced his income. Curtis is a highly successful surgeon. (SR 838, 950–51). He resigned from a lucrative and successful career at Sanford to accept a position at Bariatrics Specialists paying half of his salary at Sanford. (SR 87, 576, 838–41). Then, after the position proved to be a bad fit, Curtis inexplicably accepted employment in which he agreed to pay \$22,000.00 a month in overhead expenses with no guaranteed salary. (SR 88, 583, 585, 849). In fact, Curtis voluntarily accepted this position knowing he was not likely to make a profit for at least an entire year and knowing he could not keep up his alimony obligations if he accepted that position. (SR 88, 852–53, 859). Then, months after accepting this position, Curtis stopped paying alimony to Janelle in violation of the Judgment, asserting that it was not possible to continue to make payments due to the hefty financial obligations Curtis had just knowingly incurred. (SR 75–84). Janelle, however, should not be required to bear the costs of Curtis's bad and intentional choices.

Other states, like South Dakota, have also found that a voluntary reduction in income is not a “change in circumstances” sufficient to modify an alimony award. *See, e.g., Wallenhurst v. Wallenhurst*, 116 Ohio App. 3d 823, 828, 689 N.E.2d 586, 589 (1996) (“Voluntary reduction in income, though it might amount to a substantial change in circumstances, is not justification for a reduction in spousal support payments arising out of a separation agreement and final judgment of a trial court.”); *Wheeler v. Wheeler*, 548 N.W.2d 27, 31 (N.D. 1996) (holding an “obligor’s decision to retire constitutes a voluntary reduction in income which does not warrant a modification of spousal support”); *Burris v. Burris*, 2022 N.D. 67, ¶ 10, 972 N.W.2d 103, 108 (likewise holding “no modification [of alimony] is warranted when the change [in circumstances] is self-induced”); *Yangco v. Yangco*, 901 So. 2d 217, 219 (Fla. Dist. Ct. App. 2005) (stating that, under Florida law, “[t]o justify a modification of alimony, the [obligor] had to prove (1) a substantial change in circumstances; (2) that the change was not contemplated at the final judgment of dissolution; and (3) that the change is sufficient, material, permanent, and involuntary” (emphasis added)); *In re Marriage of Rietz*, 585 N.W.2d 226, 229–30 (Iowa 1998) (holding “an obligor’s voluntary reduction in income or earning capacity may be a basis for refusing to modify support obligations”); *Lee v. Gornbein*, 124 S.W.3d 52, 56 (Mo. Ct. App. 2004) (holding a “voluntary reduction in income does not amount to a substantial and continuing change in circumstances” for purposes of a request to modify alimony).

Here, in accordance with South Dakota law and the well-accepted majority view, Curtis cannot show a “change in circumstances” by voluntarily, and likely temporarily, reducing his income. This is especially true because Curtis knowingly accepted

employment that he knew was unlikely to generate any income for an entire year. (SR 88, 852–53, 859). Curtis has not shown that his practice at Inspire Bariatrics was the only available option for a physician of his experience and reputation. (See SR 962). The Circuit Court abused its discretion in finding Curtis's change in circumstances "involuntary" under these undisputed facts and granting the Motion to Modify Alimony.

C. The Decision granting the Motion to Modify Alimony should be reversed because the Circuit Court misapplied the law.

Finally, the Decision as to the Motion to Modify Alimony should be reversed because the Circuit Court misapplied the law. Although the Circuit Court cited the correct rule of law for modification of alimony, the Circuit Court did not correctly apply it. (SR 615–617).

The Circuit Court correctly recognized that modification of alimony requires an analysis of the obligor's ability to pay. (SR 617–18). However, it failed to consider all of Curtis's financial circumstances in determining he was unable to pay alimony. (SR 617–18). The Circuit Court found that Curtis's income was insufficient to pay alimony in compliance with the Judgment. (SR 617–18). But in doing so, the Circuit Court failed to take into account that Curtis was paying \$22,000.00 a month to Inspire Bariatrics. (SR 617–18). The Circuit Court also failed to take into account that Curtis had \$1,500,000.00 in assets he could liquidate to fulfill his alimony obligation until his practice became profitable and/or his alimony obligations reduced in February 2026 in accordance with the Judgment.

Additionally, in finding Curtis was unable to pay, the Circuit Court found Curtis had shown a change in circumstances because he accepted employment at Bariatric Experts and Inspire Bariatrics in good faith. (SR 617–618). Janelle does not dispute that a

court properly scrutinizes an obligor's requests for modification in alimony based on a change in income. *See Moore*, 2009 S.D. 16, ¶¶ 15–16, 763 N.W.2d at 540 (stating “courts must be wary of an alimony obligor’s efforts to minimize his or her ability to pay through under-or unemployment”). However, an obligor cannot show “inability to pay” by merely showing an obligor had permissible reasons for voluntarily reducing his income. The obligor must still show inability to pay based on a complete accounting of the obligor’s financial assets, which Curtis has failed to do here. *See Jameson*, 1999 S.D. 129, ¶ 16, 600 N.W.2d at 582 (“The obligor spouse who claims inability to pay must produce complete and detailed evidence of his financial position showing an inability to pay”).

The Circuit Court also misapplied the law by finding Janelle had not shown “necessity” for alimony of \$13,500.00 a month as adjudicated in the Judgment. (SR 618–20). The Circuit Court correctly observed that, to show a change in circumstances, the moving party must show a change in the recipient’s necessities. (SR 618–20). However, again, the Circuit Court failed to apply this rule. It was undisputed that Janelle’s necessities had not changed since the date of Judgment. She maintained the same lifestyle as her lifestyle at the time of the divorce, and her income at the time of the divorce was the same. (SR 997–98). At the time of the Judgment and at the time Curtis brought the Motion to Modify Alimony, Janelle relied on alimony and child support for 100% of her income. (SR 997).

However, rather than considering whether Janelle’s necessities had changed, the Circuit Court weighed whether Janelle had presented “testimony and submitted evidence” to “support a credible claim of necessity.” (SR 619). This is not the law. Janelle has no

burden to show that the alimony award previously agreed to by the parties and incorporated in the Judgment was necessary to support her. Curtis has the burden to show her necessities had changed since the date of Judgment, which he failed to do. *See Lowe v. Schwartz*, 2007 S.D. 85, ¶ 13, 738 N.W.2d 63, 68 (“The party seeking modification bears the burden of proving a change of circumstances justifying modification.”).

II. The Circuit Court clearly erred in denying the Motion for Contempt.

The Circuit Court clearly erred in denying the Motion for Contempt, and the Decision should be reversed. “The purpose of the civil contempt proceeding is to force a party to comply with orders and decrees issued by a court in a civil action for the benefit of an opposing party.” *Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶ 23, 729 N.W.2d 335, 344. “The nature of the sanction in a civil contempt proceeding is intended to be coercive in nature, as it seeks to compel the person to act in accordance with the court’s order, rather than to punish for past conduct.” *Id.* “The four elements of contempt are: (1) existence of an order, (2) knowledge of that order, (3) ability to comply with the order, and (4) willful or contumacious disobedience.” *Coffey v. Coffey*, 2016 S.D. 96, ¶ 20, 888 N.W.2d 805, 813; *see Taylor v. Taylor*, 928 N.W.2d 458, 471 (S.D. 2019). To find “willful or contumacious disobedience,” the order at issue “must state the details of compliance in such clear, specific and unambiguous terms that the person to whom it is directed will know exactly what duties or obligations are imposed upon him.” *Love’s Travel Stops & Country Stores, Inc. v. City of Wall*, 2023 S.D. 68, ¶ 18, 1 N.W.3d 664, 670.

Here, there is no dispute that all four elements are satisfied, and the Circuit Court clearly erred in denying the Motion for Contempt. The Circuit Court correctly found that there was no dispute that the Judgment required Curtis to pay alimony of \$13,500.00 a month and that Curtis had knowledge of that Judgment. (SR 620). However, the Circuit Court erroneously held Curtis was unable to comply with the Judgment and his noncompliance was not willful. (SR 620–21). Curtis had \$1,500,000.00 in assets *and* was paying \$22,000.00 a month to Inspire Bariatrics at the time he stopped paying alimony of \$13,500.00 as required by the Judgment. (SR 204–05, 889–90, 945, 965–68). As such, there was no dispute that Curtis had sufficient cash flow and assets to comply with the Judgment if he chose to prioritize payment of his alimony to Janelle over his payments to Inspire Bariatrics and preserving his wealth. If Curtis had changed his priorities to comply with the court-ordered Judgment, he could easily have made his alimony payments. The Circuit Court clearly erred in holding Curtis could not comply with the Judgment merely because his income was reduced. (*See supra*, Part I.A).

It was also clear error for the Circuit Court to conclude that Curtis’s noncompliance with the Judgment was not willful. Ostensibly, the Circuit Court found Curtis’s noncompliance was not “willful” because his “reduction in income was not willful.” (*See* SR 660–21). This finding is factually erroneous and legally irrelevant. Curtis’s reduction in income may not have been ideal, but there is no dispute that his decision to reduce his income through accepting employment at Inspire Bariatrics was completely voluntary and willful. (SR 87, 588–600, 856, 941–42). Curtis accepted the position at Inspire Bariatrics knowing that he would not generate income for at least a year to satisfy his alimony obligations. (SR 88, 852–53, 859). Curtis presented no evidence to suggest that he could not

have obtained employment elsewhere for a guaranteed salary and therefore had no choice but to accept work at Inspire Bariatrics. (See SR 856, 962). On these undisputed facts, the Circuit Court erred by finding Curtis's reduction in income was involuntary. Secondly and more crucially, the relevant inquiry for "willfulness" is whether Curtis knew of his obligations under the Judgment and knowingly failed to comply, not whether Curtis willfully reduced his income. See *Love's Travel Stops*, 2023 S.D. 68, ¶ 18, 1 N.W.3d at 670. There is no dispute that Curtis knowingly failed to comply with the Judgment by failing to pay alimony and thereby "willfully" violated the Judgment. See *id.*; (SR 889, 904–05). In fact, Curtis filed the Motion to Modify Alimony a month before Curtis stopped paying alimony in compliance with the Judgment. (SR 75–76). The Circuit Court, by finding Curtis's failure to pay alimony in compliance with the Judgment was not "willful," misapplied the law and clearly erred. Reversal of the Circuit Court's Decision denying the Motion for Contempt should ensue.

In sum, there is no question that the Judgment was enforceable, and Curtis had knowledge of the Judgment. There is also un rebutted evidence that Curtis had cash flow sufficient to pay \$22,000.00 a month to Inspire Bariatrics and had \$1,500,000.00 in assets when he stopped paying alimony in compliance with the Judgment. (SR 204–05, 889–90, 945, 965–68). Under these facts, the Circuit Court committed plain error in finding that Curtis could not comply with the Judgment. There is no question Curtis could have complied with the Judgment had he prioritized the Judgment over his other debts and his savings. Finally, there is no dispute that Curtis willfully refused to comply with the Judgment because he knew of his alimony obligations under the Judgment and knowingly stopped making them. (SR 889, 904–05).

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Curtis had the burden of showing a change in circumstances to support the Motion to Modify Alimony. Curtis failed to meet this burden as he did not show (1) inability to pay; (2) a change in Janelle's "necessities" since the date of Judgment; (3) and that his reduction in income was involuntary. The Circuit Court, by finding Curtis had established a change in circumstances despite his failure to establish these factors, abused its discretion. Additionally, the Circuit Court erred in denying the Motion for Contempt in the face of unrefuted evidence that Curtis was able to pay alimony in compliance with the Judgment and willfully stopped making those payments. For these reasons, Janelle respectfully requests that the Decision be reversed in full.

Janelle respectfully requests oral argument in this matter.

Dated this 7th day of March 2025.

/s/ Michael F. Tobin
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 6,940 words, Times New Roman Font, 12 point, and 35,078 characters (no spaces).

Dated this 7th day of March 2025.

/s/ Michael F. Tobin

Michael F. Tobin

CERTIFICATE OF SERVICE

I, Michael F. Tobin, do hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 7th day of March 2025, the foregoing was filed and served via Odyssey File & Serve upon:

Meredith A. Moore
CUTLER LAW FIRM, LLP
meredithm@cutlerlawfirm.com
Attorney for Appellee Curtis Peery

/s/ Michael F. Tobin

Michael F. Tobin

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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	: SS	
COUNTY OF LINCOLN)	SECOND JUDICIAL CIRCUIT

JANELLE PEERY,

41DIV. 19-18

Plaintiff,

vs.

**STIPULATION AND AGREEMENT
AND AFFIDAVIT OF THE PARTIES**

CURTIS PEERY,

Defendant.

THIS STIPULATION AND AGREEMENT is made and entered into on this 17 day of June, 2019 by and between Janelle Peery, the above-named Plaintiff, residing in Lincoln County, South Dakota, and Curtis Peery, the above-named Defendant, currently residing in Lincoln County, South Dakota;

WHEREAS, the parties hereto were married on May 27, 1994, in the city of Sioux Falls, County of Minnehaha, State of South Dakota, and ever since have been and now are husband and wife;

WHEREAS, more than 60 days have elapsed since the Defendant admitted service of the Summons and Complaint. The Summons, Complaint and verification of service have been filed with the Lincoln County Clerk of Courts;

WHEREAS, by reason of circumstances and conditions between the parties, they are now separated and living apart, in the above-entitled action for dissolution of the marriage is now pending in Circuit Court, Second Judicial Circuit, County of Lincoln;

WHEREAS, Plaintiff and Defendant contend that it is the purpose of this Stipulation and Agreement to make a complete and final settlement of all rights and claims that each may have against the other, to provide fairly and adequately for their support and maintenance, to memorialize the separation of the parties and their agreement, to finalize the division of property owned by them or either of them, and all other rights of property otherwise growing out of the marriage relationship that either of them now has or may hereafter have or claim to have in any property of every kind, nature, and description, real or

personal, now owned or which may hereafter be acquired by either of them, and acknowledgement by the parties that this Agreement is subject to the approval of the Court, and that if the Court finds grounds for and makes a decree of divorce for either party, the conditions of this Agreement, or any part thereof, may be incorporated in the Judgment and Decree of Divorce, as the Court shall deem necessary; and

WHEREAS, the Plaintiff is represented by Victoria M. Duehr; and Defendant is represented by Meredith Moore.

NOW, THEREFORE, in consideration of the promises herein contained, and mutual benefits to be derived therefrom, it is hereby stipulated and agreed by and between the parties hereto, subject to the approval of this Court as follows:

1.
PURPOSE

The sole purpose of this Stipulation and Agreement is to adjust and settle the issues of division of property and assumption of financial obligations, and nothing herein shall be construed as an agreement that a divorce will be obtained, or that either party is assisting the other in obtaining a Divorce. The terms of this Agreement may be incorporated by reference in any Judgment and Decree of Divorce that may be entered.

2.
ALIMONY

It is hereby agreed, Curtis shall continue to pay to Janelle, \$19,250.00 until such time as the home sells. Both parties recognize this is a combined payment of alimony and support payments for the children, including a consideration for Janelle paying expenses, rent, and allowances for adult children. Janelle will continue to pay the expenses as she was per the Interim Agreement until the home sales.

Upon the sale of the home, Curtis shall pay to Janelle, an alimony payment of Thirteen Thousand Five Hundred Dollars (\$13,500.00) per month commencing the first of the month following the sale of the home. This alimony shall continue for a period of six (6) years, at which time the alimony shall be reduced to Seven Thousand Dollars (\$7,000.00) per month for a period of nine (9) years. These payments shall be through an automatic deposit into Janelle's account. In addition, Curtis shall pay an additional Five Hundred Dollars (\$500.00) per month into a Roth IRA of Janelle's choosing for a period of ten (10) years.

This alimony obligation shall terminate upon Janelle's remarriage, cohabitation, or death or Curtis' death, whichever shall first occur. It further would terminate if Janelle's share of the IP Profits reaches \$1,000,000.00.

Janelle will no longer be required to pay for any specific expenses for any of the children, other than for Josephine as set forth in the child support section and what child support would generally include for Josephine. The parties recognize this does include an amount for Janelle to provide for the adult children when they are in her home with her, but she shall not be required to pay for any specific expenses for the adult children, including but not limited to rent, tuition, vehicle or insurance payments for the adult children.

3. CUSTODY

The parties hereby agree Janelle and Curtis shall have joint legal custody of the parties' minor child, namely: Josephine, DOB: March 13, 2007. Janelle will have primary physical custody of the parties' minor child and Curtis will have reasonable and liberal parenting time as agreed upon by the parties. Recognizing that schedules may be subject to change from time to time, the parties agree that Curtis shall have time with Jo on a midweek and at least a period of 2-4 hours, whether Saturday or Sunday, at an agreed-upon time, with the option of that visit being extended to an overnight visit should Jo choose to do so, with reasonable notice of any overnight visits.

In the event Janelle is out of town, Curtis shall be given the first opportunity to spend time with Jo.

The parties will discuss and agree on the holidays as events and activities are planned to allow the children to participate in those events.

Janelle shall have Josephine each year for Mother's Day and Curtis shall have Josephine each year for Father's Day.

Pursuant to SDCL 25-4A-17, if either parent intends to change his or her principal residence, he or she shall provide reasonable written notice by certified mail or admission of service to the other legal parent of the child. Reasonable notice is notice that is given at least forty-five (45) days before relocation or a shorter period if reasonable under the specific facts giving rise to the relocation. Proof of the notice shall be filed with the court of record unless notice is waived by the court.

No notice need be provided pursuant to this section if

A. The relocation results in the child moving closer to the other parent; or

B. The relocation is within the boundaries of the child's current school district; or

C. There is an existing valid protection order in favor of the children or the moving parent against the non-moving parent; or

D. With the preceding twelve months, the non-relocating parent has been convicted of violation of a protection order, criminal assault, child abuse, or other domestic violence and either the children or the other parent was the victim of the crime or violation.

The notice required in this section shall contain the following:

- (1) The address and telephone number, if known, of the new residence;
- (2) The purpose for relocating;
- (3) Why the relocation is in the best interest of the child(ren); and
- (4) The relocating party's proposed visitation plan for the non-relocating parent upon relocation.

At the request of the non-relocating parent, made within thirty (30) days of the notice of relocation, the Court shall hold a hearing on relocation. If no request for hearing is made within thirty (30) days of notice, the relocation is presumed to be consented to by the non-relocating parent.

4.

COOPERATION OF PARENTS AND CHILDREN

The parties recognize that the dissolution of their marriage is an emotionally difficult experience not only for them, but particularly also for the minor child. As a result, the parties will do their utmost to maintain open, complete, candid and positive communication between themselves regarding the child's health, education and well-being.

In addition, the parties will strive to maintain complete, regular and ongoing communication with the other parent, and will do nothing to inhibit or prevent such communication. The parties agree that they will do nothing to alienate the child from the other parent.

Both parties will also at all times keep the other party advised of their current residence and work addresses and telephone numbers.

The parties recognize that upon entry of the Decree of Divorce, their marriage relationship will be dissolved and each shall have the right to live separate and apart, one from the other thereafter; but, such Decree shall not dissolve their rights and obligations as parents and at all times hereafter they will so conduct themselves in recognition of their ongoing parental obligations. The parties desire that this Agreement be so interpreted as to foster the parent/child relationship of both parties whenever and however possible.

5.
CHILD SUPPORT

The parties agree Curtis shall pay to Janelle child support in the sum of One Thousand Five Hundred Dollars (\$1,500.00) per month, commencing the first day of the month after the home sales. Said payment shall continue the first of each month thereafter. Said child support shall continue until each child reaches the age of eighteen or the age of nineteen if a full time student in secondary school (high school), as provided in SDCL 25-5-18.1.

All child support payments shall be made payable to the Plaintiff, Janelle Peery, and shall be forwarded to the Child Support Payment Center, Suite 84, 700 Governors Drive, Pierre, South Dakota 57501. Each payment shall identify Curtis' name as the obligor, Curtis' social security number, and Janelle's name as the obligee.

It is further agreed that in the event Curtis becomes delinquent, a wage withholding is hereby in effect, pursuant to the provisions of SDCL 25-7A-23, et. seq. Defendant's employer shall withhold One Thousand Five Hundred Dollars (\$1,500.00 per month). This Order for Withholding of income for child support shall have priority over any prior or subsequent legal process under state law, including, but not limited to, garnishments, attachments, wage assignments or any other claims of creditors. Payment, as required by the Order for Withholding, shall be a complete defense by the payer against any claims of the Defendant or his creditors as a sum so paid.

Each party shall pay 50% of any expenses associated with Josephine's Dance activity, including but not limited to registration, fundraising, equipment, camps, solo fees, and fee charged by the organization for travel. The parents will be responsible for their own travel to attend an event. The dance provider shall send a bill to each parent and each party shall pay the dance provider directly.

It is further agree, as agreed upon previously, Curtis shall be responsible for Jo's Galapagos trip scheduled summer 2020.

It is hereby agreed Curtis shall continue to contribute a minimum of \$100 monthly to Jo's 529 account or otherwise make an alternate monthly contribution for purposes of her future education.

It is further agreed Curtis will pay for Jack's last year of undergraduate college tuition, books and school related fees and for Ceci and Jo's undergraduate college tuition, books and school related fees provided each of the children, Jack, Ceci and Jo remain in good academic standing.

6.**MEDICAL INSURANCE**

Curtis shall continue to provide medical, dental and vision insurance for the parties' minor child through his employer, provided it is available at a reasonable cost. Curtis shall be responsible for all of Jo's expenses not covered by insurance including, but not limited to, medical, optometric, dental, orthodontic, vision, and necessary counseling expenses.

Curtis agrees to continue to insure each of the parties' children until age 26, or legally eligible unless they have available to them a group health insurance plan through an employer.

7.**VEHICLES**

Janelle shall have all right, title and interest in the 2019 Jeep Grand Cherokee, currently in her possession free and clear from any claim by Curtis. Both parties acknowledge this is under a lease, which is in both parties' names. The parties agree Janelle shall be responsible for said payment and shall hold Curtis harmless therefrom. In the event Janelle becomes chronically late on payments, or Janelle obtains a second vehicle and does not continue to make payment on the Jeep, and Janelle does not make payment upon demand, Curtis may explore any options for relinquishment of Jeep to Lessor. Janelle shall maintain insurance on the vehicle and shall further be responsible for any over usage charges, penalties or damages and shall hold Curtis harmless therefrom.

Curtis shall have all right, title and interest in the 2017 Jeep Grand Cherokee and the Indian motorcycle in his possession free and clear from any claim by Janelle. Both parties recognize this is under a lease. Curtis shall be responsible for said payment and shall hold Janelle harmless therefrom. Further, Curtis shall be responsible for any over usage charges, penalties or damages and shall hold Janelle harmless therefrom.

The parties agree their son, Jack has a Jeep, which is leased and is in the parties' names. Jack and Curtis shall reach an agreement regarding payment of the Jeep and insurance and shall hold Janelle harmless therefrom.

The parties agree Cecilia has a Ford Focus, which is paid for. Curtis and Cecilia can discuss and agree for any future vehicle or insurance payments for her.

8.**PERSONAL PROPERTY**

Each party shall retain as his or her sole and separate property, all of his or her personal clothing, effects and household goods and appliances in his or her possession. Janelle shall offer photos to Curtis as she sorts said photos. Further, as Janelle is preparing the home for sale, if there are items she does not want to retain, she can offer said items to Curtis and he shall have 7 days to reply. If he fails to answer in the 7 days, she can sell or donate said items.

9.**LIFE INSURANCE**

Each party shall maintain and keep the life insurance in their name and shall be entitled to identify their own beneficiaries, with the exception, Curtis shall name Janelle as a beneficiary of a policy with a death benefit of \$750,000.00 until Curtis obtains the age of 65, after which time Janelle may pay the premiums for said policy, but Curtis shall have no obligation to continue doing so.

10.**CHECKING AND SAVINGS ACCOUNT**

The Plaintiff and Defendant shall each retain the sums in their individual checking and savings accounts for the exclusive ownership, use and possession of each. The parties will agree to close the joint accounts within 5 days of the signing of this Stipulation and Agreement.

11.**DEBTS OF THE PARTIES**

The parties hereby agree that each party shall be responsible for any debts or obligations currently in his or her name, unless said debt is specifically addressed in this Agreement.

Janelle shall be responsible for her and any outstanding medical debt for herself and any credit card debt in her name.

Curtis shall be responsible for any outstanding medical debt for himself and any credit card debt in his name.

The parties agree the \$46,000.00 student loan due and owing shall be paid from the Garry account ending in 7858.

Each party to this Agreement does hereby release the other from any and all obligations, debts, liabilities of every kind or character heretofore and

hereinafter incurred and for any and all claims and demands, it being understood that this Agreement is intended to settle the rights of the parties in all respects.

It is further agreed that the debts assigned to each party are non-dischargeable as a debt incurred in connection with the divorce decree, pursuant to 11 USC §523 (15).

Janelle Peery, Plaintiff, warrants to Curtis Peery, Defendant, that she has not incurred and she covenants she will not incur any liability or obligation for which Curtis Peery is or may become liable, and covenants and agrees that if any claim, action or proceeding shall hereafter be brought seeking to hold Curtis Peery liable on account of any debt, liability, act or admission of the Plaintiff, she will, at her sole expense, defend Curtis Peery against any such claim or demand and she will hold him free and harmless therefrom.

Curtis Peery, Defendant, warrants to Janelle Peery, Plaintiff, that he has not incurred and he covenants he will not incur any liability or obligation for which Janelle Peery is or may become liable, and covenants and agrees that if any claim, action or proceeding shall hereafter be brought seeking to hold Janelle Peery liable on account of any debt, liability, act or admission of the Defendant, he will, at his sole expense, defend Janelle Peery against any such claim or demand and he will hold her free and harmless therefrom.

12.

ATTORNEY FEES

It is hereby agreed each party shall be responsible for his or her own attorney fees, costs and necessary disbursements of this action.

13.

RETIREMENT ACCOUNTS AND INVESTMENT ACCOUNTS

The Plaintiff and Defendant shall each retain all stocks, bonds, IRA accounts, money market accounts, retirement accounts, certificate of deposits, pension accounts and/or any other accounts and securities entitled in their respective names with the exception, Curtis shall transfer to Janelle through a Qualified Domestic Relations Order (QDRO), Four Hundred Sixty-Five Thousand Six Hundred Ninety-Seven Dollars (\$465,697.00) from his Sanford 401K Retirement Plan. Both parties shall be equally responsible for the administration fee for processing of this QDRO. Janelle shall receive the accounts at Garry ending in 7858 and 11143 and Curtis shall receive the accounts ending in 11127.

14.**FEDERAL TAX RETURN AND EXEMPTIONS**

Janelle will be entitled to the income tax exemption and all tax benefits allowed by law for Josephine, for State, if any, and federal income tax purposes every year commencing tax year 2019 and continuing each year thereafter.

15.**REAL PROPERTY**

It is hereby agree the parties currently own real estate located at 5000 S. Caraway Dr., Sioux Falls, South Dakota. The real estate is currently in the process of being listed for sale. The parties agree the house will be listed by July 1, 2019. The parties agree an offer on the home will provide a closing date no earlier than the qualification date for Janelle's loan for the purchase of a new home. The parties acknowledge, Janelle will likely need to be able to show 6 months of alimony payments to qualify for a loan, of which we have three months established.

Janelle and the children will continue to reside in the home until such time as the home sells. The parties agree there is a first note, second and a line of credit on the home. Janelle will continue to be responsible for said notes until such time as the home is sold. The three notes shall be paid with the proceeds from the sale of the residence. Janelle will be responsible for the utilities of the home and the routine daily maintenance of the home and yard and as otherwise provide in the Interim Agreement. Both parties recognize that there are expenses that will be incurred for repairs and maintenance, including yard spring clean up above and beyond regular usage to sale the home and those expenses shall be paid from the trust account held with the Cutler Law Firm. Upon the sale of the home, any remaining proceeds in said trust account shall be split equally.

Both parties shall cooperate with an agreed upon realtor to obtain the highest and best possible sales price. If an offer is received and there is a dispute regarding the offer, the parties hereby agree a short notice hearing can be held for a court decision regarding the offer.

Upon the sale of the marital residence the parties shall equally split the proceeds after the sales commission, all notes and mortgages against the home, taxes and other closing expenses. In the event the home does not sell for a profit, then the parties will discuss how to address the deficiency.

16.**BUSINESS INTERESTS AND PATENTS**

It is hereby agreed Curtis shall have all right title and interest in the Intuitive Surgical and C-SAT businesses and shall be responsible for any and all liabilities of said business interests and shall hold Janelle harmless therefrom.

The parties further agree Curtis has outstanding patents with products he invented and is in joint efforts with Sanford. The parties hereby agree, Janelle and Curtis shall be equally entitled to any proceeds, royalties or any other income paid on said patents, for a period of 10 years, for Janelle's share not to exceed \$1,000,000.00. Janelle's interest shall terminate upon the expiration of the 10 years or Janelle's share reaching \$1,000,000, whichever shall first occur.

17.**WAIVER OF ESTATES**

Except as otherwise set forth in this Agreement, Plaintiff and Defendant hereby mutually release and waive any and all right, title and interest accruing by operation of law or under any statute now or hereafter in force, or otherwise, to participate in the separate estates and property of each other, whether such property be real or personal, or wheresoever located and whether acquired before or subsequent to their marriage, and whether acquired or subsequent to the date hereof, including any right of election to take against any Estate Planning document, including but not limited to, Trusts, Last Will and Testament of each other, and any right to the administration of the estates of each other, except only as provided by Will, Codicil, or Trust executed after the date of this Agreement.

18.**EXECUTION OF DOCUMENTS**

Each of the parties agrees to execute or have properly executed in legal form, any documents of title, certificates or other instruments necessary to affect any of the provisions of this Agreement.

19.**CONFLICT OF LAWS**

This Stipulation and Agreement shall be construed in accordance with the substantive laws of the State of South Dakota.

20.

WAIVER OF NOTICE

The parties hereto agree that Findings of Fact and Conclusions of Law may be waived, and that the Defendant hereby waives notice of any trial or hearing brought on the claims set forth in Plaintiff's Complaint.

21.

GROUND FOR DISSOLUTION

The parties hereto agree and consent that the above-entitled Court may find that there exist irreconcilable differences causing the irremediable breakdown of the marriage as the grounds for granting the anticipated Judgment and Decree of Divorce herein.

22.

INTERFERENCE

The parties shall hereafter live separate and apart. Each party shall be free from interference, authority or control, direct or indirect, of the other party. Each party may, for his or her separate benefit, engage in any employment, business, or profession he or she may choose, and each may reside at such place or places as he or she may select. The parties shall not molest or interfere with each other in any aspect of the personal or professional lives.

23.

REPRESENTATION OF THE PARTIES

The foregoing terms of this Agreement are based upon the representations of the parties to each other and their respective Attorneys that they have made a thorough and complete disclosure of their assets, liabilities and overall financial position, and each acknowledges that this Agreement is being executed in reliance on the validity of said information.

Both parties have read the foregoing Stipulation and Agreement and have signed the same with full knowledge of its contents and each acknowledges receipt of a copy of the signed Agreement.

24.

OMITTED PROPERTY

It is understood and agreed by and between the parties that this Agreement applies to all of the property known to the parties at this time and identified by the parties within this Stipulation and Agreement. Any property

or property rights not contemplated or known at the time of this Agreement or set forth in this Agreement, shall be considered to be the common property of the parties hereto, and shall be divided equally between the parties upon discovery. Any and all property or property rights acquired subsequent to the day of this Agreement shall be the separate property of the party acquiring the same and neither party shall have any right or claim in and to said subsequently acquired property.

25.

FAIRNESS OF THE AGREEMENT

This Agreement is deemed to be fair by both parties and not the result of any fraud, duress, or undue influence exercised by either party upon the other or by any person or persons upon either.

26.

PARTIAL INVALIDITY

If any of the provisions of this Agreement are held to be invalid or unenforceable, all other provisions of this Agreement shall nevertheless continue in full force and effect.

27.

MODIFICATION AND WAIVER

A modification or waiver of any provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement. The failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as waiver of any subsequent default of the same or similar nature.

28.

ENTIRE AGREEMENT

Plaintiff and Defendant agree that this Stipulation and Agreement constitutes the entire agreement of the parties and is a full and complete property settlement between the parties and no other or further agreement, oral or otherwise, constitutes part of the settlement.

29.

JURISDICTION OF THE PARTIES

The parties further agree that this Court has jurisdiction of the parties and the subject matter and can grant a divorce on the grounds of irreconcilable differences by Affidavit of the parties, pursuant to SDCL 25-4-17.3. This

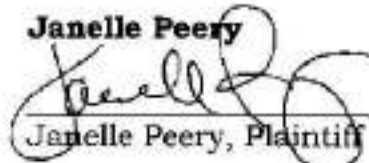
Stipulation and Agreement and Affidavit of the Parties shall be considered as the Affidavit of the Parties for jurisdiction purposes.

30.
SURNAME

It is hereby agreed, Plaintiff's name shall be Janelle Marie Rabenberg. Her date of birth is March 30, 1970.

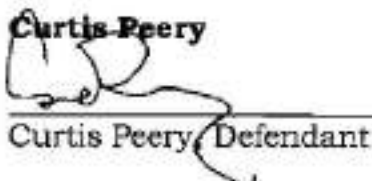
Dated this 17 day of June, 2019.

Janelle Peery


Janelle Peery, Plaintiff

Dated this 17 day of June, 2019.

Curtis Peery

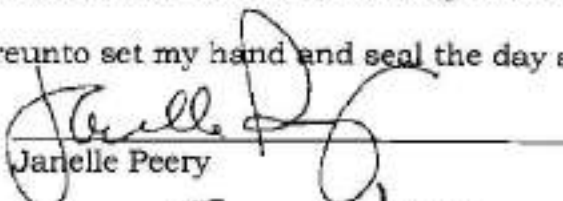

Curtis Peery Defendant

STATE OF SOUTH DAKOTA)
) ss
County of Lincoln)

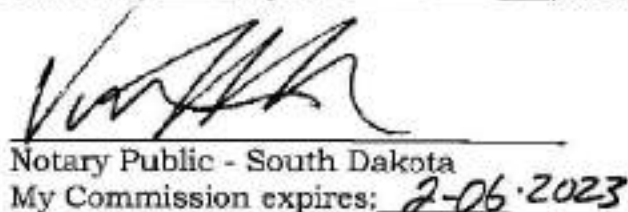
AFFIDAVIT

Janelle Perry, being first duly sworn upon oath, deposes and states that she has read the foregoing Stipulation and Agreement and knows the contents thereof, and that the same is true to the best of her own knowledge and belief.

IN WITNESS WHEREOF, I hereunto set my hand and seal the day and year hereinabove written.


Janelle Peery

Subscribed and sworn to before me this 17 day of June, 2019.


Notary Public - South Dakota
My Commission expires: 2-06-2023

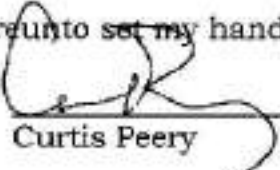


STATE OF SOUTH DAKOTA)
County of Lincoln) ss

AFFIDAVIT

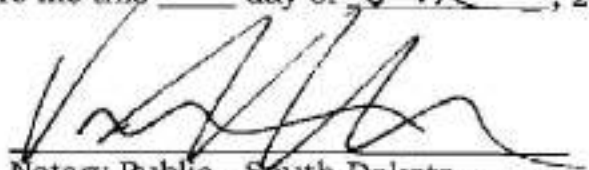
Curtis Peery, being first duly sworn upon oath deposes and states that he has read the foregoing Stipulation and Agreement and knows the contents thereof and that the same is true to the best of his own knowledge and belief.

IN WITNESS WHEREOF, I hereunto set my hand and seal the day and year hereinabove written.


Curtis Peery

Subscribed and sworn to before me this 17th day of June, 2019.

(SEAL)


Notary Public - South Dakota
My Commission expires: 2-06-2023



ORIGINAL

1

STATE OF SOUTH DAKOTA)
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JANELLE PEERY,

Plaintiff,

MOTIONS HEARING

-vs-

CURTIS PEERY,

Defendant.

41DIV.19-000018

BEFORE: **The Honorable Rachel R. Rasmussen**
Circuit Court Judge
Second Judicial Circuit
Canton/Sioux Falls, South Dakota
September 27, 2024

APPEARANCES: Mr. Michael Tobin
Attorney at Law
P.O. Box 5015
Sioux Falls, South Dakota

For the Plaintiff;

Ms. Meredith Moore
Attorney at Law
P.O. Box 1400
Sioux Falls, South Dakota

For the Defendant.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

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1 THE COURT: We'll go on the record in the divorce file,
2 19-18. I'll let Counsel note your appearances, please.

3 MS. MOORE: Good morning, Judge. Meredith Moore
4 appearing with Dr. Curtis Peery.

5 MR. TOBIN: Good morning, Your Honor, Michael Tobin and
6 Kellie Driscoll [spelled phonetically]. She's a new lawyer
7 in our firm. She will be helping in assisting me today with
8 Janelle Rabenberg, Your Honor.

9 THE COURT: All right. Nice to meet you, Ms. Driscoll.

10 MS. DRISCOLL: Thank you, Your Honor.

11 THE COURT: And, Counsel, we are here on, Mr. Peery, Dr.
12 Peery's request to reduce the alimony amount. I did go
13 through and read the prior filings in this case. I'm
14 familiar with the prior stipulation and agreement that was
15 entered into as that was referenced in these current filings
16 and, um, I've reviewed counsels' filings in preparation for
17 the trial here today.

18 Is there anything else that you'd like to note as far as
19 the record or any other matters we need to address before we
20 dive into the issues?

21 MS. MOORE: Judge, I'll handle just a couple of
22 housekeeping matters and invite Mr. Tobin to chime in if I
23 misstate anything that he and I have visited about.

24 With regard to the exhibits that each of the parties
25 will be presenting, we exchanged those last week, had an

1 opportunity to look through them. Ah, we're willing to
2 dispense with foundational requirements and be more labored
3 process for purposes of admission, and we'd actually
4 discussed just this morning that I would actually like to
5 offer Exhibits 1 through 31 that are included in the binder
6 before you before we start, just to perhaps move through the
7 testimony more efficiently. I indicated to Mr. Tobin that I
8 would have no objection to him offering all of the exhibits
9 that his client intends to produce and speak about as well.

10 THE COURT: And you'd indicated 1 through 31. There's
11 33, so just 1 through 31 at this time?

12 MS. MOORE: That is correct.

13 THE COURT: Okay. And, Mr. Tobin?

14 MR. TOBIN: I have no objection to that, Your Honor.
15 And I would likewise move for the admission of my client's
16 exhibits in the binder, they are A through S. I do have two
17 additional exhibits that I will hand to you that are T and V.
18 I did show them to Ms. Moore this morning, and I don't
19 anticipate any objection to those either. I didn't want to
20 just put them in the binder, and then have Ms. Moore wonder
21 why are, you know what she looked through ended at S and why
22 are we on V. So, I held them back a little bit, Your Honor,
23 but I will bring V and T to you, and then put them also at
24 the witness stand.

25 THE COURT: Skipping U at this time? I have through S,

1 and then I have T is blank. U and V are blank.

2 MR. TOBIN: We are skipping U simply because I didn't
3 have a U tab, and I didn't go through the alphabet when I was
4 doing it, Your Honor.

5 THE COURT: Fair enough. So, based upon that from --
6 you can go ahead and bring those up whenever Mr. Tobin. Based
7 upon that and those comments from counsel the court will
8 enter into plaintiff's Exhibits 1 through 31.

9 (Exhibits 1 through 31 were admitted into evidence.)

10 THE COURT: Excuse me, defense exhibit. Defense is
11 using numbers. 1 through 31 at this point in time without
12 objection from plaintiff and plaintiff's Exhibits A through T
13 and V entered into without objection from defendant.

14 (Exhibits A through T and Exhibit V were admitted into
15 evidence.)

16 THE COURT: All right. I'll go ahead and turn it back
17 over to you, Ms. Moore.

18 MS. MOORE: Thank you, Your Honor. One other matter
19 from a procedural standpoint. My client made the, the motion
20 for reduction in the alimony amount, and then approximately
21 fourteen days before the hearing, Mr. Tobin's client made the
22 motion for contempt and noticed that for hearing on the same
23 time. Based upon agreement of the parties, we recognize that
24 there is a requirement of personal service as it relates to
25 contempt matters. Ah, we worked together and agreed that I

1 would essentially admit service of that particular motion so
2 that he would not have to make arrangements to have my client
3 personally served in Texas. I had fully intended to do an
4 admission, a written admission of service and did not do
5 that, so Mr. Tobin and I agreed that we would simply put that
6 on the record before the court, but that both parties agree
7 that the requisites for the contempt motion were, in fact,
8 satisfied and that there would not be any further
9 requirements as related to personal service.

10 THE COURT: Is that your understanding, Mr. Tobin?

11 MR. TOBIN: It is, Your Honor, yes.

12 THE COURT: I will make you notice or note of that, and
13 I guess my intent was that to hear them, obviously, at the
14 same time depending on how all the evidence shakes out here
15 in court today.

16 MR. TOBIN: Yes, Your Honor. The, the two issues are
17 mirror images of each other, and they're all interrelated. In
18 other words, our contempt is not based on anything other than
19 the alimony issues of some payments that haven't been made.
20 So, it's all in the same arena, so to speak.

21 THE COURT: Thank you. Ms. Moore.

22 MS. MOORE: Thank you, Your Honor. As far as other
23 housekeeping matters, I do not have any. Mr. Tobin and I
24 both agree that unless the Court would like some sort of
25 opening statement from us, we think it most efficient to

1 simply start with witness testimony. I will be calling one
2 witness today, Dr. Curtis Peery. And it's my understanding,
3 Mr. Tobin also has one witness at this point in time, and so,
4 therefore, no further motions with regard to sequestration or
5 anything along those lines. So, we defer to the court as to
6 whether you have any preferences on how you would like to
7 begin, otherwise, I would simply call my client and proceed
8 with testimony.

9 THE COURT: Okay. Anything else from you, Mr. Tobin?

10 MR. TOBIN: Nope, I am on board with that as well.

11 THE COURT: All right. Let's go ahead and make use of
12 our time. I feel like I do again understand the, the issues,
13 and why we're here today based upon the pretrial submissions
14 that I've reviewed. So, I'm fine with you going ahead and
15 just beginning testimony at this point in time.

16 MS. MOORE: Thank you, Your Honor. The defense would
17 call Dr. Curtis Peery to the stand.

18 THE COURT: Dr. Peery, if you'll come on up here,
19 please, and before you sit down, if I can get you sworn in,
20 please, Sir. Raise your right hand, other hand, there you
21 go.

22 CURTIS PEERY,
23 being called as a witness, being first duly sworn, testified
24 as follows:

25 THE COURT: Thank you. Go ahead and have a seat. So,

1 I'm going to back up just a second because I gave him the
2 oath that I give to law enforcement officers when they call
3 me in the middle of the night. So, I'm going to push pause
4 and ask if you would, please, stand up again so I can give
5 you the right oath this time.

6 CURTIS PEERY,
7 being called as a witness, being first duly sworn, testified
8 as follows:

9 THE COURT: Thank you. Go ahead and have a seat,
10 please. And then the microphone is flexible. We are
11 recording the proceedings here today. So, please just make
12 sure when you're testifying or when you're testifying Ms.
13 Rabenberg that you move it, so it makes sure it picks up your
14 voice. All right. Go ahead and turn it over to you, Ms.
15 Moore.

16 MS. MOORE: Thank you, Judge.

17 DIRECT EXAMINATION

18 Q (BY MS. MOORE) Good morning.

19 A Good morning.

20 Q Could you please state your full name for the record

21 A Curtis Lynn Peery.

22 Q And, Dr. Peery, how old are you?

23 A 55.

24 Q And your date of birth is?

25 A 10-2-68.

1 Q Where do you currently live?

2 A I live in Frisco, Texas.

3 Q And for how long have you lived in Frisco?

4 A January, 2023.

5 Q Tell me a little bit about your educational background.

6 A Um, I went to Sully Buttes High School in Onida, South
7 Dakota. University of South Dakota for the, where I got my
8 degree. I did spend some time at School of Mines. Um, and
9 then medical school at University of South Dakota, also.
10 And then I went to the Des Moines, Iowa, for resident --
11 general surgery residency at Iowa Methodist Medical Center.

12 Q And when did you graduate from medical school?

13 A '96.

14 Q And what is the duration of the expected residency for a
15 person in your profession?

16 A Um, the residency would be five years. Most of the
17 people that do what I do actually also have a yearlong
18 fellowship.

19 Q And what is your specialty?

20 A So I do general surgery still mainly minimally invasive
21 surgery. And, um, I'm -- it, it's my bariatric surgery and
22 robotic surgery that I'm basically specialized in.

23 Q Following the completion of your residency, where was
24 your first employment?

25 A I stayed on the faculty at the residency program in Des

1 Moines for two years.

2 Q And following the two year stint in Des Moines, where
3 did you go?

4 A Um, at the time it was Sioux Valley. So, Sanford
5 Health, and, ah, I believe May would have been 20 years.

6 Q And what was the nature of your employment with Sanford?
7 Were you an employee? Were you self-employed?

8 A I was employed, um, functionally when I went there and I
9 was given and I was very specifically asked now that I was
10 employed, it was yet functioning as a revenue minus expense
11 model, and that we would have autonomy over our expenses and
12 the way our clinic ran and things like that.

13 Q Were you married while you were in medical school?

14 A Um, I think at the tail end of my second year.

15 Q And let me ask a better question, when did you and Ms.
16 Rabenberg get married?

17 A Um, May 27th of that year. I can't remember what year it
18 is. Um, it would be 30 years ago.

19 Q Do you remember how long you and Ms. Rabenberg were
20 married?

21 A A little over 25 years.

22 Q And how many children do the two of you have together?

23 A Four.

24 Q Are any of those children still under the age of 18?

25 A Yes.

1 Q And who is that?

2 A Josephine.

3 Q And does Josephine live primarily with Ms. Rabenberg?

4 A Yes.

5 Q When will she turn 18?

6 A March 13th of this coming year.

7 Q Of 2025?

8 A Yes.

9 Q Thank you. Do you recall when your divorce from Miss
10 Rabenberg was finalized?

11 A June, um, '19.

12 Q And did the two of you essentially negotiate a
13 resolution to that divorce as opposed to having the issues
14 tried to a judge?

15 A Yes, we, ah, we went to a mediator and was able to come
16 to an agreement.

17 Q And, Dr. Peery, you have a fairly thick binder in front
18 of you there. Ah, I'm going to ask, direct you to the one
19 right in front of you. Yes, the thicker one, please. And if
20 you turn to Tab 1, please. And you mentioned that you had
21 used a mediator in terms of the divorce. Following that
22 mediation, did you and Ms. Rabenberg enter into the
23 stipulation and agreement that is identified as Exhibit 1?

24 A Yes, I think at least the financial obligations of it
25 took effect once we sold our house.

1 Q And what, as part of that stipulation, did you agree to
2 a child support obligation?

3 A Yes.

4 Q And you know what that dollar amount is?

5 A Yeah, it was \$1500.

6 Q Were -- per month?

7 A Per month.

8 Q Were there any additional obligations that you took on
9 with regard to your children?

10 A And I actually wanted the high end for that, and so I
11 did the 1500, and it ended up I paid also for half of her
12 expenses in dance.

13 Q And when we talk about dance, is your daughter extremely
14 involved in that activity?

15 A She's been very involved. She's less involved now with
16 the dance company, so the expense's lower -- is lower now,
17 but she's very, very much involved in high school dance and
18 cheer competition, so, yes.

19 Q And do you recall approximately what you would have paid
20 per month for those dance expenses in the year following your
21 divorce?

22 A Um, it was quite variable, but at that time, I mean, it
23 wouldn't be uncommon that there's times where I was spending
24 at like \$800 or so. There's periods of the year where a lot
25 of things, um, are, um, are, are, are paid, and there was

1 times there was like \$2000. Um, so I would, I, I'm not
2 probably great at guessing it, but I'm, I'm assuming at least
3 \$5000 that first year just for all those expenses, but, um,
4 I'm not positive on that.

5 Q That's fair. As far as the spousal support obligation
6 that was agreed to in Exhibit 1, can you describe that for
7 the court, please?

8 A Um, yeah. I think it was \$13,500 per month once the
9 house was sold for six years. And, um, then, um, also, well,
10 it was not a monthly expense, but 20 thousand, um, \$20,000
11 went into a money market account essentially for retirement
12 purposes. And then I added -- I've paid \$500 a month for,
13 um, into that account, also.

14 Q And was that account for the benefit of Miss Rabenberg?

15 A Yes.

16 Q And as far as the time period before your marital home
17 sold, do you recall the space, excuse me, the specific amount
18 of the obligation you were paying?

19 A Um, yeah. Looking at the exhibit it was \$19,250.

20 Q And did that obligation commence in June of 2019 at the
21 time the stipulation was signed?

22 A Yes, that's when it started.

23 Q And do you recall when the house sold?

24 A The following January.

25 Q So, you would have paid that \$19,250 a month from June

1 2019, until January of 2020?

2 A I think I even paid that, that February, but I'm not
3 positive.

4 Q At the time that you agreed upon the spousal support
5 obligation set forth in Exhibit 1, did you believe you would
6 be able to pay that amount for the duration that is
7 memorialized in the agreement?

8 A Well, I was anxious about it, but yeah, my, my intent
9 was to honor that, yes.

10 Q Where were you employed at the time you were divorced?

11 A Sanford.

12 Q And at that time, how long had you been with Sanford?

13 A Um, fifteen, sixteen years.

14 Q At that point in time were you considered self-employed
15 or an employee of Sanford?

16 A No, that agreement had distinctly changed at that point.
17 It was made very clear that I was an employed physician prior
18 to that.

19 Q Okay. Tell me about the compensation model that would
20 have been utilized by Sanford at the time of your divorce.

21 A Um, how I was compensated?

22 Q Yes.

23 A That was always a moving target, but I was paid on a
24 revenue basis. Um, it had been tiered for production and
25 then that had gone away shortly. So, um, so RVU, relative

1 value unit, means that if I did a surgery that was more
2 complex, I might get 25. If I saw a patient in the clinic,
3 it might be .5-6%. I mean of a RVU, and then you were
4 assigned a conversion rate. So. every RVU was 60, \$80,
5 something like that.

6 Q So, is it fair to state that your compensation would
7 have been defined to a certain extent by not only how hard
8 you worked in terms of the number of patients that you saw,
9 but also the type of procedures that you ultimately
10 performed?

11 A Absolutely. You know, um, it was, you know types of
12 procedures was very important to increase that RDU rate, um,
13 not rate. The number of RDUs I produced. And, yeah, if I
14 wasn't working like during COVID, I didn't, I didn't make any
15 money at all during that period of time.

16 Q Would you have been paid on a regular twice a month
17 basis or what was the frequency with which you were
18 compensated?

19 A That was always a moving target. Um, I think it ended
20 up being it was twice a month, or it was every two weeks. I
21 believe it was every two weeks when I left Sanford.

22 Q At the time of your divorce, do you recall the
23 approximate amount of your income from Sanford?

24 A When I left -- at the time of my divorce?

25 Q Yes.

1 A I want to say it was probably somewhere, I don't, I
2 don't know if I have that. It's got to be on a W2 somewhere,
3 um, but I think it was probably between 650 and \$750,000.

4 Q For how long after your divorce was finalized did you
5 remain with Sanford?

6 A Oh, that would have been June of 2019 to January '23.

7 Q And why did you decide to leave Sanford?

8 A Um, even relocate -- to me it, it, it's more of I
9 decided to move to Texas. I had multiple reasons. I was
10 very frustrated with my employment. I don't think they
11 really understood what I did. And I think that was very
12 common, um, perception amongst some of us that were more
13 specialized at times. If they, if it wasn't part of their
14 initiative, then almost like there was, they just didn't pay
15 any attention to it. Um, now I'm trying to get back on the
16 question. Can you restate it?

17 Q Certainly. What prompted your move to Texas?

18 A So, um, so I was frustrated with my employment there and
19 that was very clear, and I've been frustrated for a very long
20 time, um, but I stayed. You know, um, that was some of it.
21 And there is, you know, some definite social reasons why I
22 wanted to get out of Sioux Falls. And my family's originally
23 from Texas. My brother lives down there. My cousins live
24 down there. Um, and plus, I had what appeared to be a very
25 good opportunity. And I, I also, not only am I employed, was

1 I employed by Sanford, I also do consulting work, and
2 Intuitive Surgical was very motivated to get me down there
3 and have me do consulting in which surgeons would fly in and
4 they would watch what I would do. And, um, you know, and,
5 and so there was, it was more of to be a showcase practice.

6 Q You talked about your consulting work. Do you have a
7 specific legal entity that you have created to operate your
8 consulting work through?

9 A Yeah. Um, that, I developed that in Texas, I believe.
10 First, yeah, I did. First Creek Surgical Solutions, um,
11 PLLC.

12 Q And you would have started that in, approximately, 2023,
13 to your recollection?

14 A Yes. I had that I think even before I moved down there.
15 I had to form that because my, my contract with the Bariatric
16 Experts was one in which I was essentially a consultant with
17 them, too. So, I ran everything through the PLC for the
18 payment that I got from Bariatric Experts and then my
19 consulting work. So, all my income went through that and
20 then I paid my own taxes and things like that.

21 Q I'm going to back up a second. When you left Sanford in
22 January of 2023, do you recall what your income was at that
23 time?

24 A Um, I, I want to say that about that time my income tax
25 was around 870,000.

1 Q And I'll represent to you that in the binder in front of
2 you, you have your tax returns as it, as Exhibits 2, 3, and
3 4, if you want to look at any of those numbers, but, ah, did
4 you when you made the decision to leave Sanford, was it a
5 spur of the moment decision?

6 A No. I mean it, it had been a consideration for years.
7 Um, and you know, what probably kept me there the longest was
8 my daughter being in Sioux Falls, and the need to keep her
9 there for, just for continuity purposes. Um, so I, I stuck
10 with it as long as I could, and I mean, if I'm to be honest,
11 really for mental health reasons, I needed to get out of my
12 employment, and I needed to get, I need -- I felt I needed to
13 get out of Sioux Falls.

14 Q Before you made the decision to move to Texas or as part
15 of your decision making process, did you talk with Ms.
16 Rabenberg about what you were thinking?

17 A At some point I did. Um, I had been considering it for
18 a long time, um, but you know, I'll be honest, life was a
19 little bit easier when I kept my cards close, and so I think
20 about maybe six months before I moved when I eventually had
21 either was very close to signing a contract or, um, had
22 signed a contract. I, I don't remember, but it was, I
23 remember once a conversation. I don't remember when I did,
24 but I remember having a conversation afterwards with Janelle,
25 and I remember like, no, I told you at least six months

1 beforehand, I recall remembering that.

2 Q You've mentioned the Bariatrics Experts, which is in
3 Texas. So when you made the decision to leave Sanford, did
4 you already have new employment in hand, so to speak?

5 A I did.

6 Q And was that with the Bariatrics Experts?

7 A Yes. He was trying to get me there as early as August,
8 and I, I pushed it back. I wanted to, there's multiple
9 things I felt I needed to do, and I wanted to extend as much
10 time as I could with my, my daughter (unintelligible).

11 Q And when you say he was trying to get me there, tell me
12 a little bit about how your contact with the Bariatric Expert
13 came about.

14 A So, I, you know, like within my consulting work, you
15 know, I work a lot with Intuitive Surgical and, um, and
16 basically the people that work there know every single
17 bariatric surgeon in the country, and I know a lot of them
18 because I've, you know, mentored them, or they've come to my
19 courses and things. Um, so I approached them, and I said,
20 um, I'm looking to get out of my practice. I would like to
21 be in north Dallas because I have family there. I've always
22 wanted to live there, and so can you help me find a location?
23 And as soon as I did that, I actually got offers from
24 Nashville, and Long Island, and, and Arizona, and stuff like
25 that, but we focused on that area, and with their help, I

1 looked at different practices, um, multiple practices and
2 opportunities there. And we, you know, retro, you know,
3 retrospectively it wasn't the best choice, but at the time I
4 felt I had done my due diligence to really enter a practice
5 that was going to more than meet the financial obligations
6 that I had.

7 Q And so when you were discussing what your compensation
8 might look like with the Bariatrics Experts, were you given a
9 guarantee of a salary or other payment?

10 A So, um, yeah, so like when we were, and it might not
11 quite have the correct order, but I was given a prospectus of
12 what it would look like, that I would be going from, you
13 know, on production. And so you know, honestly within a
14 year, by the end of the year, it appeared that I would be
15 making about 1.1 million dollars a year. That was what the
16 estimation and that's what the prospectus told me. Now, from
17 a practical standpoint, I'm not going to leave and start with
18 nothing was my plan, and so I wanted a guarantee. So I had
19 actually talked to, um, Baylor Medical Center, Frisco. And
20 they said we will give you a guarantee, but you know, because
21 of the Sunshine Act and such, they had to make sure that it
22 was, um, legal. And unfortunately they had just given in
23 that -- so they what -- they had to demonstrate a community
24 need. Okay. And so there was a community need, but they had
25 just done the same thing with another surgeon, and when, then

1 when they relooked at it, there wasn't an established
2 community needs so the healthcare system could not give me a
3 guarantee, so my soon to be new partner said get down here
4 I'll guarantee you and he guaranteed me for \$420,000. And
5 considering that prospectus, seeing where we would be, um, I
6 decided to tighten my belt, which I did, and, uh, grunt
7 through that.

8 Q Did you enter into an employment agreement then --

9 A -- yes.

10 Q -- with the Bariatrics Experts? And I'm going to ask
11 you to turn to Tab 5 in the binder in front of you, please.

12 A Okay.

13 Q Is that the employment agreement that you signed with
14 the Bariatrics Experts?

15 A Um, it appears to be, so, yes.

16 Q And tell me about your employment with the Bariatrics
17 Experts. How did that go in terms of what expectations you
18 had had and what work was actually delivered to you?

19 A Um, I was, I was pretty disappointed. Um, he begged me
20 to get down there and said don't worry about it. Um, I've
21 always been willing to work hard, and I, ah, said, I'll do
22 general surgery. I'll take the extra call. I will just, you
23 know, put me to work, let's get this going. I, I was, you
24 know, hungry to make this thing work. And, and there's a lot
25 of reasons, that's not fully their fault. I mean, there's a,

1 there's a lot of external things that were going on. But,
2 um, he wouldn't want me to do any general surgery. He wanted
3 me to be available. They didn't even really want me to do my
4 consulting work all that much. They wanted me there, but
5 they didn't put my name on the door. They, they explained
6 they didn't want to market me because they just wanted to
7 make it almost look like I had always been there, which
8 didn't make a lot of sense to me, you know, like,
9 particularly with my background, and what I do and the, ah, I
10 guess I'm well known in my field, not in the community, but
11 you could utilize some of that to say, hey, we're bringing
12 some of the best right here into and, and none of that
13 happened. Um, and, uh, yeah, it was, it was, it was very
14 frustrating. Um, I would have patients come in to my office
15 after I'd done surgery on them, and they would look at me
16 funny. And then when we get, when I get done with
17 everything, they would say, hey, I got to tell you something.
18 I go, what's that? And this happened three different times.
19 They said I wrote an online review of you. It was up for two
20 hours, then it got removed. Suddenly I was, I became the
21 threat. And it was, I mean, he, he definitely shot himself
22 in the foot, but he shut me down for business. He didn't
23 want to let me go do outreach. Um, you know, I, I finally
24 said, let me do, let me do my consulting. I will cover some
25 of my guarantee, and, um, I started doing that, and I could

1 just feel the tension mounting. And I was frustrated, and I
2 was starting to look, and we had a conversation, and we
3 decided to end our association with one another, and so we
4 entered a separation agreement. Is that what you call it?

5 Q So, the Bariatrics Experts that was just one individual
6 at the time you went there in terms of one physician?

7 A Yeah, Dr. Scott Stowers [spelled phonetically] and his
8 wife is, I, I think she's vice president of it, but she was
9 the practice manager, and then their daughter worked there,
10 too. They had a staff of about ten.

11 Q So, based on what you've described, is it fair to say
12 that you had some professional differences with the other
13 physician?

14 A He was very threatened by my presence there. I don't
15 know what happened. Well, I do know what happened. Um, he,
16 he was a, I mean his, his ego took a really big knocking and
17 suddenly the business dried up, and it dried up because of
18 you know, the economy. I mean about 45% when the prospect --
19 the prospectus included a 45% self-pay rate. Well, that was
20 following COVID where there was a lot of economic stimulation
21 money out there and the economy was really good, and that
22 dried up like right, right when I walked to the door it felt
23 like. And, um, and then Texas is really interesting. Dallas
24 market is really interesting. It's a competitive market, and
25 there's a lot of private practices there and, and basically,

1 you know, you can walk in a nail salon and get obesity
2 medications. And so there was a lot of people who were going
3 to try the obesity drugs first before they did surgery and
4 things like that. So, you know, across the nation there's
5 probably at least a 20 to 30% drop in bariatric surgeries the
6 last couple of years. So, and it's not all on him. I think,
7 um, and, and he made another bad business decision that he,
8 he, ah, you know, gave me a, a guarantee, and then he bought
9 a huge amount of equipment to start an aesthetic side of the
10 business. And so I think he got overwhelmed and anxious and
11 he started making some bad decisions.

12 Q Initially, when you looked at this opportunity, you
13 indicated obviously you were looking initially at a pay
14 decrease from what you had made at Sanford, but you believed
15 that ultimately you'd be making more; is that fair?

16 A Yeah. That was, that was made very clear to me. Plus,
17 um, an investment opportunity, you know, being in private
18 practice.

19 Q Describe for me what that investment opportunity in
20 private practice looks like.

21 A Well, you know now it would have been a very poor
22 investment, but the practice itself, you know, Scott was
23 older, he's 65, and, and that's actually one of the reasons
24 why I joined them was I thought like, you know, some of the
25 other people I knew I'd done a lot of work with. Teaching

1 courses and going to conferences and running seminars and
2 stuff like that. And so I knew them quite well, and I knew
3 they did good work, but they were my age or younger, almost
4 all younger than me, and I thought, boy, if I joined them,
5 you know there could be, you know, it's their practice. I'm
6 a more senior guy. I just thought, you know, yeah, we get
7 along, but there could be some, um, difficulty with making
8 that mesh well. And so I thought, well, Scott's got a good
9 reputation, everybody seems to love him. I've been, you
10 know, I did what I thought was due diligence to make sure
11 that things were okay. I did kind of suspect that maybe
12 clinically he wasn't up to par where I felt people should be,
13 um, but I also recognize that he was a 65 year old guy, and I
14 thought now what he would be doing is doing the bread and
15 butter, and I would be doing the complex stuff, and, and he
16 would be winning out teaching me how to run a business, which
17 I knew was my shortfall. I mean, I'm a very good clinician.
18 I've been in, you know, an employed physician for a long
19 time. So, I worked with administration and hospital systems.
20 I understand that, but I didn't know how to run a business.
21 And so what I was hoping to get was, you know, three years
22 of, of, ah, mentorship. That's why I joined that practice.

23 Q As far as the opportunities that this could have
24 presented to you, had the circumstances worked out
25 differently, ah, did you leave Sanford with the bent of

1 intentionally trying to reduce your income?

2 A No. I mean that would be silly. Now would I have been
3 okay with a reduction? I might have been because it was
4 very, I was very compromised there. And there, it wasn't
5 just me. I mean, there's a whole slew of very high quality
6 surgeons that left the intervening year before I did. I was
7 just, I wasn't going to stay in Sioux Falls. It just
8 wouldn't have worked. And, um, so most of those surgeons
9 stayed in Sioux Falls, or went to Rapid City or something
10 like that, one went to Texas. But I mean, there was a lot of
11 disgruntlement and there still is.

12 Q And you obviously understood that when you left Sanford
13 to take a job that at least on paper was initially going to
14 be paid at a lesser rate of compensation that you still had
15 the obligations under the stipulation, correct?

16 A Um-hum.

17 Q And if that -- I'm sorry, is that a yes?

18 A Yes.

19 Q Thank you. And as far as those obligations, did you
20 have concerns at the time that you moved to Sanford about
21 being able to pay your child support and pay the spousal
22 support?

23 A Well, I knew it would be tight, um, but I also knew that
24 it, it, it appeared to be very short lived. And so I didn't
25 ask for any adjustment. I just tightened my belt and moved

1 into an apartment, and, you know, kind of just stayed there
2 and worked. Um, yeah, I guess, I mean any time you do
3 something like that it's anxiety provoking. Um, but I, I felt
4 it was I, I needed, I needed to have a change. It was
5 absolutely, I mean, it's, you know if I would have stayed
6 doing something that would have probably caused me and
7 Janelle, a lot more issues than if I would have left,
8 honestly. I mean I was, I mean I'm not proud of it, but I
9 was really struggling with my mental health at that point in
10 time. I was very frustrated. I've been very frustrated for
11 many years.

12 Q You indicated that as your time with the Bariatric
13 Experts progressed that you knew things weren't working out
14 and ultimately you entered into a separation agreement; is
15 the separation agreement that you're talking about Exhibit 6
16 in that binder in front of you?

17 A Yes.

18 Q And is it, is it fair to state essentially, that the
19 Bariatric Experts chose not to renew your contract, so to
20 speak, for the duration of the original employment agreement?

21 A Yes. Once we, now we, we kind of entered a national
22 agreement, but I think this was coming very shortly. You
23 know, um, there was a lot of things I had recommended to, and
24 I recognize it was a burden on 'em. And I was like, let me
25 do general surgery, let me do more consulting. I will cover

1 some of my own overhead, um, but they were really, they had
2 kind of tightened my hands there, but I, I, and I was
3 starting to look around. Um, but their timing couldn't have
4 been worse because we had that discussion immediately before
5 the holidays, when surgeons in practice are working at their
6 hardest and hospital administrators are really hard to get
7 ahold of, and I really couldn't start looking for a job until
8 after the first of the year.

9 Q Where did you look for employment?

10 A Um, I did, you know, I did a little bit of a national
11 search, um, I put some feelers out to different, some
12 different people, but I also, you know, I had a Texas
13 license, and I didn't want to have any big gaps. So, I
14 really looked around there. So, I, I talked to some
15 healthcare systems. I talked to some other practices. I, I,
16 you know, one of the other practices that I looked at before,
17 he was interested. Um, and so we talked, and we messed
18 around with it a little bit with that, but I wasn't really
19 getting any traction with him. He's, he's just an
20 interesting guy, and he's, you know, I mean it's kind of a
21 cute story. He was -- in college he was trying to decide if
22 he was going to be a rapper or is he going to be a surgeon.
23 So, I mean, you kind of got that mentality and just kind of,
24 I just didn't get a lot of feedback from him. So, it had
25 drawn out. During the period of time, too, I let people

1 know. I said, hey, listen, if you hear of opportunities,
2 please let me know. I had actually, um, had helped Dr.
3 McCalman sometime in some surgery before. She was very
4 appreciative of it, and then so I had mentioned to her. I, I
5 knew she was in sole practice by herself and seemed fairly
6 new, so I didn't think she would be looking, but after
7 mentioning it to her, she actually approached me and said,
8 hey, you know I'd be interested in you joining me. Um, I
9 didn't get any traction with the healthcare systems and, and
10 I didn't want to really, but I recognized that I need to have
11 some income, and, um, I didn't modify anything. I didn't ask
12 for a modification. I just really tried hard to figure it
13 out. I tightened my belt even further, and, um, and that one
14 didn't pan out. We planned on it. We even told people.
15 Matter of fact, I even sent, ah, it's a requirement that
16 within 30 days if you leave in a practice, you have to give a
17 place for your patients to land and contact information. So,
18 I, actually, we put out a letter with that information on it,
19 even though I didn't have in hand the contract. When I
20 finally got the contract, it was, I shared that with a friend
21 of mine, who actually manages a surgical practice, and he
22 goes, I've never seen anything like this, and I go I've never
23 seen a contract like this either. And I said I'm just
24 curious, I'm not planning on signing this. It was
25 ridiculous. I would have been working for peanuts. I mean I

1 would have made a lot less. So, I decided to join Keli right
2 then and there, and because her overhead was incredibly low,
3 now I do a lot of my own stuff, you know, like I don't have,
4 I mean, our staff is, we have a, an insurance and biller. We
5 have a receptionist. We have an MA, and a practice manager.
6 We're skeleton. And so I do a lot of my own stuff every day.
7 You know, like I do all the script writing. I do all the
8 instructions to my patients, and as that practice builds up
9 and it gets busier, then we'll flush it out.

10 Q When you talk about Keli, ah, we're talking about
11 Inspire Bariatrics, correct?

12 A Inspire Bariatrics.

13 Q And that's the practice that you are currently
14 affiliated with, correct?

15 A Yes. The Inspire Bariatrics is her business, and, um,
16 I, the contract that we have is one that essentially it's
17 called an NSA agreement. And so it basically stipulates what
18 services she provides me, and she's basically providing me a
19 clinic to work out of. And then it and then so all the
20 billing goes through First Creek Surgical, um, Solutions.

21 Q So, when you contemplated joining her or working with
22 her practice, what was your expectation of what your
23 compensation might look like?

24 A I, I knew that I wouldn't be making, the best case
25 scenario is that I might start breaking even after a year.

1 So, I'd be paying for everything. Um, now, honestly, my
2 consulting has helped soften that blow a little bit. But
3 that's also something that's a filler. I mean, I'm either
4 going to be doing clinical practice, or I'm going to be
5 consulting. You can't do them both at the same time, and so,
6 but I was fortunate enough that I could just say, hey, I'm
7 free. You need a proctor, you need someone to speak for you,
8 you need whatever, and so, and I actually knew so in December
9 of '23 when we did the agreement, I hadn't signed the
10 agreement yet. I had received it. They stopped giving me
11 new consults. Now, if a patient asked for me, and usually
12 they approached me because it would be people that I knew
13 that had worked with me and said, hey, you know, I, I want to
14 see you. And I'd say, well, okay, and then I would go to
15 them, and I'd say I got a patient and so like I, I was able
16 to run some patients through the clinic, but basically I
17 wasn't given any new patients at that time. And so I, I did
18 as much consulting as I could to build up a nest egg that did
19 cover some of my start up for a month or two.

20 Q When you talk about building up a nest egg, what amount
21 of money would that have been?

22 A I'm not sure. I, I'd want to say around 59,000, but
23 that was also covering my, my personal expenses, let alone,
24 you know, like when I sign my agreement I had to give them a
25 check for first month expenses and that was almost

1 immediately after that for the next month. So, um, it, it
2 did cover a little bit though. So, I didn't, so I started
3 burning my own money. Um, shortly after that I had a life
4 insurance policy that had about \$100,000 that I could borrow
5 from. And so I, I started using that. I'm actually done.
6 I've been done with that for a while now, and now I'm
7 actually on a line of credit, and so I am putting almost
8 25,000 in to a line of credit.

9 Q And let's back up for a second and talk about what you
10 would have done to prepare both professionally and
11 financially then to join or work with Inspire Bariatrics. As
12 far as joining private practice, which you indicated is, is
13 obviously different from your prior experience working with
14 hospitals and clinics, uh, did you work with someone to
15 develop what I'd call a business plan?

16 A Yes, um, so, um, kind of did that with every practice,
17 um, with them, you know, like you know, that would be similar
18 with Bariatric Experts. They gave me a prospectus and that
19 was a very formal with the Bariatric Experts, um, with, um,
20 now I forget the name of the practice, um, but Filion Eula
21 [spelled phonetically], is the surgeon I was thinking about,
22 and so I went there and we talked about it and saw some
23 financials and, and, but he didn't really flesh it out for
24 me, that's why I need to see a contract. I need to see it in
25 a contract, and he drew it out for two or three months. But

1 Keli was very distinct. Like, hey, this is going to be a NSA
2 agreement. You know, I basically I'm spending about \$30,000
3 a month at least on overhead, and so we would split that
4 fifty/fifty. And so I knew distinctly what it would look
5 like. They gave me her, her first year, what it looked like
6 for her as she started up, and so you know, yeah, I'm looking
7 at it. I knew, and I know from talking with many surgeons
8 that hey, you know, it takes a surgical, a bariatric
9 practice, a new, you know, I can be doing all the bariatrics
10 and be the best known surgeon in Sioux Falls, South Dakota,
11 but in Fresno I'm no one special, and there's a lot of them.
12 So, um, it's -- I'm -- in reality it was going to take two to
13 three years. The reason I thought my first opportunity with
14 Bariatric Experts was that he's like I have so much work, I
15 cannot get this done. You will be up here by the end of the
16 year. Um, but with her it was like I did my best case of what
17 it was. And I wasn't I applied for positions like, um, there
18 was something that was advertised, um, I believe it was Texas
19 Health in east Dallas. Um, I never even received a reply
20 back. I talked to two different surgeons, bariatric surgeons
21 for Baylor Healthcare System. And, um, I told them, you
22 know, like if there's an opportunity, let me know. There was
23 a healthcare system that needed some help, um, that had --
24 they're kind of notorious. I would say it was incredibly
25 environment like Sanford. So, I talked to him about helping

1 them out, but I told him I wouldn't employ them. I'd be like
2 some kind of a contract. And, um, I didn't hear back from
3 them either.

4 Q So, is it safe to say that you looked for opportunities
5 other than where you're currently at?

6 A Yes. I looked at other opportunities, um, and then in
7 fact, like I think it was within a week of when I had signed
8 a contract with Keli, there was two -- there was a healthcare
9 system in Oklahoma City that reached out and really wanted me
10 to come, but they said the earliest would really be another
11 six months. I couldn't imagine that. I had already signed
12 a contract, and I said, well, start giving me some numbers,
13 start doing some things, but (unintelligible) I said, it has
14 to be a, a good offer. It needs to be something that can
15 support me now, or very, very soon and I will consider it.
16 I'll work it out and decide if I needed to, and they weren't
17 interested. You know, they, I, I, and that's a healthcare
18 system. And they can't make a decision on something like
19 that within a month, I mean that's a six month to a year
20 process. And so, yeah. And, and also at that time, no one
21 was really wanting to hire a bariatric surgeon. I mean
22 numbers had tremendously decreased. There's been practices
23 that have shut down.

24 Q And I'm going to stop you there. When you say that no
25 one was looking to hire someone, and numbers have decreased,

1 what are the numbers you're describing?

2 A So, nationally, numbers for bariatric surgery are down
3 about 20 to 30%. And you know, it's an economy driven type
4 thing at times cause about 50% of, of patients don't have
5 insurance coverage for bariatric surgery. Um, there's a huge
6 potential because only 1% of the people who qualify actually
7 get bariatric surgery, but, ah, yeah. So, no one was really
8 want -- everybody was nervous.

9 Q And so are these changes that you're talking about
10 generally in your specialty or in the industry, so to speak;
11 is that something that's just developed in the last several
12 years in your opinion?

13 A Yeah. Um, yeah, when with the new medications Wegovy
14 and Cenbig [spelled phonetically] and things like that, the
15 GLP-1 agonists. When they came out, um, here I mean, yeah,
16 the pharmacy, ah, pharmaceutical companies have very deep
17 pockets and they've really they've been successful in
18 marketing that quite well.

19 Q In terms of the discussions that you had with your
20 current partner, I'll use that phrase loosely as opposed to
21 in the legal sense, obviously, but with her, I'm going to
22 direct you to Tab 7 or Exhibit 7 in that binder in front of
23 you, you had talked about the conversations that you had with
24 her and her team with regard to sort of the expectations for
25 paying your way, if you will?

1 A Yes.

2 Q With Inspire Bariatrics. What's Exhibit 7 show?

3 A I, I believe this is what they gave me when we started
4 talking like immediately they wanted to give me some numbers
5 so I could understand, and so they generated this, and so,
6 um, this is the, um, kind of an average monthly expense that
7 they felt that they had for the practice without me. And so
8 the, you know, as it stipulates down there is that each
9 physician would be responsible for 50% of the share, total
10 shared expenses. Now, that doesn't mean that's my only
11 expense. Like I pay my own malpractice. I pay my own
12 professional fees, my own education. Um, computer, things
13 like that.

14 Q And so your initial expectation anyway was that for
15 purposes of this new business opportunity, you'd be looking
16 at having to take responsibility for about \$15,000 a month
17 and expenses with your partner plus then those additional
18 items you just listed such as malpractice insurance and other
19 professional organizational fees?

20 A Yes.

21 Q I'm going to ask you to look at Exhibit 8. And that's
22 labeled the pure expense breakdown. Is this the number that
23 you would have just been describing in terms of your share of
24 the practice's expenses plus your own expenses?

25 A Yeah. And this was generated by Jessica Wilkes [spelled

1 phonetically], whose the practice manager for Inspired
2 Bariatrics, and this is something she gave me. This was, um,
3 I don't know how she derived it. These, I think these are
4 estimations. Yeah, estimated amounts based on costs from Dr.
5 McCalman. So, she extrapolated some of that. So, she was
6 estimating around \$22,000 a year. Um, I don't know how she
7 came up with the malpractice.

8 Q Is it safe to say that you had visited with the practice
9 manager to get a sense of what you would be looking at
10 contributing personally for purposes of operating in this
11 business?

12 A Yeah.

13 Q And did this number give you a good idea of what you
14 were going to need to not only pay in, but also what you'd be
15 looking at as far as having to generate from a patient
16 standpoint?

17 A Yeah. It's, I think it's, it was -- it's fair.

18 Q And as far as starting out with this new practice, you
19 obviously talked about not necessarily having the work right
20 away with the practice and doing the consulting work.
21 Describe what you did initially to try to build up your
22 patient side of the practice, if you will, with this Inspire
23 Bariatrics?

24 A I, so, I, I try to get as much general surgical call
25 as possible. I did it -- as much work for Intuitive Surgical

1 as possible. I would go and visit physicians and bring them
2 cards and try to engage them. I would go to events that you
3 know, like if they had a lunch for doctors or a meeting, I
4 would put it at all those. I started establishing
5 credentials at other hospitals, engaging administration from
6 other institutions. Um, I, you know, Intuitive Surgical was
7 kind to me. They knew, they had some administrators that
8 said, hey, you know, we know a hell of a general surgeon,
9 bariatric surgeon who probably could use some work and put me
10 in contact with people. So, so when you start doing that,
11 they don't have bariatrics, and then, you know, there's a lot
12 of meeting time of just saying, hey, how can we help each
13 other. What do we expect from one another. What can I get?
14 Um, so I'm doing some general surgery. So, the Texas Health
15 Allen has actually been pretty decent for me, and so I do
16 some general surgery call there. Um, and so, and then
17 they're very interested in me starting a, a bariatric
18 program. So, there's a lot of meetings with that and another
19 hospital that wants to start a bariatric program. Um, so I'm
20 trying to do those, and so I'm, you know, I'm -- even though
21 I haven't done a single case of bariatrics at either place,
22 I've been spending many hours trying to flesh out a program
23 for each hospital.

24 Q As far as the expectations that you had when you joined
25 Dr. McCalman, did she give you, and I'm going to point you to

1 Exhibit #9 or Tab 9 in that binder, did she give you an idea
2 of what her essential revenues had looked like prior to you
3 joining?

4 A Yeah, um, yeah, this is what they had kind of given me.
5 Um, I haven't looked at this for a long time, but this is
6 when she started. Um, so, yeah, so the payer type
7 insurances, that means essentially that with the work she had
8 done. Um, and then patient, she must have been getting quite
9 a bit of self-pay at this point in time because that if it
10 says patient, that would either be copays and that'd probably
11 be self-pay for surgery. And so --

12 Q -- and as far as, excuse me, as far as the information
13 on this particular document, what did you use this for in
14 terms of your analysis of your own practice?

15 A Kind of an idea of what, ah, you know what I could look
16 forward at -- to, and, and not only that, not only did they
17 have things like this, which doesn't really help a lot, but
18 I'm talking to accountants. I'm talking to, um, um, with
19 Keli and them of what it felt like and what it looked like
20 and, and, and, and how they were using their line of credit
21 and things like that. So, that, that really kind of gave me
22 a feel like this is, you know, um, she was feeling a lot
23 better after a year, um, but you know, still, I mean, she
24 just finally started to actually pay down her line of credit.
25 She hadn't been able to and that this is like, this has

1 started in November of 2020.

2 Q So, as far as the information that she and her practice
3 manager gave you as far as practice numbers and the likely
4 shared expenses, did you then essentially put something
5 together to project what your income might be when you
6 started with Inspire, and I'll direct you to Exhibit 10,
7 please.

8 A Yeah, um, that's just me, kind of, um, eyeballing
9 things. I'm not great at this, um, yeah, so I was looking at
10 like the potential income of yeah, nearly, ah, 500,000.
11 There's business expenses that the net you see there, taxes
12 and you know what I was giving Janelle per year, and it put
13 me you know in the whole.

14 Q And when you say it put you in the hole, what's the
15 number at the bottom of the exhibit?

16 A \$36,989.70.

17 Q And that would have been on an annual basis was your
18 prediction?

19 A I believe so.

20 Q So if you were looking at this as potentially being in
21 the hole on an annual basis at least for your first year, why
22 did you take on this particular employment?

23 A It seemed to be the best opportunity that was available
24 for me. And it's, and it seems, honestly, it seems like
25 something that, you know, I mean, it's got its negatives, but

1 you know, I've traded one set of problems for different
2 problems, but I actually can have input on these problems. I
3 can decide what to do with it, you know, like, and so like
4 if, if there's something that's not working, I can change it.
5 And as far as partnering with Dr. McCalman here, did you look
6 at this as potentially an opportunity that would allow you to
7 make money sooner than starting your own practice?

8 A Oh, my gosh, that would have been, I did talk to someone
9 that starts up practices, and so there's a consulting fee
10 there, and it was just, you know, we're talking about \$20,000
11 a month. And that would have been in, ah, February, maybe
12 March, and they said the earliest we would even potentially
13 open a door would be in June. So, I started the process
14 really quick with Keli, you know, and this is very confusing,
15 but you know, I actually can't be paid directly by payers
16 very well until just recently. So, the way it works is that
17 when I -- and told them to help me started with it, but I was
18 told that by June, maybe July of this year that process would
19 be done. I'm not done yet. So, when I go to surgery, I have
20 to have my partner with me if it's an elective case for most
21 cases. I'm just starting to get some of it, and so when my
22 partner's with me, she's not, I mean, she's out of there,
23 she's got a kind heart, but she's not doing it for free. And
24 so I'm getting 50% of that case. And so that was just kind
25 of helped me to get going, and so I'm still working. I mean,

1 if I do Medicare, that's going to be at least a year. Um,
2 doesn't really pay and it creates a lot more burden onto our
3 practice because of all the rules and regulations, and I
4 mean, if you do one Medicare case, you got to do the same
5 thing for every single patient that comes through. So, we've
6 opted not to do that. But like I don't have Blue Cross Blue
7 Shield yet, and that's a major payer for us. And so until
8 all those things are lined out and I am still a little bit
9 limited in what I can do.

10 Q So, what were the advantages in joining Dr. McCalman
11 then is --

12 A -- I immediately had the opportunity to start that proc-
13 process. I had the opportunity to have very low overhead.
14 These numbers are incredibly low. Like I said, they're, this
15 is a skeleton crew. I do, you know, I mean, Dr. McCalman and
16 I take the trash out. Okay. So, it's, it's, it's, it's our
17 own little baby. And, ah, and she's incredibly financially
18 conservative. And which is great, but, yeah, it creates a
19 few opportunity issues, but, um, it, it gave me the sense of
20 control. Okay. If I would have taken any of the other
21 contracts, I'd either be working by a healthcare system that
22 would have literally dictated how the overhead was and my
23 business was. And I did not like how my business was run by
24 Sanford. I don't think it was the best patient care I could
25 provide. They didn't really understand, they really didn't

1 understand what I did. And, um, it would have been the same
2 thing with some of these others. I would have been not, I
3 would have been a contractor, but I would have been obligated
4 to the owner of the practice to do it the way they had. And
5 you know this, this surgeon that I didn't join, he has three
6 clinics. He has a staff of about 15-20 people. I don't know
7 how he pays them. This gives me the opportunity to flush it
8 out and do it better, I hope, but I've got to establish
9 myself.

10 Q So, was your expectation when you joined Dr. McCalman
11 that the initial years of the practice would be lean, but
12 that you would have a better ability to ramp up more quickly
13 for purposes of actually profiting at some point?

14 A That was my feeling, and then I also felt that I could
15 soften the blow because I'm consulting more than like she
16 could when she, she started because she didn't have that
17 opportunity to go and proctor someone and receive a
18 consulting fee. She just had to do it clinically. And so we
19 estimated probably at least, um, that I would need a line of
20 credit of about \$300,000, and so, that's kind of why we're
21 here.

22 Q And as far as that line of credit, what would you have
23 been paying for with that line?

24 A Um, that would have been all mine and Janelle's living
25 expenses, and, and I mean everything else. Kids, kids,

1 college. I'll have a kid in college pretty soon. Um,
2 starting up my practice. Um, anything unforeseen, I mean
3 everything.

4 Q So, is it safe to say that would have been the money you
5 were going to live on and support others on as well?

6 A Oh, yeah, absolutely. I don't yet cover the expense of
7 the business yet. I am borrowing everything for living
8 expenses still.

9 Q As far as your income for calendar year 2023, do you
10 recall what that is, and I'll refer you to Exhibit 4 if you
11 need the number.

12 A Which number?

13 Q 4, sorry.

14 A Adjusted gross of \$575,545.

15 Q And if I recall correctly, you indicated earlier that
16 when you left Sioux Falls you were earning approximately
17 \$870,000?

18 A I think that last year I made, I did, yeah, I don't know
19 where that's at, but I think it's 870,000.

20 Q And so that would have been for calendar year 2023 when
21 you were still with the Bariatric Experts, correct?

22 A Yes.

23 Q And so that's also when you would have had a base salary
24 so to speak of 420,000 plus your consulting?

25 A Yes. That, that's, um, a little bit of that 575 was the

1 13 days I cranked out a lot of surgery for Sanford and my
2 patients. And then the rest of that is what I made for the
3 remainder of that year.

4 Q And you indicated in terms of this year that you're not
5 yet covering your expenses with the business that you were
6 doing with Inspire, and, and that you have, ah, obtained
7 loans or a line of credit in order to try to pay your
8 expenses and otherwise live at this point in time, correct?

9 A Yes.

10 Q Okay. And as far as your consulting work, what
11 specifically are you doing right now as far as consulting?

12 A So, I, I teach courses, um, for them and so they'll you
13 know one -- once in a while I can get one in Dallas, but it's
14 usually in, in a you know like in Atlanta, Houston. There's
15 some places, there's places all over the country, but there's
16 three main ones. And so I go there, and I teach, sometimes
17 I'll do speaking events for them. I will have dinner with
18 surgeons and just have, you know, they have an opportunity to
19 interact with me and see you know why I do what I do, things
20 like that. Um, and then proctoring where I actually go in
21 the OR, and I can't scrub, but I can give advice.

22 Q How are you compensated for your consulting work?

23 A As in, um, how I'm paid or it, it's a contract for you
24 know there -- it's delineated for certain fees, um, and so
25 like, you know, if I teach a course, it's like \$4000. If I

1 proctor for a day, it's \$4000. And you know, I get a little
2 bit of a, whatever, um, what do you call when you get a
3 little bit extra for your expenses?

4 Q A stipend?

5 A A stipend, there you go. Um, about \$300 with that, so
6 and so that includes, you know, like if I go to Atlanta and
7 do that, that means that I leave sometime like my next trip
8 is to Atlanta. I'll leave around noonish. Um, I'm fortunate
9 enough to pick up like a dinner that night. They want me to
10 have dinner with one of the attendees. So, that is like I'll
11 get \$500 for that. Um, so but I'm, it can't be in practice,
12 I'm gone from my practice so I can't be developing that. So,
13 it's, it's, you know, it sounds great, but it's really a day
14 and a half or more work. And they can cancel within five
15 days, and I don't get paid anything. So, it's, it's
16 something that I don't want to do. Um, I like to do a little
17 bit of it because it kind of it, it does kind of keep my, um,
18 you know, and I, I do enjoy some of that, but when I get --
19 there's only a certain amount I can tolerate before it just
20 becomes overwhelming.

21 Q So --

22 THE COURT: -- may I, may I ask a question?

23 MS. MOORE: Certainly.

24 THE COURT: Just as I look through the exhibits, just
25 so I'm understanding financials as well. In the tax returns

1 such as 2023, the Schedule C, there's surgical training, and
2 then the Schedule E lists the first three. Surgical
3 Solutions. Are those separate items for income under
4 surgical training being in business or is that your income
5 from First Creek Surgical Solutions? I apologize, I just
6 can't --

7 THE WITNESS: -- no, which one would that be? I, I
8 don't know.

9 THE COURT: Okay. And then I'm on Exhibit 4, the tax
10 return.

11 THE WITNESS: Is there a page there I could --

12 THE COURT: -- not really. Maybe 21.

13 THE WITNESS: So, if, if I -- so I know for like this
14 year I made like 400, no, I didn't even make \$420,000 that
15 year because it wasn't a full year. It would have been
16 whatever percentage of the year that was.

17 THE COURT: Is First Creek Surgical Solutions is --

18 THE WITNESS: -- oh, I know what that tis.

19 THE COURT: -- is that classified as surgical training?

20 THE WITNESS: So, yes. And that, that started about the
21 time that I got to Texas. Okay. First Creek Surgical
22 Solutions. Okay. So, that got formed during that year.
23 That other number would be that income that I made consulting
24 prior to that year, because I went from being a, ah, um, I
25 was a W2 employee. Everything ran through that. So, I

1 didn't have a PLLC for my contracting up until the point that
2 I formed First Creek, um, Surgical Solutions.

3 THE COURT: Okay. I think I have that followed --

4 THE WITNESS: -- so if you add those, that's what I
5 would have done for the consulting.

6 THE COURT: Okay. Thank you, Sir, for explaining that.
7 Sorry to interrupt, Ms. Moore.

8 THE WITNESS: No problem.

9 MS. MOORE: No. Thank you for breaking that down,
10 Judge. I appreciate that as well.

11 Q With regard to the consulting work that you're doing, is
12 it your intention to continue that at the same pace that
13 you're currently on?

14 A I think I'm doing it as feeler right now to pay the
15 light bills, and I do enjoy it. I do enjoy some of it, and
16 if I do it more than once or twice a month, it becomes a
17 burden, and so ideally what I've, and I would make more if I
18 was staying doing clinical work.

19 Q And so it's your hope as you gain a foothold, so to
20 speak, with Inspire, that you'll be able to increase your
21 patient load and the procedures that you're doing and
22 ultimately be able to replace some of that consulting work?

23 A Yeah, decrease it.

24 Q In addition to your work with Inspire, your consulting
25 work that you're doing with First Creek Surgical or through

1 First Creek Surgical, what else are you doing right now to
2 generate income?

3 A Taking call.

4 Q And what does taking call consist of?

5 A That means that I'm available for anything that they
6 need for general surgical services. And so I, I get a, a
7 stipend for it. I get you know Texas Allen that again, you
8 know, like Texas Allen is really high. It's a \$1000. Um, at
9 the other place that I go, I can't remember, it's somewhere,
10 it depends if you get called in or not. I think if it's a
11 quiet night, which most of them are, you know we get a lot of
12 you know this is a, a small hospital. It's not made, they --
13 they're not going to accept. They (unintelligible). They
14 have an ER. They're obligated to, but it's at the back of
15 the hospital if you want to know if they have an ER. Um, so
16 you know usually I get like a \$400 stipend for that, and I
17 can only take what they'll give me. You know I haven't, they
18 don't want me as a partner. Um, I don't make any, I don't
19 bring them cases. So, I am lucky to get the work there that
20 I get. Texas Allen had a problem with quality, and they
21 actually approached me, and I needed the work, and I'm like,
22 yeah, sign me up, I'll do that. But there are call
23 contractors through another surgical practice. So, my had to
24 develop a contract with them, and it says one to three calls
25 a month, and I need more. Unfortunately, I can pick it up

1 usually from another surgeon, but I'm not guaranteed that.

2 Matter of fact, I just got out October, and I have like one
3 call for next month from then.

4 Q With how many hospitals are you currently doing call or?

5 A Right now it is Baylor Frisco, Texas Health Allen, and
6 as soon as I can talk to that surgeon, which I'm hoping to
7 today and get the calls that I can get there, then I'm going
8 to open up my door to another hospital, which is Methodist
9 McKinney. Um, and I won't get paid for it, but I will make
10 myself available for any surgical case that comes through
11 when I can. And they have a whole 52 a year that come
12 through. So, it's a very similar to a (unintelligible) shop,
13 white crystal.

14 Q With regard to the call that you're currently doing, how
15 frequent would that be in any given week?

16 A Um, I am aiming for seven to eight at least to kind of
17 buffer what I'm doing.

18 Q And I'm sorry to interrupt you, when you say you're
19 aiming for seven to eight, what do you mean by that?

20 A Calls a week.

21 Q Thank you.

22 A I mean a month. Um, which would be reasonable. I've
23 been able to get, you know, sometimes up to that six or seven
24 between the two institutions, um, and that worked pretty
25 good. I mean, you're beaten up. I mean I've done four days

1 stretches, and you know, it's not that it's, it definitely
2 wasn't like it was here at Sanford in which we were doing
3 trauma and stuff, too. Things that, but, um, but it, it does
4 do some. The problem is also I don't have contracts to get
5 paid by payers. So, the way we get around with that is me
6 taking call helps because you know you're more likely to get
7 an out of network fee from them. It won't be the full price,
8 but at least I get a like at Texas Health Allen, I'll get a
9 \$1000 for making myself available, and then I'll do the cases
10 and we'll submit them and hopefully get something. And, and,
11 and now as my contracts come in to play, I'll get paid in
12 network, and I'll get paid better for that.

13 Q And those are steps that you're currently taking to --

14 A -- yes. And I've got, I got quite a few. I have like
15 Cigna and United, um, most of them are through Aetna. Um,
16 but Blue Cross Blue Shield has been throwing us curveballs.

17 Q At the risk of asking a, a somewhat silly question, when
18 you talk about taking call and specifically -- specifically
19 seven to eight times a month, is call typically after hours,
20 that would be your --

21 A -- 24 hours.

22 Q 24 hours a day? And so then when you're taking call,
23 can that potentially interfere with your work with Inspire?

24 A Yeah, I mean it could. Um, and so at some point in time
25 once again (unintelligible) all my reimbursement would be

1 better if I was doing more elective bariatric and complex
2 minimally invasive work. So, I will decrease my call.

3 Q So is it safe to say that you're doing what you can
4 right now to generate additional income with the consulting
5 and the call, but your ultimate goal would be to either
6 significantly reduce those activities or even potentially
7 eliminate them if your practice develops the way you hope?

8 A Yeah. It's definitely not what a 55 year old surgeon
9 that is, you know, I think I've -- I'd like to get to the
10 point someday where I'm actually being rewarded for my hard
11 work. I have not yet gotten there.

12 Q In terms of the time between when you left Sanford now,
13 have you had any breaks between employment, so to speak, have
14 you taken any time off between jobs, if you will?

15 A Um, I did surgery on January 13th, jumped in a car the
16 next day and drove to Texas and did administrative work for a
17 week, flew back, moved back. You know, I was in Sioux Falls
18 for a whole three hours and with my brother loaded up my --
19 the rest of my stuff and moved to Frisco and started the next
20 Monday. Um, I did a bunch of surgery, and call on March 15th,
21 which was a Friday. Flew and taught a course on that Monday
22 and started on Tuesday. So, no, I have not taken any time
23 off.

24 Q Take any time off for vacations?

25 A I took a couple days off. I recently was asked to, ah,

1 present at a conference in England, and I did take the
2 weekend off beforehand, and I went and did that.

3 Q Otherwise, is it safe to say you've been working solidly
4 since you left Sanford?

5 A It's more than fair to say that.

6 Q And you mentioned the fact that as a 55-year-old
7 surgeon, you're hoping at some point to be rewarded for your
8 work. Do you think you're working as hard now as what you
9 were when you first started practicing?

10 A Yeah, I mean, I'm constantly trying to generate like, I
11 absolutely hate it, but like even social media content, and
12 blogs, and interact with, you know, chasing down docs, and
13 try to, you know, establish relationships, and work, and, you
14 know, taking call that I get paid peanuts for really, you
15 know, just kind of pay the bills, but there's value in it.
16 There's value in establishing, you know, like, you know, I'm
17 already well known at Texas Allen. I meet people, and
18 they're like, oh, I've been looking forward to meeting you.
19 You know like we hear great things about you. I mean, it's
20 all, it's all work to establish your reputation. And you
21 know, like my reputation was established here and you know, I
22 get it, but down and you know, and I do, I mean, I'm well
23 known in my field for what I do, but, you know, Joe Blow,
24 they just know what's on TikTok, you know, and things like
25 that. They have no idea if that's good care or not. But you

1 know is it cool TikTok. You know, so it's, it's hard to beat
2 that. I mean, you just have to establish that. And I,
3 that's how I've chosen to do that is, is, is, you know,
4 create a reputation, and I do that by doing surgery. And
5 that's why I really had a problem with Scott because he was
6 removing opportunities for me to establish relationships,
7 and, um, so we are where we're at.

8 Q And do you feel like you're going to have those
9 opportunities with Dr. McCalman?

10 A Oh, yeah. I mean, she is. She's very OCD, but she's a
11 very sweet person, and, um, you know, I mean, she's very
12 ethical and I felt very comfortable in that environment.

13 Q And so as far as looking at the future trajectory, if
14 you will, of your practice, what are you thinking it's going
15 to take in terms of months or years to ultimately generate
16 the income that you'd like to make?

17 A Well, that's the thing, we're doing a lot of things to
18 fix that. We've aligned and that was an opportunity that
19 came to me because of my national reputation. We aligned
20 with a program that's called recovery and they provide a
21 service to patients for counseling, that's nutrition, and
22 stuff like that, but it's also kind of a, it's supposed to be
23 a fee to us. We're not getting a lot, but it's also a
24 financial program for patients that are self-pay, and it
25 helps them finance it. And so, and so I'm doing a lot to

1 establish itself the self-pay amount because that's, that's
2 the thing, when I got down there for surgical, excuse me, the
3 Bariatric Experts, 45% of his business was self-pay. When I
4 left, it was barely 15-20%. So, that needs to come back.
5 Um, but then I also don't want to establish it so much that
6 I'm reliant on it. That's where it means that I need to be
7 hopefully developing relationships and a reputation in which
8 we will just bypass insurances and employers will direct and
9 or organizations that take employers and they directly refer
10 to us, that's the goal.

11 Q So, how long do you think that's going to take?

12 A Three to four years.

13 Q You mentioned earlier in regard to Inspire that as far
14 as what you're generating there that you're still not
15 covering your expenses, and I'm going to ask you to look at
16 Exhibit 14 in the binder in front of you. And first of all,
17 what is Exhibit 14?

18 A Excuse me.

19 Q What is Exhibit 14? I'm sorry.

20 A It looks like an expense sheet for March of 2024 for
21 Inspire.

22 Q And would this consist of the numbers, shall we say, for
23 purposes of the expenses that each of you and Dr. McCalman
24 owe to the practice for March of 2024?

25 A Yes, somewhat. It doesn't include the things that I

1 don't have them pay for. I think Keli does have run through
2 this for malpractice, and I actually pay mine directly. Um,
3 so it doesn't reflect all of that, but, um, yes, it, it shows
4 what I owe Inspire, and then I think this was my first one.
5 It was March of 2024, so it was only part of the month. So,
6 that's why you know it was only \$7000 some.

7 Q And when you say \$7000, that would have been what you
8 owed to Inspire for your share of the practice's expenses?

9 A Yes.

10 Q And so --

11 A -- I, I think I wrote them a check for 7500, but that
12 was what I ended up owing them at the end of the month.

13 Q Okay. And if you had generated sufficient income, would
14 you still write them a check at the end of the month or does
15 that -- is that essentially withheld from whatever your
16 profit might be?

17 A So, there's some money that will go directly to them. So
18 like if a patient comes in and they pay cash, um, if they pay
19 cash, then they keep that cash and that will go towards what
20 I owe for my expenses. Or if they write a check and they
21 didn't write it to me, they wrote it to Inspire Bariatrics.
22 They'll do that. So, and, and I had this conversation with
23 her recently. I was thinking that that number would increase
24 over time, but probably not. It's not ever going to be a
25 lot. And so like where the income from my work goes directly

1 in to First Creek Surgical Solutions.

2 Q Okay. Do you recall whether you made money in March of
3 2024?

4 A No, I did not.

5 Q Let's look at Exhibit 15, which is April of 2024. Would
6 this have been your first full month with Inspire?

7 A Yes.

8 Q And how would you describe the difference between March
9 and April in terms of your work for the clinic or for the
10 business?

11 A Oh, we're still, I, I didn't really have a lot of work
12 to do. That was more me creating relationships and things
13 like that.

14 Q And this one indicates that you would have owed Inspire
15 \$17,430.94 for the month of April; is that correct?

16 A Yes.

17 Q And do you recall whether you actually made any money
18 that month?

19 A I made month only through my consulting.

20 Q So, as far as what you were paying into the practice and
21 what you were taking home at the end of the day, did you make
22 money? Did you break even? Did you lose money?

23 A Oh, I lost money.

24 Q Let's look at Exhibit 16, which is for May of 2024. Was
25 there a difference between April and May?

1 A It looks like I owed them more, um --

2 Q -- and why would that be?

3 A Yeah, I think there is probably some additional
4 expenses, um, that month, and I don't know if it would have
5 been like rent. Sometimes rent falls twice in a month or
6 when it's paid anyway. Um, so, uh, sign, signage, office
7 supplies. Um, otherwise, then, just, yeah, the routine
8 expenses that may have been a little bit higher for that
9 month for the business.

10 Q Do you recall whether your business with Inspire was
11 picking up or your patient and procedure load was increasing
12 in May of 2024?

13 A Um, you, you know, I think I, I did have a few patients
14 that I was, they hadn't gotten yet to surgery, but I was
15 working him through because it takes sometimes four to six to
16 eight months to get a patient from consult to actually having
17 surgery. So much is involved. It's just not doing surgery.
18 And so there's I think a couple of those patients that I had
19 been there, one of them actually came from South Dakota to
20 see me. Um, I, I don't remember exactly which months, but
21 during this period of time is when I would have been doing a
22 little bit of surgery on, on patients that I've established
23 relationships with prior to Inspire.

24 Q So, is it fair to say that between March when you
25 started in May that you were starting to see some of that

1 patient work increase?

2 A A little bit.

3 Q Did you make money in May of 2024?

4 A No.

5 Q Let's turn to Exhibit 17, which is June of 2024. Did
6 you make money in June of 2024?

7 A I haven't. There hasn't been a month yet I've made any
8 profit.

9 Q And during these months, you're continuing to do call
10 and you're consulting work, correct?

11 A Yes.

12 Q And is that money covering the expenses for Inspire?

13 A I, it, it has not covered yet in my expenses for Inspire
14 yet.

15 Q Okay. So, in terms of that extra work that you're doing
16 for call and Inspire, that isn't covering your expense load
17 with Inspire?

18 A No.

19 Q Okay. So, where are you getting that money?

20 A I'm borrowing it.

21 Q And is that from the line of credit that you obtained?

22 A Um, so I went through that nest egg real quick, and then
23 that, um, that loan that I'm giving myself from the insurance
24 policy.

25 Q Okay. And I believe you indicated earlier that the nest

1 egg was approximately \$59,000; is that fair?

2 A Well, 59. I, if I remember correctly about 59,000 was,
3 I really ramped up and I did a lot of work. I think 59,000
4 is what I was able to do for consulting in those first
5 several three months because I just wasn't doing much for,
6 yeah, any, any clinical work. So, I, so I, I believe so, but
7 then there was also the monthly expenses before that. So,
8 some of that got used even before I got to Inspire.

9 Q Sure. So we're looking at you applied the nest egg that
10 you had built up in that amount to the various expenses
11 you've had, and then you mentioned the insurance policy, and
12 what was the dollar amount of that again?

13 A It was a 100,000 that we borrowed from them.

14 Q Okay. And have you exhausted that sum at this point?

15 A Yeah, it's gone.

16 Q Okay. Let's look at Exhibit 18, please. And is this
17 your essential, uh, it's a profit and loss statement from
18 January to July of 2024 for your consulting entity?

19 A Yes. Well, consulting in clinic now. I mean my
20 clinical work runs through that, too.

21 Q Okay. And how's your, you've indicated obviously that
22 you have picked up your consulting work, but how do you
23 actually consider your consulting work to be in terms of is
24 it above average, average, is it more than what you've done
25 in years past?

1 A It, it would have been more than what I did at the
2 Bariatric Experts, and it would have been more than what I
3 did when I was in practice in Sioux Falls.

4 Q So, how much in 2024 from January until July have you
5 done in consulting work from a net income perspective?

6 A Is that on here somewhere?

7 Q I believe it's in the last category, the very bottom
8 line. There's a \$100,000. Do you see that there at the
9 bottom lower right hand corner?

10 A And that's all from consulting? It must be, yeah. I'm
11 not great at reading these, I apologize.

12 Q It's okay.

13 A Um, it wouldn't, I guess it wouldn't surprise me if I
14 made about a \$100,000 so far this year because it, I've
15 picked it up.

16 Q So, through about seven months of 2024, you've made
17 about \$100,000 in your consulting?

18 A Yes.

19 Q And then as far as checks that you've actually taken
20 home from Inspire, you have not done that yet?

21 A Nope. I'm only writing them checks.

22 Q Okay. And then is the pay that you are taking in from
23 call also reflected in your First Creek Surgical Solutions --

24 A -- yes.

25 Q -- numbers?

1 A It all runs through there.

2 Q Okay. So, to date your income at least through July of
3 this year would be approximately \$100,000 in that?

4 A Yes. Yeah, that's my net income.

5 Q Okay.

6 A I gotcha now.

7 Q Do you think you can continue to work at the pace you're
8 currently working?

9 A I don't know if I have a choice. Um, I hope not.

10 Q Are you actively seeking out any employment
11 opportunities outside of Inspire at this point, or
12 essentially that would replace your work with Inspire?

13 A No. I think, um, I am in a place where I can control my
14 expense as best as possible. I think I have ownership here
15 even though I don't, the clinic is not mine. I can end that
16 relationship whenever. I have great ability to influence
17 their decision. I've been able to establish a professional
18 reputation amongst healthcare systems down there. And, um,
19 it's just going to take time. Do I ever think that I'll get
20 back up to what I was making at Sanford? No.

21 Q Why is that?

22 A It's private practice. I mean it's just, you know,
23 that's the way the world has decided to work healthcare.

24 Q At the risk of asking a Quasi offensive question, are
25 you the ideal candidate to go back into a role like what you

1 once had at Sanford?

2 A Um, am, am I an ideal candidate?

3 Q Yes.

4 A I think it would be uncomfortable having me.

5 Q Why is that?

6 A Because I know too much. I mean, I understand them, and
7 I, I don't think that would work in their favor. I do have
8 them approach me. I don't know if they'd consider me a, I
9 mean they might consider me an ideal candidate, but I mean, I
10 definitely have developed my boundaries with the healthcare
11 system now that I think are much healthier for me than they
12 had been.

13 Q Have you ever considered returning to Sanford?

14 A No.

15 Q We've talked about the loan that you've taken out. The,
16 in the form of a line of credit.

17 A So, can I go back to that just for a second? Is that
18 okay?

19 Q Sure.

20 A Okay. You know, this has been miserable for me. It's
21 been horrible. I have been, the level of, I'm amazed that
22 I'm handling the level of stress that I've been under since
23 I've left. Um, I am still thankful every day that I'm not at
24 Sanford Health. It just was not an environment that I was
25 comfortable being in anymore. And, um, we're, I mean, that's

1 a national problem. We're going to have a problem at some
2 point in time. Well, we do, but people may not be aware of
3 it as much as I am personally aware of it.

4 Q In terms of your income, we've talked about your
5 consulting work, call, Inspire. We've talked about your use
6 of the insurance policy in terms of essentially taking an
7 advance against that.

8 A Yes.

9 Q We've talked about the line of credit. Do you have any
10 other income producing assets that you have been living off
11 of?

12 A I, I have, um, I was able, I have a house here in Sioux
13 Falls that, um, I haven't sold yet, and I have an investment
14 property in Sioux Falls. And so I lease investment property
15 out and then my house is being leased out now, too.

16 Q What are you generating in terms of monthly income for
17 those --

18 A -- it all breaks even right now.

19 Q -- and when you say --

20 A -- I'm, I'm actually the last couple months since I'm
21 leasing it, I'm making a little bit more, but then when that
22 lease ends, I'm going to have a gap and so, my, my
23 anticipation, as long, as long as it's been breaking even,
24 I'm okay with that.

25 Q And when you say breaking even, do you have a mortgage

1 on each of those properties?

2 A Yeah.

3 Q Okay. Have you considered selling those properties at
4 all?

5 A I did consider selling, um, it and actually put it on
6 the market, um, last winter, or late winter, or early spring,
7 and really had my house and really had no interest. I think
8 we had a couple people look at it. One, maybe one real
9 interest, and it just never came to flourishen, and so, um,
10 so I actually had them pull it off the market so we wouldn't
11 interfere with, my son was running it as an Airbnb, but then
12 the realtor approached me with the potential for leasing it
13 to a family, and I chose to do that.

14 Q Is it your hope at some point that you may be able to
15 generate some income off of those investments?

16 A My thought is that I would sell it, and I would use the
17 money that I had accumulated value in to run my practice.
18 Um, which is, I mean, I, my plan was to use that for as I
19 haven't been paying into the retirement at all. I just
20 haven't been able to afford that and so, um, my hope was that
21 I will keep those houses and I will generate an estate for me
22 when I retire.

23 Q Did you have an established retirement plan when you're
24 at Sanford?

25 A I did.

1 Q And with any of your work subsequent to Sanford, have
2 you had any sort of institution or corporate sponsored
3 retirement plan?

4 A No.

5 Q And so have you been making any contribution to IRA's or
6 your prior retirement accounts?

7 A That insurance policy thing kind of accumulates some
8 value and then \$500 a month in to a money market.

9 Q Have you made any other investments since you've left
10 Sanford?

11 A No.

12 Q So, is it safe to say that the retirement and other
13 investment accounts, ah, that you had at the time of your
14 divorce essentially are what you have at this point for
15 retirement?

16 A Yeah. And, and, yeah, so since I left Sanford, I mean
17 since the divorce and when I left Sanford, I continued to pay
18 in to a 401k and whatever there was a smaller vehicle of
19 things that I, deferred income, I forget what it is.

20 Q When did you begin having difficulty making spousal
21 support payments?

22 A I mean, I always did, um, since I left. But you know,
23 you know, heck, even when I was during COVID, I didn't ask
24 for adjustment. I just paid it. So, I was, I haven't, it's
25 not that I haven't been trying, it's just when it became

1 physically impossible, and so I didn't tell Janelle because I
2 know that would have created a lot of anxiety until I had a
3 plan. And so I forget exactly when that is.

4 Q And when you say you didn't tell her, what do you mean
5 by that?

6 A I didn't know what to tell her how it was going to go.
7 I mean, like, I didn't know if I could or if I needed to. You
8 know, I was really, you know, that three months was a mad
9 dash looking for an employment and figure out what I was
10 going to be doing next.

11 Q And you're talking about the time frame between the
12 Bariatric Experts and Inspire?

13 A Same, yeah, yeah. So, signing or being given the
14 separation agreement on December 15th to March 15th and you
15 know honestly if you think about the ability for me to find
16 an opportunity to start clinical practice within that period
17 of time that's, that's very fast, um, but I didn't, I didn't
18 tell her during that period of time until I knew what I was
19 going to do. It didn't, it didn't have any value, and then I
20 looked at it, figured out what I felt was, um, that I could
21 handle, what I was hoping to be able to handle and presented
22 her with that.

23 Q In terms of the spousal support payments that you've
24 made since June of 2019 until June of this year, have you
25 missed a payment?

1 A Well, um, I forget exactly when it was. I couldn't make
2 the entire payment, so I gave her a reduced amount.

3 Q Would that have been after June of this year?

4 A Yeah, I think so.

5 Q Okay. And I'm talking about, let's go back to June of
6 2019 when your spousal support obligations started.

7 A Right.

8 Q Until June of 2024, have you consistently made --

9 A -- yeah.

10 Q -- the required monthly payments?

11 A Yeah, it was never any problem.

12 Q And have you also consistently made your child support
13 payments?

14 A Yes.

15 Q And so is it safe to say that from June of 2019 until
16 January or February of 2020 that you would have been paying
17 \$19,250 a month?

18 A 19, yeah, that you mean up until we sold the house?

19 Q Correct.

20 A Yes.

21 Q All right.

22 A Those are always paid.

23 Q Okay. Didn't miss any of those payments?

24 A (Answer is inaudible.)

25 Q Okay. So, then from February of 2020 until,

1 approximately, June of 2024, you would have been paying
2 \$13,500 a month in spousal support, correct?

3 A Yeah.

4 Q And did you miss any of those payments?

5 A Never.

6 Q And you would have also had \$1500 a month in child
7 support?

8 A Yes.

9 Q And you also made a \$500 contribution to an investment
10 account that Janelle's advisor had designated?

11 A Yes.

12 Q And did you also make any other payments, whether for
13 your children, or for other activities?

14 A Yeah, yeah. I mean, you know, once in a while I'd help
15 a child out. Well, I mean, I did all their college. Um, and,
16 um, but like with Jo, um, I gave her an allowance. I still
17 give her an allowance.

18 Q What's that amount?

19 A Um, like \$200 twice a month like on the 15th and the 1st.
20 And then I, um, you know pay the, half of the dance.

21 Q And do you know what that is?

22 A And medical. Anything medical.

23 Q Do you pay medical insurance for her?

24 A I do.

25 Q And do you know what that amount is?

1 A 470 some dollars.

2 Q And as far as the dance expenses currently, do you know
3 what those are a month?

4 A They're all over. I mean, sometimes you don't have any
5 for months. They're less now. But I think I, and that one I
6 forget what I exit -- exhibit that was. I once calculated
7 and I followed that at an average of what I was spending
8 extra was the allowance of the dance, and I was like that
9 together was about like \$575 a month on average for those two
10 together.

11 Q So, from February of 2020 until June of 2024, how much
12 do you think you've paid per month for the support of others?

13 A I think it's sixteen something thousand dollars.

14 Q And you've never missed any of those payments?

15 A No.

16 Q And so you alluded to the fact that at some point it
17 became impossible for you to continue paying at that amount?

18 A If I wanted to be financially solvent, yes. I needed to
19 make an adjustment. I had to make an adjustment. I, I
20 couldn't, matter of fact, the, I mean, I, I need to have an
21 adjustment because there's still the potential that I don't
22 have enough of a line of credit, and I could only get
23 \$200,000 line of credit. That's all I, and one bank just
24 flat turned me down. They weren't interested at all in
25 financing it, which I thought was I, but that's the reality

1 of it. And the other one they were willing to do 200,000.

2 Q In terms of your own spending habits, you've referenced
3 tightening your belt a couple of times. Where do you
4 currently live in Texas? Do you rent or do you own?

5 A I rent.

6 Q And have you made any changes to where you even live in
7 Texas since you first moved there?

8 A Yeah, on the day that I, so March 15th, I ended my
9 practice, and I moved into the smaller apartment, a single
10 bedroom apartment.

11 Q And why did you do that?

12 A Because it was \$1200 less a month.

13 Q In rent?

14 A In rent.

15 Q Okay. Ah, and I'll have you look at Exhibit 23. Let's
16 talk about your other monthly expenses. So, you mentioned
17 rent, which is about \$1600 a month. What else are you paying
18 for?

19 A Yeah, rent, car. I have a motorcycle. I'm actually not
20 paying that amount. I'm actually right I've -- in years past
21 I overpaid the 370, so right now I'm paying like \$100 because
22 I can afford that otherwise I'm going to have to sell it. My
23 health insurance, utilities, life insurance, cell phone,
24 computer, medical, that's a guess. It's actually more than
25 that. Gas has increased, too, because now I go to a clinic,

1 McKinney Hospitals in Frisco, Allen, and McKinney, too. So,
2 I have to get to all of those. Um, you know, some basic
3 fees. The NTTA is toll road fees, and that's increased
4 probably, it's probably tripled now that I'm on the tollway
5 so much more. Dry cleaning, I'm, I'm sure I spend more than
6 that, but I put in 20. Groceries, clothing. A travel
7 budget. That includes me and Jo. I wanted to have a \$1000
8 if I needed to fly her down or, or whatever, which I would
9 like to do more of obviously, and I'm roughly guessing about
10 my play money is around \$1000 a month. I didn't put in a
11 money market for savings. And I forgot what insultensel
12 [spelled phonetically] is. When I sat down, and I, I think
13 that's probably, um, things like a fee for, um, my computer,
14 like malware and stuff and things like that. And then Jo's
15 health insurance is actually that's, it's \$473 I think is
16 what it is now, 500.

17 Q So, what would you estimate your monthly expenses to be
18 right now?

19 A You know, I, I think this probably underestimates it.
20 It's probably closer to 10,000.

21 Q And does this include both personal and professional
22 expenses? That's a poor question, does this include some, it
23 --

24 A -- well, it includes --

25 Q -- expenses that would be related to your work?

1 A It includes expenses for me and Jo mainly. And then,
2 yeah, there's probably a little bit of professional stuff in
3 there. The gas, the, the tollway, you know, I guess you
4 could consider clothing some of that for scrubs and stuff,
5 but --

6 THE COURT: -- is the allowance in here; is that that
7 incidental?

8 THE WITNESS: No. That's not, I didn't put that in
9 here.

10 THE COURT: Okay.

11 A The allowance and the dance, I didn't put that in there.
12 That or I used to pay gas for her vehicle. I don't, oh, I,
13 what I don't have in here is her car insurance. I pay her
14 car insurance.

15 Q And what's that amount?

16 A It's kind of bundled in some other things. I'm not
17 sure.

18 Q Is it fair to state that you've tried to assist all of
19 your children as you've been able since the divorce?

20 A If I had more money, I'd be doing more. I, I mean,
21 yeah, of course I would. I mean up to a certain point where
22 I want them to be responsible adults and take care of
23 themselves, but, yeah, I mean, I don't. I, I don't think my
24 personal life reflects my, my place in society. I mean, I
25 live a very meager life, so..

1 Q Have you had difficulty making your own personal
2 expenses on a monthly basis or paying for them?

3 A Well, it's nice to have a line of credit. So, like if
4 I, you know, I don't, I try not to be extravagant, you know,
5 I do. I go out and have a nice meal and, you know, do
6 things. I splurge on my daughter, you know. I'm just going
7 to take a leap of faith that I'm going to be able to make it
8 through this. So, yeah, I could tighten up. I could, you
9 can tighten more, but if you took a look at what I would owe,
10 you know, I, I think you'd be incredibly impressed with how
11 modest I live.

12 Q What are you currently paying Janelle in child support
13 every or, excuse me, in spousal support right now?

14 A Currently, not what I'm, what I'm obligated, you know
15 what I'm in contempt of. I think with the \$500 thing that
16 we're doing 4000. The, the \$500 comes out directly from my
17 account every month that goes into her money market or
18 whatever, her retirement. So I'm sending her electronically
19 \$3500 every month.

20 Q And are you still paying the \$1500 in child support
21 every month?

22 A I still pay that, and I still pay, um, her dance, half
23 of dance and medical expenses.

24 Q Do you believe you're capable of paying more than the
25 \$4000 a month right now?

1 A Um, I don't think so. And I think, I mean, I just did
2 some expense stuff now, and like I, I'm going to really be
3 digging into that line of credit here now.

4 Q How much is still available on that line to your
5 knowledge?

6 A A 177,000 I believe. But like this month I, I ended up
7 taking out like 22.

8 Q And would that have been for purposes of paying business
9 expenses?

10 A Living expenses. My living expenses, um, my business
11 expenses, my malpractice comes out regularly. Um, the, yeah.

12 Q Do you think you can tighten your belt much further at
13 this point?

14 A I can't. Yeah. I don't have an ability to do that.

15 Q Do you see in the foreseeable future an increase in your
16 income such that you could resume making the \$13,500 payments
17 every month?

18 A I don't. I, I mean, I, I would love to be able to do
19 that. That means that I'm doing at least what I was before.
20 But I think I don't, I think it's going to be very difficult
21 to ever get back to that the way things were structured, and
22 what where we're at right now, of course, things seem a
23 little bleak because, you know, for us, the economy and this
24 Wegovy thing is really throwing a wrench at us. Um, but you
25 know what, that'd be the same situation here potentially. I

1 mean there, I mean I talk to people all the time. I know
2 that there's ongoing changes in physician reimbursement at
3 Sanford and things like that. It's, it's not because I chose
4 to move. I mean it, there's some of one this is going to be
5 ubiquitous. I'd still have the same probably decrease the
6 number of bariatric surgeries that you see here. I mean,
7 well, not the same as what I have in Texas, but I would say,
8 yeah, I mean it would be a fair assumption that if it, it's
9 down nationally 20 to 30%, then my numbers would be down 20
10 to 30%. And you would, and I would have some difficulty with
11 maintaining spousal support then even if I was here.

12 Q Do you think you're all, excuse me, do you think you're
13 doing all that you can do right now to earn an income?

14 A And I think I'm doing too much honestly.

15 Q In terms of the amount of work that you're doing?

16 A Yeah. I think it, yeah, yeah. I mean, if I don't
17 increase my business, this is, this isn't going to work for
18 long.

19 Q At this point, do you think you'll be able to retire at
20 the age of 65?

21 A I have zero plans to retire at 65. I, I've written that
22 off. I know I won't be able to do that.

23 Q What are you asking this court to do?

24 A Um, I, I, I want an adjustment. I want it to be fair. I
25 don't want to be, I'm not doing this out of malicious intent.

1 I just want to be able to stay solvent, pay my bills, take
2 care of my, my kids, you know, leave a, a honestly
3 comfortable life with less stress than I have right now.
4 That would be very nice.

5 Q Do you think you can continue paying Janelle at the
6 \$4000 a month rate?

7 A If I do not have an increase in business, I will run out
8 of my, um, line of credit with, I guess I didn't calculate
9 it, but I mean what I've already, March to September I've
10 already spent, um, a hundred and twenty-two thousand some.
11 So we can extrapolate, I have maybe a year left if I keep it
12 up like this without seeing an improvement. And like I said,
13 that's why we calculated we needed at least 300,000, and I
14 couldn't get it.

15 Q As far as child support, you're not asking for any
16 adjustment as it relates to that, correct?

17 A No.

18 Q And you anticipate your -- you'll be able to pay that
19 moving forward?

20 A I'll make sure I get that.

21 Q Is there anything else you'd like this court to know?

22 A I, no, not really. I mean, I just want it to be fair. I
23 think I've gone above and beyond what I, my obligation has
24 been, and I want it to. I wanted everybody to get along,
25 and, ah, be able to enjoy our children, and so I was willing

1 to pay for it. Unfortunately, I can't maintain those
2 payments.

3 Q Thank you, Dr. Peery.

4 MS. MOORE: Nothing further at this time.

5 THE COURT: All right. Would either party like a brief
6 break at all?

7 MR. TOBIN: I think people are nodding yes, Your Honor.

8 THE COURT: All right.

9 MR. TOBIN: Ah, well, maybe at least five minutes if not
10 ten.

11 THE COURT: All right. Do you want to, well, it's a
12 little early to break for lunch? We'll go ahead and take,
13 let's try to do closer to a five minute break now, and then
14 we can break for lunch at a good stopping point during cross-
15 examination. I'm flexible at lunch hour break, too. So, all
16 right, you can step down for now.

17 (The witness was excused.)

18 (Recess at 11:07 a.m.)

19 (Proceedings resumed at 11:14 a.m.)

20 THE COURT: All right. At this point in time, I'll go
21 ahead and turn it over to Mr. Tobin for cross-examination.

22 MR. TOBIN: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 Q (BY MR. TOBIN) Good morning, Doctor.

25 A Good morning.

1 Q Would you agree with me that for the first six years of
2 your marriage that Janelle was working full time as a dental
3 hygienist?

4 A I believe so.

5 Q And that would encompass the last two years of your
6 medical school and then four years of your residencies?

7 A Yes.

8 Q And for a few of those years, not only was she working
9 full time, but you also had a first child and a second child
10 together during that time period?

11 A And then a third.

12 Q Correct.

13 A Oh, no, that's not true. Yeah, she, ah, yeah, when,
14 when she was pregnant with CCC, she stopped working.

15 Q Correct. So, you are going to medical school, and then
16 you're doing your residencies, and Janelle's working full
17 time for those six years and was still working full time
18 through the birth of the first and second children you had
19 together?

20 A Um-hum.

21 Q Is that a yes?

22 A That's correct.

23 Q And then when she was pregnant with the third, your
24 daughter CiCi, that is when it was mutually decided that she
25 would no longer work?

1 A Yes.

2 Q And Janelle then did not work anymore during the
3 duration of the marriage; is that correct?

4 A No, she did not work.

5 Q Okay. So, basically, once the two of you and, not the
6 two of you, your family, moved from Des Moines to Sioux Falls
7 to start your career, she never worked outside of the home,
8 did she?

9 A She didn't work at all.

10 Q When you, I want you to turn to Exhibit 1 in the big
11 binder of yours. And this is the stipulation and agreement
12 that resolved your divorce, correct?

13 A Yes.

14 Q And it's dated June 17 of 2019?

15 A Yes.

16 Q So by the time you guys get divorced, you had just been
17 married for a little over 25 years?

18 A Correct.

19 Q And during your divorce, you had an attorney, correct?

20 A Yes.

21 Q In fact, the same attorney you have now?

22 A Correct.

23 Q And you resolved your divorce at a mediation?

24 A We did.

25 Q And of course, Janelle had an attorney as well?

1 A She did.

2 Q And when you settled your divorce as set forth in this
3 document you settled everything, meaning the property, debts,
4 assets, alimony, child support, custody, parenting time?

5 A Yes.

6 Q Correct. But crucially, when you made all the
7 agreements about alimony, that same day you were also
8 discussing the division of assets and debts, correct?

9 A Yes.

10 Q So, when you and Janelle made the decisions that you
11 made that are reflected in Exhibit 1, you were dividing up
12 assets and debts, and then also considering the alimony?

13 A I believe that's correct.

14 Q And at the end of that day, the two of you came to an
15 agreement and Exhibit 1 was signed, correct?

16 A Yeah, we came to an agreement.

17 Q And you knew when you signed that agreement that you
18 were agreeing to at least 15 years of alimony to Janelle,
19 correct?

20 A That is correct.

21 Q There's going to be a little uncertainty as to when the
22 house sells, but when the house sells, that's going to kick
23 in 15 years of alimony?

24 A Yes.

25 Q And you knew that at the time?

1 A Absolutely.

2 Q All right, okay. And then after Exhibit 1 was signed
3 and the court adopts it, you then made the required alimony
4 payments from June of 2019 until June of 2024?

5 A Yes.

6 Q By the terms of Exhibit 1, the \$13,500 alimony that was
7 to run for a period of six years?

8 A Yes.

9 Q And I think we're on the same page that the house sold
10 in January of 2020?

11 A Yes.

12 Q So, beginning in January or February, it's a month, I
13 don't want to quibble over it, but you then would be paying
14 \$13,500 a month in alimony for the next six years?

15 A Yes.

16 Q And as we sit here today, we're roughly what, eighteen
17 months or so from that alimony naturally taking a step down
18 pursuant to the agreement to 7000, correct?

19 A I think it's less than that, but...

20 Q Okay. Less than eighteen months?

21 A Um-hum.

22 Q Is that a yes?

23 A Yes.

24 Q Okay. And then after those six years, so roughly in
25 January or February of 2026, you then are obligated for

1 alimony of \$7000 a month for the next nine years?

2 A Yes.

3 Q And you'll agree with me that that time frame is going
4 to get Janelle to roughly the age of 65?

5 A Janelle to the age of 65?

6 Q Correct.

7 A Um, it got me to the age of 65 I think.

8 Q Yep, I know. The two of you are approximately the same
9 age?

10 A Approximately.

11 Q Yes, so from when you and Janelle are sitting in a law
12 office back in June of 2019, negotiating all these different
13 things to resolve your divorce, you knew that at that point
14 in time you would be making alimony payments till roughly the
15 age of 65, correct?

16 A Yes.

17 Q And that, Janelle would then be receiving alimony
18 payments from you until she's roughly 65?

19 A Yes.

20 Q In addition, you agreed to the \$500 a month payment into
21 her retirement account for a period of 10 years?

22 A Yes.

23 Q So, that obligation will run for approximately another
24 three and a half years pursuant to the agreement?

25 A I believe so.

1 Q Now, as set forth in your agreement, it's actually on
2 page three of Exhibit 1, but you and Janelle negotiated and
3 agreed upon the conditions that would allow the alimony to
4 end, correct?

5 A Yes, yeah.

6 Q I mean, it's set forth at the top of page three, the two
7 of you negotiated and agreed that it would cease upon her
8 remarriage, cohabitation, or death, correct?

9 A Yes.

10 Q And you're not contending she's remarried, are you?

11 A No, I'm not.

12 Q You're not contending that she's cohabitating with
13 anyone, are you?

14 A Not that I know of.

15 Q And thankfully, she's not dead?

16 A No.

17 Q All right. And the other thing you negotiated and
18 agreed upon is that it would cease if you passed away?

19 A Correct.

20 Q All right. And then the only other condition that the
21 two of you negotiated and agreed upon for the termination of
22 your alimony is if her share of the IP profits reached
23 \$1,000,000?

24 A Correct.

25 Q And you're not contending that the IP profits or at

1 least her share has hit a \$1,000,000, are you?

2 A We are not.

3 Q Okay. So, none of the conditions for the termination of
4 the alimony that the two of you negotiated and agreed upon
5 have occurred yet, have they?

6 A Not in the original agreement.

7 Q Not in any agreement, correct?

8 A No.

9 Q All right. And then in addition, you agreed to a child
10 support amount, this is on page five, section five of \$1500 a
11 month, correct?

12 A Yes.

13 Q Will you agree with me that that child support amount
14 would be quite low and below the grid for someone that's
15 making \$850,000 a year?

16 A And Janelle didn't think so. She actually, I was the
17 one that suggested the highest amount.

18 Q And at no time has the child support ever been modified
19 by either one of you, correct?

20 A I've never wanted to.

21 Q And Janelle's never tried to modify it either, has she?

22 A No.

23 Q All right. But then in addition to that, you also made
24 a variety of promises in this agreement to pay for a lot of
25 other items. For example, you're going to pay for CC and

1 Jo's undergraduate college tuitions, books, and school
2 related fees, correct?

3 A Absolutely.

4 Q All right. So, your daughter, Josephine, she goes by
5 JoJo, correct?

6 A Yeah.

7 Q All right. So, JoJo's currently a senior at O'Gorman,
8 correct?

9 A Correct.

10 Q And she'll graduate in May, correct?

11 A Yes.

12 Q And at that point in time, your child support obligation
13 of the 1500 will end?

14 A Correct.

15 Q And then you're still intending to honor the promise to
16 pay for her undergraduate college?

17 A Absolutely.

18 Q All right. What funds do you have set aside to pay for
19 her undergraduate college?

20 A We've been, I've been putting money in above what I had
21 agreed to, um, in to a 529 account, and then I will do
22 whatever I can to continue to make sure that that her
23 education is met, which I believe is supposed to be in-state
24 tuition for a period of four years.

25 Q All right. So, if the 529 isn't going to cover her

1 expenses, you will still go above and beyond and make sure
2 that her undergraduate college is paid for?

3 A It's what I've done to date.

4 Q Is it? This, in calendar year 2024, have you and JoJo
5 gone on some college trips for her to look at some schools?

6 A Yeah. She came down to visit me, and we went and
7 visited, ah, yeah, two colleges.

8 Q And what two colleges did you visit?

9 A TCU and St. Edwards.

10 Q And by the names of those, they're both private schools?
11 Correct?

12 A Yes.

13 Q I mean Texas, TCU is Texas Christian University?

14 A Correct.

15 Q Um, and you said St. Edwards?

16 A St. Edwards.

17 Q All right. So, they're private schools?

18 A Um-hum.

19 Q Correct. So, are you intend -- if she chooses one of
20 those, you're intending to fully pay for that college
21 education at those two private universities?

22 A No.

23 Q What are you intending to pay?

24 A Jo and I have discussed this in great detail, but what
25 we're planning and doing, and what I've always agreed to is

1 that I'll be paying for four years of in-state tuition rates,
2 and she is otherwise obligated to pay, get loans or whatever
3 for the difference. Which is also why I'm counseling her
4 that she should also be looking at state universities and
5 things like that and what a burden school debt can be.

6 Q Did any of your other children graduate from college?

7 A Yes.

8 Q Did all four of them?

9 A No.

10 Q Okay. How many have graduated from college?

11 A Ah, my, two of them.

12 Q All right. Is Cece still in college or is she done?

13 A No, she went to beautician school.

14 Q All right. Did you, the two that you that have
15 graduated from college, did they come out with any student
16 loan debt?

17 A No.

18 Q If you could turn to Exhibit 2, you'll recognize this as
19 your 2021 individual income tax return?

20 A Yes.

21 Q And if you page ahead about four or five pages, there's
22 not numbers on it so it might be a little difficult, but
23 let's make sure we're looking at the same pages as we look
24 through these.

25 A Sure.

1 Q But I'm looking at it's your form 1040 for tax year
2 2021. Do you see that?

3 A Yes.

4 Q And in 2021, you had wages of \$720,000, correct?

5 A Yes.

6 Q And that would all be from Sanford Health? Correct?

7 A Yeah, I believe so.

8 Q And then down at Line 8, you have other income in the
9 amount of, ah, I'm going to round up, but it's a \$118,000?

10 A Yes.

11 Q And that would have been your consulting work, correct?

12 A It is.

13 Q So, in 2021, you had an adjusted gross income, I'm going
14 to round up again about \$834,000?

15 A Yes. Or, yes.

16 Q And then if you go forward a couple pages to the
17 Schedule 1 that's entitled additional income and adjustments
18 to income.

19 A Yes.

20 Q And there it shows on Line 3 that your business income
21 was 109,850?

22 A Yes.

23 Q Oh, and that you had rental income of \$8056?

24 A Yes.

25 Q Now, I think we're going to get to it, but the rental

1 income that's reflected there, that's for the house that you
2 own on 6th Street in Sioux Falls, correct?

3 A Yeah, I think it would have to be.

4 Q All right. Back in, never mind, strike that. And I'm
5 going to, I paged ahead maybe eight-nine pages, but it's the
6 Schedule C, and it's titled profit or loss from business.

7 A Yes.

8 Q Okay. And this is showing \$113,000 of income, gross
9 income for what's called surgical training?

10 A I don't see surgical training, but that has to be my
11 consulting.

12 Q Well, if you look up towards the top, you have your
13 name and an A.

14 A Oh, yeah.

15 Q Okay. Says surgical training. But at this point in
16 time you have not obviously incorporated and begun the entity
17 with which you're now doing your training, correct?

18 A Correct.

19 Q All right. So, back in 2021 you were just doing that,
20 for lack of a better term, in your own name, using your own
21 Social Security number as the Tax ID?

22 A Absolutely.

23 Q Okay. I'm jumping several pages, um, within Exhibit 2.
24 And it is a 1099 from Intuitive Surgical, Inc. As I say that
25 name, do you know what that is?

1 A Surgery, ah, Intuitive Surgical?

2 Q Yes.

3 A Yes. I know who that is.

4 Q What is Intuitive Surgical, Inc?

5 A Intuitive Surgical is a medical device company, and they
6 sell the Davinci Robot Surgical system.

7 Q Okay.

8 THE COURT: They sell the what?

9 THE WITNESS: The, um, Davinci Surgical Robot -- Robotic
10 platform.

11 THE COURT: Okay.

12 Q You, are you at that 1099, Doctor?

13 A I don't think I've seen that.

14 THE COURT: It might be easier if you go from the back
15 about six pages or so.

16 THE WITNESS: It's from the back?

17 THE COURT: From the back it's last, I think. Never
18 mind. I was trying to be helpful; I'll just stop now. About
19 nine pages from the back actually.

20 Q Well, my, Doctor, let me ask you my question and if you
21 want to then see it, I'll, I will show it to you, but on that
22 1099, it's --

23 A -- it's, excuse me, I think I found it, Virtue -- no.
24 That's another company. All right. I got it, yes.

25 Q Okay. All right. So, on that 1099, Intuitive Surgical,

1 Inc paid you \$110,050 in 2021?

2 A Yes.

3 Q Is that inclusive within the consulting you did?

4 A That, yeah, that has all been consulting.

5 Q Okay. So, when you're doing the consulting in 2021, it
6 was by and through Intuitive Surgical, Inc.?

7 A I, I, I still do that, but, it, yeah, I do it through,
8 I, I'm paid by Intuitive Surgical to consult. It's just the
9 way I pay taxes on it is different now.

10 Q Okay. All right. And then if you go forward about
11 three pages, you're going to come to a closing statement from
12 when you bought the house on 6th Street.

13 A Okay.

14 Q And in October of 2021, you bought that house on 6th
15 Street for approximately \$94,375?

16 A That appears to be correct.

17 Q Okay. And you still own that house today?

18 A I do.

19 Q And that's one of the houses in Sicux Falls that is an
20 investment property for you?

21 A Correct.

22 Q If you then turn to Exhibit 3, this is your 2022 tax
23 return, and you have to page through your estimated tax
24 payments. These actually have numbers at the bottom, this
25 might be a little easier, but if you turn to page ten, the

1 page number is right in the middle at the bottom. And is --
2 are you at your 1040?

3 A Yes.

4 Q For your 2022 taxes?

5 A I am.

6 Q Okay. So, in tax year 2022 you had income from Sanford
7 Health in the amount of \$787,788?

8 A Yes.

9 Q And if we divide that by 12, you would on average have
10 made \$65,650 per month from Sanford Health in that year? If
11 you want to trust my arithmetic.

12 A Um, before taxes and other things, yes.

13 Q Yes, absolutely. But gross per month you're making in
14 2022, you're making over \$65,000 from Sanford Health?

15 A I am.

16 Q And then if you come down in that particular year at
17 Line 8, you made \$88,500 in your consulting work, correct?

18 A Yes.

19 Q So your adjusted gross income for 2022 is \$872,402,
20 correct?

21 A That sounds correct. I don't see it on here, but yeah.

22 Q That's at Line 11?

23 A There we go, yeah.

24 Q And again, if you divide that by 12, your income from
25 Sanford Health and your consulting that generates a gross

1 number of \$72,700 per month?

2 A Yes.

3 Q As we go from Exhibit 2 to Exhibit 3, so your 2021 to
4 2022, you'll agree with me that your gross income increased,
5 correct?

6 A Yeah.

7 Q In 2021, your adjusted gross income was 834,000 and the
8 next year it's up to 872,000, correct?

9 A Where? Where do I find that at?

10 Q I just quickly referred back to Exhibit 2 where it has
11 your adjusted gross income at 833,932, and I'm just comparing
12 that to your AGI on 2022, which is 872,402?

13 A That does sound correct.

14 Q Okay. So, from '21 to '22, your overall income
15 increased by roughly \$35,000?

16 A Yes.

17 Q And you testified that at the time of the divorce in
18 2019, you estimated that your wages from Sanford were between
19 650 and \$750,000?

20 A Yes.

21 Q Were you doing consulting work in 2019?

22 A I believe I was, but I wasn't doing that volume.

23 Q All right. So, if we use 650 and 750 as the range of
24 your income from Sanford in 2019, how much would we need to
25 add on as a fair estimate for your consulting work in 2019?

1 A I don't have those numbers to, I mean, do we have those
2 tax returns?

3 Q I don't.

4 A Um, I, I have, I have no recollection.

5 Q All right. But you were doing some consulting work in
6 2019?

7 A Yeah.

8 Q So, will you agree with me that at the time of the
9 divorce you were making in in excess of the range of 650 to
10 750?

11 A Now, I think the 650 to 750 that I was describing was
12 actually including the, all of that together.

13 Q All right. So, then as we go from the divorce through
14 2022, even if we accept the top range of 750 in 2019, your
15 income had increased by over \$125,000 by the time we get to
16 2022?

17 A Yeah.

18 Q So, as you're making these payments, let me back up,
19 when you agreed to make these payments in 2019, you had 15
20 plus years of history and experience with Sanford Health,
21 correct?

22 A I believe so.

23 Q You're making somewhere between 650 and \$750,000 a year,
24 correct?

25 A Correct.

1 Q And that gave you some confidence that you would be able
2 to honor the promises you made in Exhibit 1?

3 A Yes.

4 Q And then after the divorce was finalized, your income
5 only increased, correct?

6 A It did increase.

7 Q All right. So, your ability to make those payments got
8 easier by the time we get to 2021 and 2022, correct?

9 A A little bit, but there's other extenuating
10 circumstances, too. Such as multiple children in college.

11 Q But paying for that was part of what you agreed to in
12 your agreement, correct?

13 A Yeah, but I didn't say that was easy.

14 Q And then if we turn to Exhibit 4, this is your tax
15 return for 2023.

16 A Okay.

17 Q If you page in a little bit to page eleven, that is the
18 1040 for 2023.

19 A These are numbered a little bit differently. There's
20 multiple.

21 Q Yeah, I think after you get through the first few that
22 the pagination starts to make more sense.

23 A But it's 1040?

24 Q Yes.

25 A Yeah. I'm on a, yeah, a 1040 for 2023.

1 Q Okay. Now, your income for 2023, I think you said the
2 first fifteen days of 2023 was at Sanford. And then
3 essentially everything else was going to be at the Bariatric
4 Experts down in Frisco, Texas, plus your consulting work,
5 plus rental income.

6 A Yes.

7 Q Is that -- okay. So, when we look at Line 1, your
8 wages, there's a total of \$378,597, correct?

9 A Yes.

10 Q So that number would be a combination of the 15 days at
11 Sanford plus whatever the Bariatric Experts paid you down
12 pursuant to your agreement?

13 A Yes.

14 Q Okay. And then in addition to that, you had consulting
15 income and rental income, a combination of \$203,215, correct?

16 A Yes.

17 Q Okay. When did you, I think you already answered this
18 because you were talking about you did a surgery and then you
19 drove to Texas, and you flew back with your brother and drove
20 back to Texas.

21 A Um-hum.

22 Q But when did you begin work with the Bariatric Experts
23 down in Frisco, Texas?

24 A Immediately.

25 Q So, are we talking January 15, 16?

1 A Um, I think the January 13th was a Wednesday or a
2 Thursday. That was the last day they would allow me to
3 operate because I would round on my patients, and so I want
4 to say on the 14th was literally the last day I was at
5 Sanford. I think, I can't remember. And then I got down
6 there and I started on Monday doing, not clinical work, of
7 course, none of that was ready, um, but setting up a
8 practice.

9 Q Okay. My initial question, we're going to go through
10 this tax return in more, but my initial question is, is that
11 when you signed your agreement with the Bariatric Experts,
12 you accepted a minimum or a guarantee of \$420,000?

13 A Yes.

14 Q So, help me understand how you're reporting wages in
15 2023 of 378 when that includes some money from Sanford, but
16 yet you spent almost eleven months working for the Bariatric
17 Experts down in Prisco?

18 A That's what I was paid.

19 Q And that, do you have any idea why you seemingly were
20 underpaid by the Bariatric Experts? If you have, if you
21 know.

22 A Um, um, no, I don't know. I received a, I think I
23 received a check every half month for like \$17,500.

24 Q Okay. If you page ahead two pages to Schedule 1, the
25 additional income and adjustments.

1 A Where, where at?

2 Q Two more pages to page thirteen, Schedule 1. And on
3 line three, it shows your business income of 72,350. Do you
4 see that?

5 A Okay.

6 Q Now, that, as I understand that that would be your
7 consulting income?

8 A I have no idea.

9 Q All right. Okay. The reason I'm asking is if we go
10 back and look at your 2022 return, you had your consulting
11 income of 88,523?

12 A My consulting --

13 Q -- I'm sorry. It's actually 71,991.

14 A In, in what year?

15 Q In '22.

16 A Okay.

17 Q So, in '22 you have consulting income of almost 72,000.
18 And in '23 you had consulting income of just a little over
19 72,000.

20 A Okay.

21 Q My, my question is this. You testified that one of your
22 criticisms and frustrations with the Bariatric Experts is
23 that they wouldn't want you to go do the consulting, that
24 they were putting roadblocks in front of you for the
25 consulting?

1 A Yeah.

2 Q But you'll agree with me that you've earned almost the
3 exact same amount of consulting money in '22 as you did in
4 '23 with the Bariatric Experts?

5 A True.

6 Q Okay.

7 A But the work was done in 2022. I had a \$39,000 fee that
8 was paid to me by Device Technologies in Australia when I
9 went down there for ten days and did work for them, that was
10 paid in '23.

11 Q And then if we're back to Exhibit 4, you then have
12 rental income, well, that's not true, that's probably more
13 from your Prairie Creek. We're going to get to that. I want
14 to jump way to the end of this return. So, from the back,
15 it's going to be about twenty pages in from the back.

16 A It's still #4?

17 Q Yep. And we lost --

18 A -- is there a number on the bottom of it?

19 Q Well, weirdly, there's one before it and there's one
20 after it. So, it's, it's page sixty-five, but there's no
21 number 65.

22 A Gotcha, I got it.

23 Q Okay. And that's a form 1116?

24 A Yes.

25 Q All right. And on this particular document, your

1 accountant is reporting that you have \$378,000 in
2 compensation. \$72,000 from a business profession. \$52,000
3 from rents and royalties. And then a \$108,000 from a
4 partnership or corporation. Do you see that?

5 A Yeah.

6 Q Okay. And then if you page forward a few pages to page
7 seventy, at the top, it says wages received and taxes
8 withheld?

9 A Page seventy?

10 Q Yep.

11 A Withheld and, I'm not seeing received for whatever
12 reason.

13 Q Wages received and taxes withheld. It's kind of at the
14 very top.

15 A Okay, yes, sorry, at the very top.

16 Q That's okay. I just want to make sure we're on the same
17 page. I don't want either one of us to be looking at
18 different pages.

19 A Absolutely, I appreciate it.

20 Q Okay. So, in 2023, in the fourteen days you worked for
21 Sanford Health, you made almost \$83,000, correct?

22 A Yeah. That was, that was my salary, that, that was my
23 salary for the first of the month and a reconciliation check.

24 Q Yeah. \$83,000 for being at Sanford for two weeks, and
25 then you received \$295,000 from the Bariatric Experts which

1 paid it through into your First Creek Surgical Solutions,
2 correct?

3 A Right.

4 Q Sanford Health did not fire you, did they?

5 A No.

6 Q Your decision to leave Sanford Health was your decision
7 to make, correct?

8 A Absolutely.

9 Q All right. You decided that you were going to leave
10 Sanford. You were going to leave Sioux Falls and you were
11 going to go to Texas?

12 A Definitely was mine.

13 Q And you indicated that you had been struggling with
14 Sanford and its culture, I think you said for years?

15 A Um-hum.

16 Q Is that correct?

17 A Correct.

18 Q You were struggling with Sanford and their culture in
19 2019 when you got divorced, did you not?

20 A Even before that.

21 Q Correct. Even before that. But it wasn't until 2023
22 when you left?

23 A Correct.

24 Q You talked about this prospectus that the Bariatric
25 Experts gave to you?

- 1 A Yeah.
- 2 Q And that it made it look like you would be making, you
- 3 know even over a \$1,000,000 once you got down there?
- 4 A Yes.
- 5 Q Where's the prospectus?
- 6 A I'm not sure.
- 7 Q I'd love to see it. Do you have it?
- 8 A Yeah.
- 9 Q Okay.
- 10 A I believe so.
- 11 Q All right. All right.
- 12 A I, I have to make sure. I'm pretty sure I do.
- 13 Q All right. But it's not in your exhibits.
- 14 A I do.
- 15 Q Correct?
- 16 A I, I can't answer that question.
- 17 Q I mean, that was the document that you saw that
- 18 indicated to you that professionally the grass was going to
- 19 be greener down in Frisco, Texas, than it was in Sioux Falls,
- 20 South Dakota, correct?
- 21 A Yeah.
- 22 Q Because you were thinking if I'm making 750 to \$850,000
- 23 in South Dakota, and if I can make over a \$1,000,000 in
- 24 Texas, I'm coming out ahead, correct? You're nodding your
- 25 head yes. I just need you to say yes.

1 A Correct.

2 Q All right.

3 THE COURT: That's because we're recording, that's why
4 um-hum and head nods don't work.

5 THE WITNESS: Yeah, I understand that.

6 Q So, in addition to this prospectus making the grass
7 greener in Frisco, Texas, economically, it's also then going
8 to free you from this corporate healthcare culture that you
9 have a lot of problems with, correct?

10 A Almost correct.

11 Q Okay.

12 A But what I recognized I knew that I'd be changing one
13 set of problems for a different set of problems.

14 Q Did you know what the problems you were buying were
15 gonna be?

16 A Obviously not.

17 Q I think you described in your direct examination; I
18 think you said something that retrospectively it was not a
19 good choice to leave Sanford in Sioux Falls?

20 A No. It wasn't, that's incorrect. What I said was that
21 it was not the right choice to join the Bariatric Experts.
22 It was clearly the correct choice for me to leave Sanford
23 Health.

24 Q We don't have the prospectus, so we don't see it, see
25 the date if it even has a date, but do you have any

1 recollection when you would have seen and, and reviewed this
2 prospectus about the Bariatric Experts down in Texas?

3 A Yeah. I saw it when I was with them, that was given to
4 me.

5 Q What time frame are we talking about?

6 A Well, I was in discussion with them for I think a little
7 over a year before I actually joined them. But I don't know
8 when I would have received that. That was probably closer to
9 six months to nine months beforehand.

10 Q The reason I'm wondering is Exhibit 5, which is your
11 employment agreement with the Bariatric Experts, there's no
12 date by your signatures, and unfortunately the date line at
13 the very beginning is empty. Right. I know you arrived down
14 in Frisco to work with them right around the middle of
15 January?

16 A Yeah.

17 Q Do you believe you signed this document before you got
18 down there?

19 A I definitely did. I don't remember when, but I had a
20 signed contract before I went down there.

21 Q Okay. How much time, if you can recall, went by from
22 when you saw this prospectus where the grass is so much
23 greener till you get this contract where it's \$420,000?

24 A Can you repeat the question?

25 Q Sure. How much time went by from when you received the

1 prospectus until you received Exhibit 5, which was the actual
2 contract?

3 A And like I mentioned, I don't remember if it was six
4 months, eight months beforehand.

5 Q Did you negotiate this \$420,000?

6 A I did.

7 Q So, they were actually starting out with something
8 lower?

9 A Much lower and I was much higher.

10 Q All right.

11 A Can I explain that a little bit?

12 Q Sure.

13 A When I went down there, what, I was not going to join
14 them because I couldn't get a guarantee through the
15 healthcare system. And I was convinced by Scott Stowers
16 [spelled phonetically], the owner of The Bariatric Experts,
17 that he, don't worry about it. I need you. This is not
18 going to be a problem. I can do 420.

19 Q So, if I'm understanding you correctly, were you first
20 negotiating with a healthcare system down there?

21 A Not for a contract? I was negotiating for a guarantee
22 and that is legally done as a forgivable loan. So, they
23 actually wouldn't have paid me, they would actually have paid
24 the practice, and then I would have received that, that would
25 have been what would have buffered me for my income. And

1 then as long as I stayed, every month I stayed there after
2 that first year, I only had a year of guaranteed, and then
3 136 of it was forgiven over the next three years.

4 Q All right. Was the prospectus from this, I'm going to
5 call it a hospital system. I don't know what to call it.

6 A No, it was from the practice.

7 Q It was from the Bariatric Experts?

8 A Yes. It was, it was created by Donna and Scott Stowers.

9 Q Okay. So, you would have signed Exhibit 5, which is
10 your employment agreement with them. I think you already
11 told me this, certainly before you actually went down there
12 and started in the middle of January?

13 A Yeah.

14 Q And did you actually sign Exhibit 5 before you would
15 have provided you -- whatever notice you had to provide to
16 Sanford Health?

17 A Yes.

18 Q Okay.

19 A Matter of fact, they, they -- it, it got in the rumor
20 mill, and I was approached by administration. I said,
21 frankly, it's none of your business, but I have been offered
22 a contract, and if it looks legitimate I might sign it, and
23 then I was pestered by Sanford. You gave your due notice.
24 And I'm like I never gave notice. I was asked a question.

25 Q Okay.

1 A And so I know I didn't sign that. I didn't give them a,
2 ah, whatever, a quit, a letter that I was resigning until I
3 had signed contract.

4 Q Okay. So, the chronology is, is that you're negotiating
5 with people down in Texas. You're still employed at Sanford.
6 You then get Exhibit 5, sign it, and then after that, you
7 provide notice to Sanford Health that you're leaving?

8 A Yes.

9 Q Okay. So, before you even ever told Sanford Health that
10 you were going to be leaving then, you knew and had signed a
11 document that was basically going to cut your income?

12 A Yes.

13 Q By 40 some percent?

14 A Yes.

15 Q It was a voluntary choice on your part?

16 A Absolutely.

17 Q When you did that, did you ever sit down and do any math
18 as to now, wait a minute, Dr. Peery, I'm, I'm talking as if
19 I'm you. I want to get out of Sioux Falls. I want to get
20 away from corporate healthcare, but I have this other signed
21 document that's been judicially accepted and approved by a
22 court that obligates me to some things. Did you ever sit
23 down and compare those two documents and have a plan as to
24 how you are going to make those payments in your divorce
25 agreement?

1 A First off, I don't refer to myself as Dr. Peery.

2 Q Fair enough.

3 A But, um, yeah, I have, um, I think if you know me, you
4 know that I'm a very thoughtful, considerate person who meets
5 his obligations to a T every time until it's physically
6 impossible to my own detriment. So, yes, I've given it great
7 consideration and thought, and I believe I have met those
8 obligations. The problem wasn't when I was with that
9 guarantee. The problem occurred when I had to find a
10 solution when I no longer had a guarantee.

11 Q Let's dig into Exhibit 5 a little bit more. If you go
12 to the third page, Section 2.5.

13 A Yes.

14 Q The Bariatric Clinic, the entity was going to be paying
15 all sorts of expenses on your behalf, correct?

16 A Incorrect.

17 Q It says that the practice shall pay for state licensing
18 fees, hospital, and ambulatory surgery center privilege fees,
19 and fees associated with this group each calendar year,
20 correct?

21 A That's a practice expense. That's not my expense.

22 Q And then they were also going to reimburse you \$2500 a
23 year for CME expenses, correct?

24 A Yes.

25 Q And then down at 2.7, the Bariatric Experts was also

1 agreeing to pay your malpractice insurance?

2 A Yes.

3 Q So, we're not quite there yet, but when you're with
4 Sanford, you aren't having to write Sanford a check every
5 month to share expenses with anyone at Sanford, were you?

6 A No employed physician does.

7 Q Correct. And then when you go to the Bariatric Experts,
8 you were also not having to cut them a check for any portion
9 of expenses or overhead either, were you?

10 A No.

11 Q All right. But that stands in contrast to your
12 relationship with your current practice at Inspire by,
13 Inspire Bariatrics, correct?

14 A Absolutely.

15 Q So, not only were you getting \$420,000 guaranteed, but
16 then you also didn't have these clinic practice expenses that
17 you now are incurring?

18 A Absolutely.

19 Q All right.

20 A And right now those are, you know, obviously, those two
21 situations didn't work out too well for me today, you know,
22 so me being able to control my expenses in my business is of
23 vital importance to me now. Um, if I felt I could develop a
24 trust with somebody that would, you know, enter a similar
25 circumstance with me, I'd definitely entertain it.

1 Q If you go to Exhibit A of that Exhibit 5. So, Exhibit A
2 to your employment agreement with the Bariatric Experts, if
3 you do the math and you divide the 420 by 12, that
4 essentially means you're going to be receiving about \$35,000
5 per year gross from the Bariatric Experts, correct?

6 A You mean 35,000 gross a month?

7 Q A month?

8 A Yeah, a month.

9 Q All right. And that again is almost half of what the
10 gross amount you were receiving from when you were at Sanford
11 Health the year before?

12 A Correct. The agreement was that I could, and I told
13 them that I thought that I would be short there. So, that I
14 would be able to travel and do more work for Intuitive to
15 help buffer that.

16 Q And then Exhibit 5, of course, is your separation
17 agreement from the Bariatric Experts?

18 A Which exhibit?

19 Q Exhibit 6, I'm sorry.

20 A Yes.

21 Q So, that relationship imploded in less than a calendar
22 year, correct?

23 A Correct.

24 Q You, you've talked about one of the reasons you wanted
25 to move to Texas is because you have family there?

1 A Yes.

2 Q And I think you indicated you had a brother and cousins?

3 A Yes.

4 Q But it's also true that back in Sioux Falls, where you
5 had lived for 20 years, you had multiple children?

6 A Absolutely.

7 Q All right. Including one that was a minor?

8 A Correct.

9 Q You indicated on your direct examination that you didn't
10 leave Sanford with the intention of reducing your income, but
11 you knew your income was going to be reducing by
12 approximately --

13 A -- temporarily.

14 Q -- forty-five percent?

15 A No, temporarily.

16 Q But you knew it was going to go down 45 percent?

17 A Temporarily.

18 Q You, you are not limited to only practicing bariatric
19 surgery, are you?

20 A Correct.

21 Q In fact, on top of that little exhibit book, there are
22 some exhibits, and these are from the website of your current
23 practice with Inspired, correct?

24 A Ah, yes, the one with paperclips?

25 Q And on the second page of Exhibit V of their, towards

1 the bottom of that middle paragraph it talks about how you
2 also accept general surgery patients and perform surgery for
3 reflux, hernias, colon, gallbladder, appendix, and many other
4 conditions, correct?

5 A Yes.

6 Q And your license, this might be a silly question to a
7 physician, but you're licensed to practice medicine, whether
8 that's in South Dakota or Texas. You are not constrained to
9 only doing bariatrics?

10 A Correct.

11 Q So, as the market with these new medications that's
12 coming on that might be taking a bite out of bariatric
13 surgeries, you would still be fully qualified and able to
14 perform other surgeries that have nothing to do with weight
15 loss?

16 A Absolutely.

17 Q And you do do that, don't you?

18 A I do do that, yeah.

19 MR. TOBIN: Your Honor, I'm at a point where if we
20 wanted to take a break for lunch, it would be okay with me,
21 but if you wanted to keep going, I can.

22 THE COURT: That's okay. If you were at a good stopping
23 point, we will go ahead and stop for lunch, um, taking into
24 consideration what you have left for cross, potential
25 redirect, and then also that we have Ms. Rabenberg's

1 testimony. Do you want to take an hour for lunch or an hour
2 and a half? I will leave it up to the parties.

3 MR. TOBIN: I am personally find back, to be back here
4 at 1:00, so an hour is fine by me.

5 MS. MOORE: That works for me, Judge.

6 THE COURT: Okay. So, we'll go ahead and resume at
7 1:00 o'clock here in the courtroom. No one else is coming in
8 here between now and then, so if you want to leave your items
9 they'll be fine here.

10 MS. MOORE: Thank you.

11 MR. TOBIN: Thank you.

12 THE COURT: Thank you. We'll be in recess.

13 (Recess at 12:06 p.m.)

14 (Resume at 1:00 p.m.)

15 THE COURT: All right. Let's go ahead and go back on
16 the record in divorce file 19-18. Peery v. Peery, now known
17 as Rabenberg v. Peery. We left out before lunch with Dr.
18 Peery's cross-examination. All parties are present again
19 with Counsel. Go ahead and continue whenever you're ready,
20 Mr. Tobin.

21 MR. TOBIN: Thank you, Your Honor.

22 CROSS-EXAMINATION cont.'d

23 Q (BY MR. TOBIN) Dr. Peery, I want you to turn to Exhibit
24 7, please. And then just also quickly look at Exhibit 9.
25 Those are both documents from Inspire Bariatrics, and at the

1 bottom of each it says that the report was created on March 4
2 of 2024. Do you see that on both of those exhibits?

3 A I see a March 19th on the second one.

4 Q On the very bottom, it says this report was created on
5 03-04 of '24.

6 A Oh, okay, that's the first one. I was looking at the
7 second one, yeah.

8 Q Oh, okay. So, seven and eight, these are expense breaks
9 downs that Inspire Bariatrics put together and provided to
10 you as you decided what it is you were going to do going
11 forward after you leave the Bariatric Experts?

12 A This is, this is something that they gave me to kind of
13 show me what my overhead would likely be per month so I could
14 financially plan.

15 Q Okay. Then you would have received both of these on or
16 about March 4 of 2024?

17 A I believe so. I don't, I remember seeing the other
18 thing, um, I don't remember when I saw it though.

19 Q All right.

20 A I remember nine.

21 Q Okay. If we look at Exhibit 8, I mean 7, I'm sorry, 7.
22 This is the shared expense breakdown and in this document,
23 Inspire Bariatrics is tabulating all the expenses that they
24 are telling you that you will be sharing with the other
25 physician, correct?

1 A This is an, um, this is, um, their best guess at what
2 they expected to have for regular monthly expenses.

3 Q All right. Now, what is the other physician's name?

4 I, I --

5 A -- Dr. Keli McCalman.

6 Q If I just, is, is that a man or a woman? I guess I know
7 it's a --

8 A -- it is a woman, yeah.

9 Q It's a female. Can I just refer to her as Dr. Keli?

10 A That's fine.

11 Q Okay. I'm not trying to be disrespectful. I, I just
12 might struggle in pronouncing that other name over and over
13 again. How long to -- do you know how long Dr. Keli has
14 owned and operated Inspire Bariatrics?

15 A Yeah, since November of 2020.

16 Q All right. So, November of 2020. And to your
17 knowledge, prior to your arrival, did she ever work, or
18 associate, or partner with any other physician at Inspire
19 Bariatrics?

20 A No. Inspire is her own business.

21 Q Okay. So, do you agree with me that on Exhibit 7, these
22 shared expenses that total \$29,998 that Dr. Keli would have
23 had to have been paying that amount whether you decided to
24 come work with her or not?

25 A Yes.

1 Q So, her pitch to you is, is you can come work with me
2 and when we do that, we will share expenses?

3 A Correct.

4 Q Do you have any ownership interest in Inspire
5 Bariatrics?

6 A Not yet.

7 Q Okay. Any promise as to when you'll be up for some sort
8 of an ownership?

9 A No.

10 Q I didn't see that in any documents as to when you may be
11 considered for ownership?

12 A Because there's really no value to it.

13 Q Okay. So, in March of 2024, whether you showed up or
14 not, Dr. Keli is going to have to be paying something around
15 these \$30,000 of expenses?

16 A Yes.

17 Q And she's had her practice there since 2020, so she
18 would have had about three and a half, close to four years of
19 experience there on her own? Yes?

20 A Yes.

21 Q So, the deal that you struck with Dr. Keli is that
22 you're going to pay half the expenses, but yet you're not
23 going to participate in any of her income, correct?

24 A Yeah, of course not.

25 Q Can you, can you explain to me why in the world you

1 would agree to pay half the expenses of this practice, but
2 yet not participate in any of the overall income from the
3 practice?

4 A Because the practice doesn't make any income except for
5 what she writes a check for to the practice, and what I write
6 a check to for the practice. This is an entity in which that
7 we have a physical, um, where we pay the lease. The EMR.
8 The employees, and things like that. There is no, there is -
9 - the only time I'd be interested in becoming a partner would
10 be if we bought a physical building. And then, then there
11 would be some value to that.

12 Q And, and maybe, maybe I just won't get you to go down
13 this journey with me, but you signed on for half the expense
14 that she was otherwise going to be paying in March, June, and
15 July, going forward, correct?

16 A Yes.

17 Q But you don't participate in any of the revenue that she
18 generates from her practice?

19 A Nor does she share mine.

20 Q Correct, but as it stands right now you don't have any,
21 correct?

22 A No, I actually do. I have -- producing it. I mean I do
23 the consulting. I do have the occasional fee from call and
24 things like that, yeah.

25 Q Correct. But you're not really meaningfully generating

1 any income from Inspire Bariatrics?

2 A That's not the purpose of Inspire Bariatrics.

3 Q Then what is the purpose of Inspire Bariatrics?

4 A To give me the facilities to have a clinic to prac -- to
5 practice my practice.

6 Q Okay.

7 A The value is here.

8 Q And maybe I'm misunderstanding, but I'm, I mean, I, I, I
9 don't want to get bogged on, on the day, but on any given
10 Tuesday, where would you go to see a patient?

11 A At Inspire Bariatrics.

12 Q Okay. So, there is a location somewhere in McKinney,
13 Texas, where it says Inspire Bariatrics on the door?

14 A Yes. And it's a lease, we lease it.

15 Q Okay. And if I'm your patient, I'm going to go to this
16 Inspire Bariatrics location, interact with Inspire Bariatric
17 staff when I'm having an appointment with you?

18 A Yes.

19 Q When I pay you, whether that's me personally or my
20 insurance company, am I, let's say it's me personally,
21 hypothetically, am I writing a check to Inspire Bariatrics,
22 or am I writing a check to your individual company?

23 A First Creek Surgical Associates, ah, I mean Surgical
24 Solutions.

25 Q And then what is the name of Dr. Keli's separate entity

1 that I would write the check to if I was seeing her?

2 A Ah, I, I think it has doctor in it, but it's Keli
3 McCalman DO or Dr. Keli McCalman DO.

4 Q Okay. I want to do a little math, but just looking at
5 Exhibit 7, I mean, if we are thinking that there's roughly
6 \$30,000 in expense, if I do the math and I take that times
7 12, that comes out to \$360,000 a year in overhead expense?

8 A Yes. And for what I do, that's a steal.

9 Q Okay. Well, I'm not so interested in what you're doing
10 right now.

11 A No, you're, you are because that is what I do. You're
12 asking about Inspire Bariatrics.

13 Q Stay with me. It sounds like Dr. Keli is getting the
14 steal because she doesn't have to see a single more patient
15 in 2024 and her potential income just went up by a \$180,000 a
16 year simply because you're going to cover that side of the
17 expense?

18 A Um-hum.

19 Q Correct? Correct?

20 THE COURT: You have to, yep, I have to have you say yes
21 or no.

22 A Yes.

23 THE COURT: Thank you.

24 A Okay. Which is if I was to replicate it, I would be
25 paying 180 thousand extra than what I do right now. So, you

1 see, it's a deal for both of us to split these shareable
2 expenses.

3 Q Yep, we're going to get into all the different options
4 you had available to you. Okay. This was the one you chose?

5 A Yeah.

6 Q And what you signed on to is I'm going to take Dr. Keli
7 \$180,000 of your expenses per year. I'm going to shoulder
8 them on to me, and I don't expect you to give me any sort of
9 a spiff payment, anything else in return. Correct?

10 A Absolutely. I would never ask for that. All right. It
11 wouldn't be appropriate.

12 Q So, if we think about what you owe Janelle for the next
13 15-16 months, that is \$14,000 a month, correct?

14 A Ah, no.

15 Q For the next 14-16 months you owe Janelle \$14,000 a
16 month in alimony?

17 A Ah, and, no, it's 13,500 per month.

18 Q Plus the additional 500 into the IRA?

19 A Correct.

20 Q Okay. That's \$14,000.

21 A Well, but then there's also what I give her that goes to
22 her discretionary income of child support.

23 Q Yeah, but we're not here talking about child support.
24 You're not asking the court to modify that, right?

25 A But you asked me, um, what do I give Janelle a month,

1 and that is what I give her, I give her the child support.

2 Q I understand that. If I started too broad, that was an
3 accident, but per month right now under the court order, you
4 are to pay Janelle \$14,000 a month in alimony, correct?

5 A Yes, if you include that 500, yes.

6 Q Okay. So, instead of paying Janelle what was court
7 ordered, you are agreeing to pay Dr. Keli \$14,000 plus seven
8 more for \$22,000 on average a month going forward?

9 A Absolutely.

10 Q Correct?

11 A Correct.

12 Q You're not court ordered to pay Dr. Keli a penny, are
13 you?

14 A Well, I do have a signed contract. Yeah.

15 Q You have a signed contract with Janelle as well,
16 correct?

17 A I do.

18 Q And that was also adopted by a court and is part of a
19 judgment, correct?

20 A Is what?

21 Q It's also incorporated into a judgment?

22 A Correct.

23 Q All right. So, when you're in March of 2024, earlier
24 this year, and you're trying to figure out what it is you
25 need to do going forward, you, again knew of your obligations

1 to Janelle pursuant to the agreement and the court judgment,
2 correct?

3 A Rephrase that.

4 Q Okay. When you're leaving the Bariatric Experts and
5 you're going to start working with Dr. Keli at Inspire, you
6 knew what your court ordered obligations to Janelle were?

7 A Yes.

8 Q Okay. You also knew that in the foreseeable future, if
9 you choose this path, you're going to make virtually no
10 money, correct?

11 A Yes.

12 Q So you then have to decide who am I going to pay first?
13 My new business partner or my ex-wife, correct?

14 A I don't know if there's a correct answer to that.

15 Q Well --

16 A -- it doesn't make sense to me what you're trying to
17 imply.

18 Q Well, let me ask you this. Have you made all of the
19 payments required of you to Inspire Bariatrics?

20 A Absolutely.

21 Q Okay.

22 A Because that enables me a better shot of allowing to get
23 Janelle her alimony. If I didn't choose this, and there
24 would be no way that I would be given her even any at all.

25 Q So, your, I mean, your approach is, is I'm going to pay

1 a third party that I'm not judicially obligated to pay
2 anything to so I can come into court and say I don't have
3 money to pay to Janelle all under the guise of I'll have
4 money to pay to Janelle someday? Is that what you're telling
5 this court?

6 A I think you need to rephrase that. I'm not really
7 understanding. I mean, if you're, I don't know what you're
8 implying.

9 Q I'm not implying anything. You have made every payment
10 to Dr. Keli and Inspire Bariatrics since you signed the
11 agreement with her, correct?

12 A To be gainfully employed, yes.

13 Q All right. Okay. Now, if you turn to Exhibit 8, this
14 is a more detailed expense that was also generated for you on
15 March 4 because it has the 14,999 from Exhibit 7. And then
16 it's got additional expenses that you're going to have to be
17 responsible for, correct?

18 A Yes, it's half of the shared expenses.

19 Q Yep.

20 A And then it's my additional expenses that I would need
21 to practice.

22 Q All right.

23 A This was an estimation of what it would be.

24 Q Correct. And that totals just over \$22,000 a year,
25 correct?

1 A Um-hum.

2 Q Correct?

3 A Correct.

4 Q All right. Now, if I'm understanding this document
5 correctly, before you would make a penny for any of your work
6 associated with Inspire Bariatrics, you first have to
7 generate \$22,000 and change to pay to bariatrics or Inspire
8 Bariatrics?

9 A Yeah. It's a typical business model.

10 Q Okay. So, you knew because you got this document on
11 March 4, you knew that before you would make a penny, you got
12 to come up with \$22,000 and change to Dr. Keli, and you've
13 got to come up with \$15,500 for Janelle.

14 A Yes.

15 Q And if you add those two together, that's \$37,500?

16 A Yes.

17 Q And you knew that before you ever signed your name to
18 any agreement with Inspire Bariatrics?

19 A Yes.

20 Q And you knew at the time you had no hope of being able
21 to generate \$37,500 to meet your obligations to Dr. Keli and
22 also your legal obligations to Janelle.

23 A You mean that particular month?

24 Q Yes.

25 A Because that's the only month I can really answer that

1 to.

2 Q Sure. You had no ability to make to do that for, for
3 March, 2024, could you?

4 A Correct.

5 Q You had no ability to do that in April of 2024, did you?

6 A Which I dug into my own personal money to provide her
7 that money.

8 Q And you had no ability to do that in June, and July, and
9 August, and September, did you?

10 A Incorrect. Because I did give Janelle her money, and
11 three of those months until July.

12 Q Now, if you look at Exhibit 9, actually before that.
13 Let's first just confirm that on Exhibit 11, that's your
14 management services agreement with Inspired Bariatrics,
15 correct?

16 A Correct.

17 Q Now, the document says that takes effect on March 18,
18 but you and Dr. Keli, you signed it on March 13, and she
19 signed it on March 14th, correct?

20 A Okay.

21 Q So, about nine days went by from when you saw Exhibit 7
22 and 8 before you signed the agreement with them, Exhibit 11,
23 correct?

24 A Yes. Exactly nine days.

25 Q And so again, you knew exactly what you were signing up

1 for, and what your contractual obligations would be to Dr.

2 Keli if you put pen to paper on that document?

3 A Absolutely.

4 Q Okay. Now, if you turn to Exhibit 9, you indicated this
5 was a document that Inspire Bariatrics or Dr. Keli gave to
6 you as part of this process in March of 2024?

7 A Yes.

8 Q All right. Now, I don't know what in the world this is
9 trying to tell us, but it's capturing a year for Dr. Keli
10 from November 9 of 2020 to November 30 of 2021, correct?

11 A Yes.

12 Q So, that's essentially a full calendar year, correct?

13 A Yes.

14 Q And I'm interpreting this document that in that year,
15 Dr. Keli had revenues of about \$328,000.

16 A And that's the way I read it, too.

17 Q Okay. Here's where I, strike that. But you were
18 provided this document around the same time that you signed
19 the agreement, correct?

20 A Yeah.

21 Q Okay. If you take Exhibit 8, which shows that you're
22 going to owe on average \$22,000 in change and you multiply
23 that by 12, that produces a number of 265,000 and 76 dollars?

24 A Yes.

25 Q Okay. If I subtract those payments that you are going

1 to have to make from what was projected as possible income
2 from you, that leaves you with \$63,369?

3 A Absolutely.

4 Q So, we are 14 months removed from you making \$870,000.
5 Fourteen months later, you're signing a document that in a
6 best case scenario is going to pay you \$63,000?

7 A Correct.

8 Q And then if we turn to Exhibit 10, this is your sketch
9 taking the information from Exhibit 7, 8, and 9, and trying
10 to do some sort of a rudimentary budget, and you've got the
11 projected income of the 328, right?

12 A Yes.

13 Q And that's the same number from Exhibit 9?

14 A Yep.

15 Q Correct? You then are estimating your call and
16 consulting income of 160?

17 A That was an estimation.

18 Q Yep.

19 A That's exactly correct.

20 Q Okay. And that's going to generate \$488,500, correct?

21 A Yes.

22 Q And then you have to subtract all this expense of
23 265,000 that we talked about as well?

24 A Correct, yes.

25 Q Okay. So, if we go back to January of 2023, when you

1 signed an agreement with the Bariatric Experts, you were
2 signing up for \$420,000 of guaranteed income, but you didn't
3 have \$265,000 of expenses to pay, did you?

4 A Correct.

5 Q And by your math, that was going to net you 220,
6 223,000, correct?

7 A Yes.

8 Q You took off child or the tax, correct?

9 A Yeah, that's me. That was a poor accountant.

10 Q Okay.

11 A So, I don't know what it would have been, but.

12 Q And then by your account when you then subtract out what
13 you owe Janelle and some other items, you are in the hole by
14 \$37,000?

15 A Yeah. Can I explain why I did this?

16 Q I, in a, in a second, or, or your lawyer will ask you.

17 A Okay.

18 Q But again, before you sign this agreement, you knew you
19 were signing up to your own estimation to be in the hole by
20 \$37,000, correct?

21 A Which is exactly why I got the line of credit to make
22 sure I could cover my expenses.

23 Q You'll agree with me that you are a very well-respected
24 surgeon in the United States?

25 A I, I, I would rather say that I have a good reputation.

1 Q Sure. In fact, people pay you to come give talks and to
2 teach other physicians some of the skills and knowledge that
3 you have, correct?

4 A Correct.

5 Q And that's even international? You talked about going
6 to Australia. You just recently were in England, correct?

7 A Yes.

8 Q I mean, you're, you're good at what you do?

9 A I am.

10 Q In fact, you're in demand to come teach other physicians
11 and give talks to other physicians?

12 A Yes.

13 Q If we look at Exhibit 14, this is a document from
14 Inspire Bariatrics for March of 2024, and I'm not sure
15 exactly what this document is supposed to tell us, but on the
16 left hand side at the bottom beneath the line, it says Puree
17 Individual total, and then it says 2359. Do you see that?

18 A Yeah, I do.

19 Q What is, what is that telling us? Is that an expense or
20 is that an income?

21 A I, um, I don't read these very well either, but, um.

22 Q I mean, I think if you tabulate up --

23 A --

24 Q -- those top three items --

25 A -- income.

1 Q Then equals this Peery Inspire \$7345.

2 A Oh, and it actually shows me right there underneath
3 Peery, the column. It's a total of those expenses. So, it's
4 printing business cards. It's Amazon office supplies. It's
5 Inspire.

6 Q Um, yep, with you now.

7 A QuickBooks subscription. All those.

8 Q Okay. So, then those first three items are all
9 expenses, which then flows into the Peery's Inspire \$7000
10 number, correct?

11 A Yeah.

12 Q And then below that it says Peery March equity paid, and
13 it says plus 7500; is that money that you received?

14 A That's money I, that's the check I wrote to them.

15 Q Okay. So, that's a check from you?

16 A To Inspire.

17 Q To Inspire, to cover the \$7300 that's right above it?

18 A Yeah. And so that 750 was an estimation of what she
19 thought it would be. And, and, obviously, she's very good at
20 guessing what the expense is going to be because it was very
21 close.

22 Q Okay.

23 A And then if I, then it rolls over if, and then my
24 collections were \$205, and that's from like copays when
25 patients comes into office that are part of the month, and

1 then it rolls over to the next month.

2 Q Okay.

3 A For expenses.

4 Q But you, if I, if I understood your testimony with your
5 attorney, you have not received any meaningful income from,
6 from or for Inspire Bariatric since you've started?

7 A I'm not sure what you mean. Inspire Bariatrics doesn't
8 give me an income. It's not the mechanism of it.

9 Q Well, let me ask you this --

10 A -- because of my clinical work and because yes, I have
11 received some surgical fees and some insurance payments for
12 work that I've done a while at Inspire Bariatrics.

13 Q Right. Maybe, I don't know if you can do this or not,
14 but are you able to tell us for the month of August how much
15 money you received in these call coverages that you do?

16 A Let's see.

17 Q In fact, let me --

18 A -- um, it's going to be around \$5000.

19 Q Okay. I want to go back; I'm going to go about this in
20 the other direction. As you sit here today, do you have any
21 idea how much money you earned from any medical related
22 component in August of 2024?

23 A No, I don't. That's too soon. We haven't figured that
24 out yet.

25 Q Okay. Let's go to July. Any idea what your income

1 would be for July of 2024? And I'm talking call, consulting,
2 and I'm going to say work for Inspire because I don't know
3 what else to call it.

4 A Which month?

5 Q July.

6 A \$22,365.23.

7 Q And you're looking at Exhibit 18?

8 A Yes.

9 Q And are you the individual that inputs the information
10 into the software that then generates a document like Exhibit
11 18?

12 A And that'd be an accountant.

13 Q So, if I'm reading Exhibit 18, the income for each of
14 these months would be the income that would flow into First
15 Creek Surgical Solutions?

16 A Yes.

17 Q And the income that's generated there would be from all
18 medical related services that you've performed in 2024?

19 A Or consulting.

20 Q Correct. I mean that, I'm trying to --

21 A -- any income that I've received.

22 Q Yes. I want, the only thing I'm really trying to set
23 aside would be any rental income from your properties.

24 A No, that doesn't flow in to that.

25 Q Okay. And I know you get a little spiff from a trust

1 that we're going to talk about.

2 A Sure.

3 Q But other than those two items, all the other income you
4 generate would flow in to First Creek Surgical Solutions and
5 be represented on Exhibit 18?

6 A Yeah.

7 Q Okay. So, then as we look, you've had total income the
8 first half of the year of \$295,000?

9 A Yes.

10 Q Okay.

11 A Well, and some of that is from the Bariatric Experts.

12 Q Yeah. I, but I, I understood that that flowed in to
13 your First Creek Surgical Solutions?

14 A Yes, absolutely.

15 Q All right. So, at the end of July, you had received
16 total income of almost \$300,000?

17 A Yes.

18 Q Okay. And then the monthly totals are right there,
19 correct?

20 A Yes.

21 Q So your best month was May when you generated \$57,000?

22 A Ah, February was a little more.

23 Q Oh, you're right. Thank you. February is 62,750.

24 A Yeah.

25 Q And then we go to your next best month which was May

1 which was 57,100?

2 A Yes.

3 Q Now, if we look at some of these expenses, and let's
4 come about halfway, two-thirds of the way down, and you have
5 payroll expenses. And beneath payroll expenses, you have
6 wages. Do you see that?

7 A Oh, okay. I was looking at a different total payroll.
8 Um, yes.

9 Q Who are you paying that \$68,333 to?

10 A And that would be to, ah, that was to me. So, at that
11 time the money would go into First Creek Surgical Solutions,
12 and when I was working for the Bariatric Experts and what
13 would happen is, um, we would then generate a whatever W2,
14 that's what I paid taxes on.

15 Q Okay. And the reason I'm asking is because as you flow
16 this all the way down, I mean the wages is under the expense
17 columns. Do you agree with that?

18 A Um, I don't, um --

19 Q I mean if you go up to the very top.

20 A Yes, okay, I see it.

21 Q Okay. We have expenses and then it starts with auto,
22 and it starts capturing all these things.

23 A Right.

24 Q So, when it's -- this 63 -- \$68,000 that's deducted,
25 that actually went right into your account?

1 A Yes.

2 Q Okay. So, then when we flow all the way to the end and
3 you have net income, you'll agree with me that we need to add
4 back in that \$68,000 because it went to you?

5 A I, I'm not sure how that works.

6 Q Well, I mean, you agree with me that it would be an
7 inaccurate representation of the money that's available to
8 you to claim that it's only \$100,000 when you've paid
9 yourself 68,000, correct?

10 A I think you're correct. Yeah, I, I, I do believe you're
11 correct, but I, I, I really I find this confusing. Um, so,
12 yeah, 51,000 to 30, expenses, and operating income.

13 Q And now if we look at --

14 A -- I'm not sure.

15 Q Okay. If we just look at up above wages a little bit,
16 there's this line called management fee expense.

17 A Yes.

18 Q Am I correct that that's the amount that's being paired
19 -- paid to the Bariatric -- Inspire Bariatric?

20 A Yes, it is.

21 Q Okay. So, if we look at May, for example, when you had
22 income of \$57,000, you would have paid \$17,000 out of that?

23 A Uh. Yes, it looks like that.

24 Q Okay.

25 A Yep, yeah, so that coincides exactly with March being

1 the smaller amount than what I've subsequently paid. You're
2 absolutely correct.

3 Q And then if we keep coming down in May under
4 professional fees, there's an amount for \$25,000. Who or
5 what did you pay for \$25,000 in May of 2024?

6 A I, I'm not sure. I, I, I'm not sure. I, I, I'm not
7 sure what that is.

8 Q I'm not trying to stick my nose where it doesn't belong,
9 but was that the amount that you would have paid to your
10 attorney for this proceeding?

11 A No.

12 Q Okay. But you don't know as you sit here what, what
13 that \$25,000 payment was for?

14 A Um, yeah, I'm not, I'm not sure what it's for. And I
15 don't know, I don't even know what the professionals. I'll
16 have to check on that. I really don't understand what that's
17 for.

18 Q Have you generated any, now that you have six months of
19 data and at least four months with Inspire Bariatrics, have
20 you or Inspire generated any sort of projections as to your
21 cash flow, income, anything like that?

22 A That was the purpose of this profit and loss sheet here.

23 Q Well, this is capturing what's happened historically?

24 A Yeah.

25 Q I'm asking, have you generated or has Inspire generated

1 any documents to project into the future of what your numbers
2 will be?

3 A Well, maybe not to your satisfaction, but this is the
4 best we can do. Okay. I mean we don't have a number. I
5 mean that's pulling, I don't know -- have a way of doing
6 that. All I can see here is the trend of how things improve.
7 And it's not enough, it's not enough. I get that.

8 Q And I'm asking because when given an opportunity to tell
9 the court what it is you want the court to do, you said you
10 wanted the court to do something that's fair, right?

11 A Absolutely.

12 Q Okay. So, I want to know how am I, how are you, how is
13 the judge supposed to know what is fair without being able to
14 look into the future with any sort of guidance with actual
15 numbers as to what your profit and loss is going to be? What
16 the prognostications are for First Creeks Surgical Solutions?

17 A I guess it depends on what you mean by being fair. I
18 mean, I think there's an, you can really look at what an
19 estimated expense is for somebody, and I've been very
20 generous with that. I've ex -- I've been given, I've
21 facilitated a very luxurious life for the last five years, at
22 least compared to mine. Um, I'm just, yeah, so I'm asking
23 for that to be reconsidered, and do I need to be paying for
24 luxuries that I didn't even myself don't enjoy?

25 Q So, you're asking this court to kind of reconsider the

1 whole idea of alimony and what you should be paying?

2 A I, I think it's been established that I cannot
3 financially continue to pay the alimony as it's been outlined
4 in the agreement, and which is also why I offered to come to
5 agreement with Janelle and she decided that she -- that's not
6 the purpose of what she wanted to do.

7 Q Does Janelle then get to renegotiate the property and
8 asset division from the divorce?

9 A I, I don't think she does.

10 Q Okay.

11 A But I don't think that's a bad idea. I would love to go
12 back and renegotiate what we originally agreed upon.

13 Q You'll agree with me that to resolve the divorce that
14 day in June at the mediation that Janelle was relying upon
15 your offers and your promises as to what you would pay to
16 her, correct?

17 A Repeat, please.

18 Q You agree with me that when you resolved the divorce,
19 Janelle was relying upon the promises of what you would pay
20 to her in alimony, correct?

21 A I think she would. I guess I don't know how to answer
22 that question.

23 Q In the last year, have you engaged in any discussions
24 with Sanford Health to return to Sanford Health to be a
25 surgeon at Sanford Health?

1 A No.

2 Q Did you engage in any discussions with Avera Health to
3 come be a surgeon at Avera Health?

4 A No.

5 Q What about Monument Health in Minneapolis?

6 A No.

7 Q Any hospital system in Minneapolis?

8 A No, I haven't engaged in any discussions with, have I
9 reached out to people? Yes, but not those three facilities
10 that you talked about.

11 Q What about any facilities located in Des Moines or
12 Omaha?

13 A Um, no, not those locations. I don't have a license to
14 practice in any of those states. So, I focused on where I
15 would be most likely to acquire gainful employment, which was
16 the state of Texas. And you can have some, the surrounding
17 states, there's some reciprocity a little bit with the
18 ability to practice.

19 Q But you're telling this court under oath that the only
20 meaningful option available to you in March of 2024 was to
21 sign on with a solo practitioner where you would not generate
22 any meaningful take home pay for months, and months, and
23 months?

24 A No, that's not what I would say.

25 Q Okay. What would you say then?

1 A What I would do, what I did was I chose the practice
2 that was most available and most likely to be able to
3 generate an income that was reasonable and appropriate for
4 where I was at that particular point in time. And yet I did
5 so and turned down other contracts that would have further
6 limited my ability to pay alimony. I turned those down.
7 Okay. So, what this did was facilitate me a practice that I
8 could control expenses, and the direction of the practice to
9 best meet my financial obligations. That's how I'd classify
10 it.

11 Q If you turn to Exhibit 19, that is a rollover IRA that
12 is in your name, correct?

13 A Yes.

14 Q And the balance in that IRA from April of 2024 is over
15 \$638,000?

16 A Yes.

17 Q And then if we quickly look at Exhibit 20. That is
18 another retirement account also from April of 2024, and in
19 that account you have \$58,000?

20 A Yeah, or maybe there's a money market, I guess I haven't
21 really looked at these. It was one of the two. It's what I,
22 it's what I'm relying on for retirement.

23 Q And then the next one, Exhibit 21 is a Roth also from
24 April of 2024, and that one has \$144,000 in it?

25 A I, I'm not sure if I'm looking at it, but I'm going to

1 take your word for it.

2 Q Well, it's Exhibit 21.

3 A Okay. Yep. And all of these are retirement.

4 Q And then the next one, Exhibit 22, this is what's left
5 from your Sanford retirement and that, trying to find the
6 date, that is at the end of March that one had \$130,000 in
7 it, correct?

8 A Yeah. I think this was, um, yeah, another retirement
9 vehicle by Sanford.

10 Q Okay. And then if we look at. Exhibit 12. This is a
11 personal financial statement that you filled out for a loan,
12 and at the bottom of the Exhibit 12, it's signed, I believe
13 that's March either 18 or 13 of 2024?

14 A 18.

15 Q And when you filled this out, were you trying to be
16 honest and forthright with the bank?

17 A Yes.

18 Q Okay. So, as we look through your financial statement
19 from March, on the first page, you're capturing some cash in
20 banks, and then some real estate and the loans. Do you see
21 that?

22 A Yeah.

23 Q So, if we look right in the middle, your homestead, that
24 that's the house in Sioux Falls that you lived in following
25 the divorce, correct?

1 A I believe so.

2 Q And you still own that house?

3 A I do.

4 Q And you represented to the bank that you believe that
5 property is worth 650,000, correct?

6 A That's what I feel it's worth. I think, yeah.

7 Q And then you listed the mortgage for that house at just
8 under 400,000?

9 A Yeah.

10 Q So, you're telling the bank that in that particular
11 property you have approximately \$250,000 of equity, correct?

12 A Yes.

13 Q And then the other, the investment property on 6th Street
14 that you bought for about \$90,000, you represented that you
15 believe it's now worth \$190,000?

16 A Yes.

17 Q And the mortgage on that is 68,000?

18 A Correct.

19 Q So, you're representing to the bank that on that
20 particular property you have about \$120,000 in equity?

21 A Yes.

22 Q So added together, you've got roughly \$370,000 in equity
23 and the two properties you own, correct?

24 A Yes.

25 Q All right. Now, on that same page, I'd make a joke

1 about you having handwriting like a physician, but can you
2 read what that says under other assets?

3 A Yeah. That's a trust from my father who passed away a
4 couple years ago.

5 Q And if I'm reading it, there's a trust where you have a
6 25% interest and a 2000 acre ranch with mineral rights,
7 correct?

8 A That would be with, um, that would be 25%. So, 500
9 acres of that 2000 acre ranch, and that is shared with, um,
10 two of my brothers, and then my nephew and my niece.

11 Q So, your, you are sharing the 25% interest with other
12 people?

13 A Yes.

14 Q Okay.

15 A So, I have 25% of 25%.

16 Q Okay. Well, let's, do you have any idea what this per
17 acre value of this ranch is in Texas?

18 A Yeah. It's seven, yeah, I think it's probably around
19 \$700 an acre.

20 Q Okay. So, if we take 2000 acres times, you said 700?

21 A No, 500 acres.

22 Q No, no, I'm, I'm gonna do the math the hard way.

23 A Your way?

24 Q What, how much per acre do you think?

25 A 700.

1 Q Okay. So, that would generate \$1.4 million in total
2 value for the ranch. Okay. If my math is right. Um --

3 A -- no, I mean, it's, it's, we call it a ranch, but it's
4 not an entity of a ranch. So, me and my brothers own 500
5 acres.

6 Q Okay.

7 A And my niece and nephew.

8 Q Okay. Well, let's do it this way then.

9 A And my niece and nephew.

10 Q Okay. So, there's 500 acres at \$700 per acre. That's
11 350,000.

12 A Okay.

13 Q And then you own 25% of that?

14 A Yes.

15 Q So, if we do that math, that would be another asset of
16 \$87,500 that you would own, correct?

17 A Absolutely correct.

18 Q Okay. And then if you turn to the second page of
19 Exhibit 12, in the middle, it's asking about Roths and other
20 retirement accounts.

21 A Yes.

22 Q And I know we just looked at those.

23 A Those are exactly what we looked at.

24 Q Yep. And when you add those together, you've got just
25 over \$900,000 in those three accounts?

1 A Yes.

2 Q And then separate from that you have the other
3 investment account that's noted below, which has \$58,000 in
4 it.

5 A Yes.

6 Q And then if you go to Exhibit 13, this is another
7 personal financial statement you filled out?

8 A Yes, this was for another bank, I believe, I think.
9 Yes, it was.

10 Q And this, yep, and then on the second page you signed it
11 and it's also dated, March 18 of '24?

12 A Okay.

13 Q Correct?

14 A Yes.

15 Q And now it's, it's organized a little bit differently,
16 but at the middle under assets, you are showing just over
17 \$2,000,000 of assets, correct?

18 A Yeah. Which page was this?

19 Q Right in the first page.

20 A On the first page.

21 Q Of Exhibit 13, right in the middle.

22 A Yes.

23 Q And you're showing total debts of just over 500,000?

24 A Yes.

25 Q So, your net worth as of March of 2024 was approximately

1 1.5 million?

2 A Yes.

3 Q And of that 1.5 million about \$950,000, so almost a
4 \$1,000,000 of it is sitting in four different investment
5 accounts, three of which are retirement accounts, correct?

6 A Yeah. Repeat that again.

7 Q Of the 1.5 million in assets, I mean of, of your, of
8 your, of your net worth, 950,000 of it is sitting in four
9 different accounts. Three retirement accounts and one
10 investment account?

11 A Yes.

12 Q Okay. So, you'll agree with me that as the last few
13 months unfolded, you had almost a \$1,000,000 in these
14 different accounts that you could have accessed to fund your
15 life, fund this business opportunity that you think is really
16 going to be something and also to pay Janelle what is court
17 obligated, correct?

18 A Yes. I could have, I could have totally dove into all
19 the money that I saved after our divorce, put into these
20 investment vehicles rather than spending them on things, for
21 my retirement, hopefully at a comfortable age.

22 Q All right. You could have done that, couldn't you have?
23 Right.

24 A Could have done what?

25 Q Accessed the money in those accounts?

1 A Probably illegally, I think. Fraught with all sort of
2 inappropriate ethical issues with that. I don't think it's
3 my responsibility to do that.

4 Q You don't think it's your responsibility to access funds
5 that are available to you to meet the obligations that you
6 agreed to and that the court ordered?

7 A No. I don't think that. I think what I feel is that I
8 didn't spend this money, um, on expenses on luxury. I did it
9 to try to make my life comfortable at some point in time in
10 the future.

11 Q And you could sell the two properties in Sioux Falls?

12 A I could.

13 Q And you could have generated well over \$250,000,
14 correct?

15 A Probably not because I didn't receive any interest in
16 those properties. So, which is why I put them back, took
17 them back off the market.

18 Q Well, if you would have maybe lowered the price a little
19 bit, you might have had a little more activity, correct?

20 A There's a lot of what ifs, you're correct.

21 Q You know, there's a lot of what ifs in this case, I'll
22 agree with you there. Um, had you sold those properties, and
23 let's say you even generate 200,000, you then add that to the
24 200,000 line of credit that you got that surpasses by
25 \$100,000 the \$300,000 line of credit you wanted so that you

1 could make your plans go and also pay Janelle, correct?

2 A Correct.

3 Q And if you did that, it wouldn't have impacted your cash
4 flow one iota, would it have?

5 A I'm not sure if I understand that last part there. It
6 would have definitely impacted my cash flow. I wouldn't have
7 had any cash flow when I retired.

8 Q So do you think that because you no longer like the deal
9 you struck in 2019, that Janelle should have to consume her
10 retirement accounts?

11 A Um, first off, it has nothing with what I like or
12 dislike, what it has to do with what I'm capable of doing.

13 Q Well, what you were capable of doing is calling the
14 administrator at American Portfolios to access money in this
15 account that has \$638,000. You could have done that,
16 correct?

17 A There's a lot of things I could have done.

18 THE COURT: How much more do you think you have, Mr.
19 Tobin? Because you're still going to call your client as
20 well, right?

21 MR. TOBIN: Correct. I'm very near the end of him. Do
22 you want to?

23 THE COURT: Okay. No, I don't need a break. I'm just
24 starting to worry about time a little bit, if we still have
25 Ms. Rabenberg to go and she takes even half as long as he

1 does, we're running out of time today. And I don't have
2 another day. We'd be in November before I can get a half day
3 without any other rescheduling. Go ahead whenever you're
4 ready.

5 MR. TOBIN: Okay. Thank you.

6 THE COURT: I'll just go with that caveat.

7 MR. TOBIN: Before I, I don't intend to take a
8 tremendous amount of time with my client, so I'm not feeling
9 overly nervous, but...

10 THE COURT: Okay. Well, you know your case more than I
11 do, so I will go off of you unless you're feeling nervous,
12 and you have a lot with his client.

13 MS. MOORE: Not to my knowledge at this point, Your
14 Honor.

15 THE COURT: Okay. That's fair.

16 MS. MOORE: I'm not, I'm not (unintelligible).

17 THE COURT: That's fair. If you're not nervous, then I
18 shouldn't be nervous either. So, go ahead, Mr. Tobin.

19 Q But you'll agree with me that you did not make any
20 alimony payment to Janelle in July of this year, correct?

21 A I disagree with that.

22 Q You did not pay to her the \$13,500 that was required?

23 A Correct?

24 Q And did you make the \$500 payment?

25 A You know what, actually, I'm not sure that's correct.

1 I did make, um, there was one more \$13,500 payment that I
2 made that I did not intend to make.

3 Q I think that one was in June.

4 A In June.

5 Q But you didn't make a payment in July, but you certainly
6 agree with me --

7 A -- I did make a payment in July.

8 Q The \$500?

9 A No, I believe we made \$7500.

10 Q Okay. We'll have Janelle answer that question. Can you
11 point me to a document that would show that you paid \$7500 in
12 July?

13 A I know I paid something every month. Um, and, and, and
14 I, and I honestly don't recall if that ended up happening, or
15 if it was, if that was the point where I wanted to pay
16 17,500, excuse me, 7500. And actually the thirteen five came
17 out. But every month I did make a payment -- she received.

18 Q Okay. Well, we'll have Janelle testify, but if we go
19 backwards, you'd agree that for September, the month we're
20 in, you only paid 3500?

21 A Yes, correct.

22 Q And then for August you paid 3500?

23 A Yep.

24 Q And then you agree with whatever you paid, if anything,
25 it was less than what the court required for July?

1 A Excuse me?

2 Q Whatever you paid in July, if anything.

3 A Yeah, correct.

4 Q It was less than what the court ordered?

5 A Correct.

6 Q And you, I mean those weren't mistakes that you made.

7 You knew that you were going to be paying in those months
8 less than the \$14,000 that was required.

9 A Yet, well, no, I didn't plan that. My plan was to get
10 in some agreement with Janelle back in April when I
11 approached her and gave her a very fair equitable solution to
12 the problem, but she didn't -- declined it. Actually didn't,
13 um, respond to it for two months.

14 Q Yep. And you never responded to her response, have you?

15 A Which one?

16 Q Never mind. And whatever you paid in July, it was less
17 than what the court ordered, correct?

18 A Correct.

19 Q And you knew that you were going to violate the court's
20 order starting in July when you paid less than what was
21 required, correct?

22 MS. MOORE: Objection, argumentative, calls for a legal
23 conclusion.

24 THE COURT: I'll sustain it. And I understand the point
25 that you're getting at there, Mr. Tobin.

1 Q You didn't pay \$14,000 in those months, did you?

2 A In, in which months?

3 Q July, August, and September?

4 A Correct.

5 Q And when you did not make those full payments, you had
6 over \$950,000 readily available to you in four different
7 accounts?

8 A Not regularly because getting in the retirement account
9 takes a little bit of work.

10 Q I -- did you even investigate?

11 A No, because I was hoping that we could come to an
12 agreement instead of just putting it on the back burner.

13 Q Okay. And how do you know it takes a lot of work to
14 access money in an IRA?

15 A Previous experience, and talking to other individuals,
16 it's pretty common knowledge.

17 Q But you didn't have conversations about pulling money
18 out?

19 A I wouldn't, I wouldn't see why I would.

20 Q Okay. You didn't have conversations with pulling money
21 out so you could meet your obligations in July, August, and
22 September, correct?

23 A I've, I've overly met my obligation that to my wife,
24 ex-wife.

25 Q But what this really comes down to is, is you, you just,

1 you really regret the alimony decisions you made in June of
2 2019, correct?

3 A To be honest, I do.

4 Q All right.

5 A I do. I, I wanted to have an amicable relationship and
6 I didn't receive that, and that's why I was so incredibly
7 generous.

8 MR. TOBIN: That's all the questions I have. Thank you,
9 Your Honor.

10 THE COURT: Redirect, Ms. Moore?

11 MS. MOORE: Yes, Your Honor. Thank you.

12 REDIRECT EXAMINATION

13 Q (BY MS. MOORE) Dr. Peery, Mr. Tobin asked you a series
14 of questions about the tax returns that we've offered and
15 specifically walked you through your income during the years
16 of 2021, 2022, and talked about how your income has actually
17 increased since the time of your divorce. Do you recall that
18 line of questioning?

19 A Yes.

20 Q To what do you attribute the increase in your income in
21 2021 and 2022?

22 A Well, I mean, it took a decline with Covid, and then so
23 it was just kind of ramping back up over time. And then also
24 my professional reputation. I mean, I was drawing people
25 from Iowa, and, Minnesota, and other places to do surgery on

1 them.

2 Q Had you remained with Sanford in 2023, would you have
3 expected to earn the same income as you had in either 2021 or
4 2022?

5 MR. TOBIN: Objection, Your Honor, calls for
6 speculation.

7 THE COURT: I'm going to overrule. He can answer if he
8 knows. If it's a wild guess, then I'll give it the credit it
9 deserves.

10 A Yeah, I would, my volume was about the same so I would
11 have expected about the same.

12 Q Since you left Sanford, how many jobs have you been
13 offered that pay in excess of \$650,000 a year?

14 A None.

15 Q Have you looked for other employment?

16 A Yes.

17 Q Beyond Inspire?

18 A Yes.

19 Q Mr. Tobin also asked you a series of questions regarding
20 the essential business model that is Inspire Bariatrics and
21 specifically he talked with you about Exhibits 7 and 8, which
22 talk about the shared expenses. If you were to go out on
23 your own and start your own private practice, would you have
24 been paying, approximately, \$22,000 a month in expenses?

25 A No, it would have been considerably more than that.

1 Probably for the first six months I could have been, I would
2 estimate spending somewhere between 50 and \$60,000 a month.

3 Q Is there anything unusual about Inspire Bariatrics
4 business model?

5 A Yeah, it's very lean. It's incredibly lean. This is a
6 steal. This is the, ah, the managed service -- services
7 agreement contract is what is being encouraged for healthcare
8 now in private practice. I mean, it's, it's, it's a decent
9 vehicle, and I'm very fortunate to have this agreement.

10 Q And so when we talk about this managed, managed services
11 agreement, what we're talking about that there is essentially
12 a sharing of expenses, correct?

13 A Absolutely. You know, because we can't, the reason that
14 private practice people make less, I mean, you give total --
15 medicine is for profit. I don't care what entity it is.
16 Someone's making a profit. It's either, and it, well, it's,
17 it's the administrator, okay. In private practice, you don't
18 have the avenues for making revenue like they do. I mean,
19 they get better contracts. They get, you know, all these
20 things. So, you cannot negotiate well with an, with a payer
21 as a solo practitioner. They'll, they'll play hardball with
22 you and say, well, I got, I got another guy over here,
23 they'll accept \$900. Well, I mean, he might have one year of
24 experience. He might, you know, I mean, he's one of the take
25 it just to get going. So, what a manager service agreement

1 does is, is brings people together so that you can actually
2 negotiate a fairly reasonable reimbursement practice. And so
3 I just feel that's a much more ethical way of practicing.

4 Q And there's nothing unusual about that type of a shared
5 expense arrangement, correct?

6 A No. Ah, no, well, it is. Keli does a little bit
7 different because in my other contracts that I see, and I was
8 being greatly taken advantage of. There's a lot of what you
9 would call blue sky, you know, in which that the person who
10 was starting to practice was finding some way for me to pay
11 more of the expenses than the 50%. And you know like the,
12 the one that I turned down was if I went over my expenses,
13 and everything, and say I made a \$100,000, at the end of that
14 year, I want to receive \$100,000. In January I received
15 eight, you know, that would have been paid off over the next
16 12 months. So they really have that cash in hand for a much
17 longer period of time than they should. So, I, I didn't sign
18 that contract.

19 Q So, is it fair to state that over time you believe that
20 the relationship you have with Dr. McCalman will ultimately
21 pay off?

22 A Definitely, for everybody.

23 Q And if you had started your own private practice, you
24 would be looking at a worse situation than you are currently
25 in; is that fair?

1 A I could have never done it. I could have never done it.
2 I would have never, ever been, yet I would have been so far
3 behind the ball because I would have started to pay a
4 contractor to help me do that. And then they would have
5 started, you know, you know, so that's like \$20,000 a month,
6 and then I would, they would help me try to negotiate a line
7 of credit, and they just flat out refused me because of my
8 burden of monthly expenses.

9 Q Does Dr. McCalman do surgery?

10 A Yes.

11 Q And does she do the same type of surgery that you do?

12 A Ah, for the most part. She is learning procedures that
13 I do. I'm, I'm teaching her some more advanced procedures.

14 Q And as someone who had a practice that had at least been
15 established for several years at the time that you look to
16 partner with her, did you believe there was opportunity there
17 for you to grow your own practice more quickly?

18 A Definitely, because they had the mechanisms where I
19 wouldn't be concentrating on just building the structure of
20 it, and so I was able to engage, and engage a bunch of
21 different entities which has benefited her, too. You know,
22 so like Texas Health Allen and, um, Methodist, um, Salina,
23 which is a brand new hospital who we're going to be working
24 with. I mean, I'm -- we're busting it. I mean we're busting
25 our butt to create a great business model. Um, and so I

1 mean, I, I'll just keep on doing it because I, I feel that
2 gives me the most control over my future. I might not, I
3 might not make the most money in the world, but I, I'll be
4 able to come to work every day.

5 Q Mr. Tobin also asked you a series of questions about why
6 you chose to go to the Bariatric Experts and talked about you
7 had, at least initially an expectation of lower income for
8 that first year, but also believed that you would eventually
9 make even more than what you had been at Sanford; is that
10 correct?

11 A Yes.

12 Q And what was your ultimate goal in joining Inspire
13 Bariatrics? Were you hoping to acquire an interest actually
14 in that practice?

15 A I don't think I really want to have an interest in the
16 practice because it's really nothing that creates any value,
17 um, but what I did talk to Keli about was that, you know, we
18 lease right now, maybe I go into a partnership with her to
19 buy a building or something like that. If you know that,
20 that's where I would see value.

21 Q And I apologize, I think I misspoke in my question. My
22 intention was when you were initially looking at the
23 Bariatric Experts to inquire as to what your ultimate goal
24 was in that particular practice?

25 A I was naïve. And my intention was to buy that practice

1 which has no value, and, um, and the overhead was tremendous,
2 and at one point in time we talked. He said there's not
3 enough business for two surgeons here, and I said, well, why
4 don't you retire? And he goes, you don't want my overhead.

5 Q You talked about what led you to leave Sanford, but I
6 think something that got lost and that was the fact that you
7 also needed to change from Sioux Falls. And in your direct
8 testimony you mentioned there were some social reasons for
9 that. You also mentioned that you actually have family in
10 Texas. What were the other stresses in your life at the time
11 that you decided you needed to change not only from Sanford,
12 but from Sioux Falls itself?

13 A Um, ah, well, um, yeah. I mean my, it was, it was
14 difficult to live in a small town as a surgeon with an ex-
15 wife that was as, you know, involved in, it's not society,
16 but in, in, in the community with, and so like it was just, I
17 felt very socially isolated, I guess is what I'm trying to
18 say.

19 Q Do you feel like you lost some friends in the divorce?

20 A I definitely lost a lot of friends in the divorce.

21 Q Do you feel like you lost some family in the divorce?

22 A Yeah.

23 Q Did you feel like staying in Sioux Falls, regardless of
24 your employment long-term, was a good idea?

25 A Um, despite all the difficulty that I've had over this

1 last year, I am very grateful to be out of Sioux Falls. Um,
2 I'm, I, I'm doing better down there, so..

3 Q Was money a source of stress during your marriage to Ms.
4 Rabenberg?

5 A It was.

6 Q Was it a constant source of stress?

7 A It's always been, yeah.

8 Q Did you have different ideologies when it came to
9 spending money?

10 A I don't know if that's the case necessarily as much as I
11 didn't, life was easier if I didn't address some things. And
12 so I did my best to resave them through a retirement vehicle
13 and just try to choose (unintelligible).

14 Q You were asked a lot of questions about what you could
15 have done over the, the course of the last few months to make
16 the entirety of the existing spousal support payments to Ms.
17 Rabenberg. As an initial matter, are you aware if there are
18 any tax consequences or penalties that apply in the event
19 that you try to withdraw from a retirement account or other
20 IRA?

21 A Yeah, I am. I'm aware there is.

22 Q And even if you had done that, do you think that's a
23 long-term solution to where you are at currently from a
24 financial perspective?

25 A I'm not sure if I quite understand. I mean I would, I

1 mean what I saved over the last, I mean, what I was able to,
2 I built that over the last five years of our divorce. Um,
3 both of the properties, I had none, you know, I, you know, I
4 maxed out my 401k's and my investment vehicles. Um, I, um,
5 it would have helped her financial situation if I went ahead
6 and liquidated all -- everything that I created subsequent to
7 our divorce.

8 Q Did you leave Sanford with the intention of trying to
9 get out from underneath your alimony obligations?

10 A No.

11 Q Did you take the job with Inspire Bariatrics with the
12 lower guaranteed payment with the intention of trying to
13 avoid alimony payments?

14 A No. It seemed like my best ability to, um, meet as best
15 as I could, actually. Um, I, I turned down an opportunity
16 because it was, well, I, I didn't turn it down. I, I told
17 them what I would need, and it would need to be fast. It
18 would need to be quick. It would, you know, otherwise I
19 wouldn't need it. And so, and I just think that I've been
20 burnt twice in business models, and I could have easily been
21 burned the third time until I looked at that contract, but,
22 um, this gives me the best ability to control my future and
23 my destiny and be financially solvent. And it had nothing to
24 do with paying Janelle less. I think it was very clear
25 during Covid, during, you know, other times where when money

1 is tight that I met those obligations. I went a whole year
2 with a much smaller budget and spent a lot less and traveled
3 a lot less for leisure and things like that. To me that
4 financial obligation, recognizing there was an end point to
5 it that I would be at a practice that was successful. And it
6 didn't come to flourish, and so I went into survival mode
7 and, and I, I think I did very well.

8 Q Do you view some of what happened with the Bariatrics
9 Experts now with the benefit of hindsight? In other words,
10 when you chose to pursue a new opportunity beyond Sanford,
11 did you have any reason to believe that the Bariatric Experts
12 was not going to be a good opportunity for you?

13 A I completely overly estimated and beat them up and tried
14 to really understand, but you know, I, I'm like a, I don't,
15 I, I had no business background. I mean, I mean, I just
16 don't understand that. I didn't and you know, honestly, I
17 didn't understand the environment down there. And so it's
18 just, it's very different. And so, you know, maybe, I mean,
19 I've had a crash course in that, and I think I would still
20 would have some difficulty in navigating it, but I sure
21 understand a lot more now.

22 Q And when you chose to join the -- Dr. McCalman at
23 Inspire Bariatrics, did you do so with the intention of
24 deliberately not paying your spousal support?

25 A No. I asked for some help in that regard.

1 Q And you did avail yourself some loans, correct?

2 A Yeah. And it was, it was when, it was when I couldn't
3 get a full line of credit that we, um, you know, to the best
4 of our knowledge that we guessed I would need. That is when
5 I asked for it.

6 Q And at this point in time, the \$4000 payment that you've
7 been making every month for the spousal support and the \$500
8 contribution to the retirement account of her choice, do you
9 think that's sustainable moving forward knowing what you now
10 know about your business, and what you project to be your
11 future income?

12 A Yeah. I mean, I'll, I'll, yeah, I mean, I think it'll
13 be tough for a while and I, I can't predict the future and
14 now I'm kind of anxious period that I'll run out of money.
15 It, it seems to be going pretty quickly, but, you know, I
16 hope so. I mean, I really do. I think I can, I think that
17 I'm given the best opportunity for it. If it doesn't come to
18 fruition then, I don't know what I'll do.

19 Q Thank you.

20 MS. MOORE: No further questions.

21 THE COURT: Thank you. Any recross based on those
22 questions?

23 MR. TOBIN: Very brief, Your Honor.

24 RE CROSS EXAMINATION

25 Q (BY MR. TOBIN) Doctor, you'll agree with me that the

1 -- starting your own practice from scratch was not the only
2 other alternative, correct?

3 A Yes, it was.

4 Q That was it?

5 A Yeah, I investigated the other opportunities and none of
6 them would avail themselves to me.

7 Q So, you're, you're telling this court that a nationally
8 renowned surgeon who teaches other surgeons, in fact,
9 teaching the surgeon you're now working with greater tricks
10 and, and maneuvers, the only option was to join a practice
11 where you will make no money --

12 A That's --

13 Q -- or you have to start your own?

14 A That's incorrect.

15 Q What, what is incorrect about what I said?

16 A That I'm not going to make any money.

17 Q You've made very little money since you've started with
18 Inspire, correct?

19 A No, I've, I've, I've made, ah, you can take a look at
20 it. I mean we've already established I've made what a
21 hundred, \$200,000.

22 Q Well, if we look at that, the vast majority of that was
23 in the first part of the year when you were still with the
24 Bariatric Experts, correct?

25 A Some of that, but you know if we, you know, we looked

1 at that, I'm making \$20,000. I'm taking calls. I'm busting
2 my ass. I don't know what else do you want from me.

3 Q And you, you talk about these social issues and
4 pressures that required you to apparently leave an incredibly
5 established, successful practice in the community your kids
6 lived in, but some of those social issues were because of
7 some of your infidelities during your marriage, correct?

8 A Is that a question we really want to get into about
9 infidelity? Because we can talk about that if you want.

10 Q I, I asked you a question.

11 A Um, then rephrase and go ahead and repeat the question
12 so I can make sure I answer that.

13 Q Sure. You and your attorney wanted to talk about some
14 of these social pressures and some of these social issues
15 where you felt isolated as a reason that you needed to leave
16 the area, and part of the social isolation and the issues you
17 confronted were your infidelities during your marriage,
18 correct?

19 A Absolutely not.

20 MR. TOBIN: That's all that I have, Your Honor.

21 THE COURT: Thank you. Dr. Peery, you can go ahead and
22 step down.

23 (The witness was excused.)

24 THE COURT: And I don't know if you want to take a short
25 break, I was kind of waiting cause I thought there was

1 someone coming in to do a walk through warrant this
2 afternoon. Um, they had emailed me that they were coming
3 over, and I told him to wait about five minutes and that was
4 about five minutes ago. So, maybe just like a five minute
5 recess or so between because your next move is calling your
6 client, I presume?

7 MR. TOBIN: Yes, Your Honor.

8 THE COURT: All right. And so we'll, I'll be in here,
9 but take about a five minute recess.

10 (Recess at 2:19 p.m.)

11 (Resume at 2:24 p.m.)

12 THE COURT: We'll go ahead and go back on the record.
13 The parties and their attorneys are both present again. And
14 any other witnesses to call, Ms. Moore?

15 MS. MOORE: No, Your Honor. Thank you.

16 THE COURT: I'll go ahead and turn it over to you, Mr.
17 Tobin.

18 MR. TOBIN: Thank you, Your Honor. We would call
19 Janelle Rabenberg.

20 THE COURT: All right. And come up here and I'll get
21 you sworn in before you sit down, please. If you'll please
22 raise your right hand.

23 JANELLE RABENBERG,
24 being called as a witness, being first duly sworn, testified
25 as follows:

1 THE COURT: Thank you. Go ahead and have a seat and
2 please remember just to pull the microphone to wherever it
3 best picks up your voice.

4 THE WITNESS: Okay.

5 THE COURT: Go ahead, Mr. Tobin.

6 MR. TOBIN: Thank you.

7 DIRECT EXAMINATION

8 Q (BY MR. TOBIN) Good afternoon, Janelle.

9 A Good afternoon.

10 Q Could you state your name and your address, please.

11 A I'm Janelle. And, sorry, Janelle Marie Rabenberg and
12 2911 South Ridge (unintelligible), Sioux Falls.

13 Q And who all lives with you at that address?

14 A Currently, it is myself and my seventeen-year-old
15 daughter, JoJo.

16 Q And what year in school is JoJo?

17 A She's a senior.

18 Q Do you have other children?

19 A I do.

20 Q How many children do you have?

21 A Four.

22 Q And are all four of those with Dr. Curtis -- Dr. Peery?

23 A Yes.

24 Q And what's the name of the oldest?

25 A Samuel.

1 Q And how old is Samuel?

2 A Samuel is 30.

3 Q And where does Samuel live?

4 A Samuel lives in an apartment here in Sioux Falls.

5 Q And what is child number two?

6 A That would be John or Jack, and he also resides here in
7 Sioux Falls.

8 Q And your daughter Cici?

9 A Um, yep, Cecelia is, just turned 24, and also lives here
10 in Sioux Falls.

11 Q And, obviously, JoJo does as well?

12 A Um-hum.

13 Q So, you and all four of your kids are in the Sioux Falls
14 community?

15 A Correct.

16 Q Where did you grow up?

17 A I grew up in Mitchell.

18 Q And what year did you graduate from high school?

19 A In 1988.

20 Q Did you go on to education following your high school
21 graduation?

22 A I did.

23 Q Where did you go?

24 A I attended SDSU and transferred to the University of
25 South Dakota.

1 Q And did you ultimately graduate?

2 A I did.

3 Q What year did you graduate?

4 A I graduated in '93.

5 Q And what did you graduate with?

6 A Um, it was a dental hygienist, dental hygiene major.

7 Q Where did you meet Dr. Peery?

8 A At the University of South Dakota.

9 Q And when did you and he get married?

10 A We were married, um, let's see March 27th of 1994. And
11 when he was when, when you got married, where was Dr. Peery?
12 What was he doing?

13 A I believe he was just, ah, he -- we met. He was in his
14 first year of medical school. He was just finishing.

15 Q And did you ever work as a dental hygienist?

16 A Yes, I did.

17 Q And for how long did you work?

18 A Um, let's see, from I graduated right after I met
19 Curtis, started working in Sioux Falls residency, and at
20 least six years.

21 Q And I think even Dr. Peery agreed that when his
22 residency was going on, you guys lived in Des Moines?

23 A Yes.

24 Q And did you work as a dental hygienist then?

25 A I did, yes.

1 Q And did you continue, what were the hours that you were
2 working as a dental hygienist?

3 A Um, well, at that time I was working usually six days,
4 five and a half days a week.

5 Q And that heavy schedule continue even after you started
6 having children together?

7 A Correct.

8 Q Ah, when you were pregnant with your third child, is
9 that when you stopped working?

10 A Yes, right before I had Justine, I was done.

11 Q And --

12 A -- or, excuse me, Cecilia.

13 Q And then soon after did the -- your family relocate to
14 Sioux Falls?

15 A Um, we actually had Cecilia, Curtis finished his last
16 year. We decided to stay in Des Moines for two years. He
17 joined (unintelligible) and attending practice there.

18 Q Um --

19 A -- moved to Sioux Falls.

20 Q But after, when you were pregnant with Cecilia and then
21 you quit working, did you ever return to the workforce at any
22 other time?

23 A No.

24 Q So when you, the family moved to Sioux Falls, did you
25 ever work in Sioux Falls?

1 A No.

2 Q From your perspective, was that a joint decision between
3 you and Curtis?

4 A Yes.

5 Q And you then fulfilled the duties of homemaker?

6 A Correct.

7 Q Mother? And mother?

8 A Um-hum.

9 THE COURT: I need you to do the same thing, please, say
10 yes or no.

11 THE WITNESS: Oh, yes, yes.

12 THE COURT: Thanks.

13 Q What, when, when you guys relocated to Sioux Falls at
14 that time, was Curtis a practicing surgeon?

15 A Yes.

16 Q And what sort of lifestyle did you and the kids enjoy
17 being in Sioux Falls, given Curtis and his employment, and
18 his income?

19 A We enjoyed a very nice lifestyle once we moved to Sioux
20 Falls. His practice was very good. We lived in a nice home.
21 We paid our bills off quickly. Children were in private
22 school, um, country club. It just, it was a very, yeah, very
23 nice lifestyle.

24 Q What, what country club did you and Curtis belong to?

25 A When we first moved to town, we were members of Westward

1 Ho, which is now Country Club of Sioux Falls. And then later
2 switched and we're at Minnehaha.

3 Q How old are you today?

4 A I'm 54.

5 Q And when were you born?

6 A March 30th of 1970.

7 Q If we fast-forward to the divorce, you and Curtis with
8 your lawyers had a mediation in June of 2019 to resolve the
9 divorce?

10 A I believe so, yes.

11 Q And you had an attorney at the time?

12 A Yes.

13 Q And who was that?

14 A Victoria Duehr.

15 Q And with Victoria's help, the divorce was successfully
16 resolved at the mediation?

17 A Yes.

18 Q And part of the things that were discussed that day were
19 issues with alimony?

20 A Yes.

21 Q And issues with how the assets and debts that the two of
22 you had were also going to be divvied up between you?

23 A Yes.

24 Q How important was it to you in getting the divorce
25 resolved knowing what the alimony offers were from Curtis to

1 you during that process?

2 A Very important.

3 Q I mean if we go back to 2019, did you have any separate
4 money that was in your own name in your own account anywhere?

5 A I remember, yes. I did have my own, a little 401k that
6 I had from my years of working.

7 Q Other than the 401k from two decades before, any other
8 nest egg or money that you had in your own name?

9 A No.

10 Q And when the divorce was finalized, you of course knew
11 that he would pay \$19,000 plus until the house was sold?

12 A Correct.

13 Q And do you agree that the house was then sold in January
14 of 2020?

15 A Yes.

16 Q So, from the time the divorce was resolved until then,
17 did Curtis make those alimony payments?

18 A Yes, he did.

19 Q And then the alimony by the agreement would reduce to
20 \$14,000 for a period, well, let's be, let's be accurate. It
21 was \$13,500 for a period of six years?

22 A Correct.

23 Q And then separately, there was a \$500 contribution he
24 would make for a period of 10 years?

25 A Correct.

1 Q And after the divorce was finalized, how important was
2 that alimony to you in your life?

3 A Um, it was my sole source of income. I am -- have
4 children living with me, not just JoJo, but adult children.
5 It's very, very important.

6 Q Other than his alimony payments, and, and we can throw
7 in the \$1500 in child support, did you have any other means
8 of money coming into your accounts to help keep you and the
9 kids afloat?

10 A No.

11 Q Were you completely reliant upon him and the alimony?

12 A Yes.

13 Q And were you basically completely reliant upon him for
14 the last 15 years of your marriage?

15 A Yes.

16 Q I mean, you weren't working at that time?

17 A No.

18 Q So, whatever was being generated and spent, and the
19 trips, and the country clubs, and the cars, that was all
20 exclusively from Curtis and his work as a surgeon?

21 A Correct.

22 Q As you look at your life now to where it was in 20 --
23 in June of 2019, is your lifestyle any really, is it really
24 different in any way, shape, or form?

25 A Not particularly, no.

1 Q Is it maybe a tad easier with your kids just continuing
2 to get older?

3 A Correct, yes.

4 Q From a need perspective, are you, do you still need the
5 alimony from Curtis?

6 A Yes.

7 Q Do you have any other sources of revenue that would come
8 to keep you afloat without it?

9 A I do not.

10 Q Have you done anything on your side of the equation that
11 would give rise to why alimony should go away?

12 A As far as I know, no.

13 Q You're not here asking that the court increase it, are
14 you?

15 A I am not asking for an increase, no.

16 Q Are you simply asking the court to have Curtis pay what
17 Curtis agreed to pay?

18 A Correct.

19 Q If you look in the small exhibit book, yep. If we look
20 at Exhibit A, what is Exhibit A?

21 A Yeah.

22 Q What is Exhibit A?

23 A Um, Exhibit A is looks like, um, a description or a list
24 of my monthly expenses.

25 Q And as you put Exhibit A together, what, what were some

1 of the things you did to compile the information and figure
2 out what was going to be in some of these various categories?

3 Let's start with maybe some of the easy ones.

4 A Okay. I mean this as far as I went to, I mean, I know
5 most of them by heart, but I mean, yeah, I went to my bank
6 statements, and went through and highlighted what each of
7 them were. I, you know, went on to where I pay online, and,
8 ah, looked them up.

9 Q And let's, if we work at Exhibit M, and if you go to the
10 very last page, in the upper right hand corner, there's a
11 statement period for that bank statement. What is that
12 statement period?

13 A It is April 20th to May 21st.

14 Q And then if we go to the very first page of Exhibit M,
15 what is the statement period for that statement?

16 A It would be January 24th and through February 22nd.

17 Q And I'm not going to take the time to go through them,
18 but are the statements for the other months between the end
19 of January to the end of May, are they also included within
20 this exhibit?

21 A I believe so, yes.

22 Q Now, if you just quickly thumb through, there appears to
23 be a lot of highlighting on these statements.

24 A Yes.

25 Q I know you just referenced this, but who did that

1 highlighting?

2 A I did.

3 Q And to do that, did you actually sit down and pull these
4 statements out and literally go through them line by line?

5 A I did.

6 Q And then at the bottom there are numbers and then
7 highlights. Do you see those?

8 A I do.

9 Q And if, and if these pages were in color.

10 A Um-hum.

11 Q How many different highlight colors would we maybe see?

12 A Um, probably five.

13 Q And as you were going through them, what was the point
14 that you were using different highlighters to capture
15 different things on these statements?

16 A Um, I was just trying to break the spending expenses
17 into categories, so that it was easy to reference for
18 everyone.

19 Q And when you put together the budget, which is Exhibit
20 A, were you heavily relying upon your review of all those
21 statements that are Exhibit M?

22 A Yes.

23 Q And at the end of your monthly budget, what is the
24 total?

25 A Um --

1 Q -- on Exhibit A?

2 A On Exhibit A. I don't think I have a total on mine.

3 Oh, I do. I'm sorry. It is \$14,008.74.

4 Q Now, we -- did you exclude some obvious expenses for
5 your minor daughter?

6 A Most definitely.

7 Q For example, she goes to school at O'Gorman?

8 A Yes, she does.

9 Q And who pays the tuition for O'Gorman?

10 A I pay the tuition for O'Gorman.

11 Q But have you set that aside and that's not included here
12 on the monthly expenses?

13 A Um, I don't believe it is on this page.

14 Q And other expenses for your daughter, have you also
15 excluded those, so they're not necessarily reflected on this
16 document?

17 A On, yes, a lot of them.

18 Q Okay.

19 THE COURT: Can I ask a clarifying question? So, are
20 you saying that your daughter's not included in the, say,
21 five to six lines in the bottom?

22 THE WITNESS: She is, she is included in those, yes.

23 MR. TOBIN: Well, we'll, we'll go through them.

24 THE WITNESS: Yeah. She's, she's included in, in those.

25 THE COURT: You don't have to go through them. I just

1 wanted to make sure from my end what --

2 MR. TOBIN: -- sure.

3 THE COURT: -- what she's alleging she needs per month
4 based on that for herself and/or daughter.

5 THE WITNESS: Yeah.

6 Q I mean if we look at the, the groceries, food, DoorDash
7 line. Do you see that?

8 A Yes.

9 Q And that's a little over \$2000 a month?

10 A Yep.

11 Q Now, did you arrive at that number by literally going
12 through your bank statement and highlighting things?

13 A Yes.

14 Q When you buy groceries, and food, and DoorDash, are you
15 the only one that's eating it, or are others?

16 A Others.

17 Q And who typically are the others?

18 A Um, well, Josephine, um, friends. We have, you know,
19 friends over a lot. Other, my other children come over on a
20 regular basis.

21 Q So, JoJo may be included in that particular number
22 merely because she's part of your household?

23 A Correct.

24 Q But when you went through your bank statements, you were
25 spending approximately \$2000 a month on this general category

1 of groceries, food, DoorDash?

2 A Correct.

3 Q All right. If you go to Exhibit B, would, would that be
4 your Verizon bill?

5 A Yes.

6 Q And that's what you pay every month?

7 A It is.

8 Q Now, does that include JoJo or any of your other
9 children on that particular bill?

10 A It includes all of my children.

11 Q All right. And then if we go to Exhibit C. What is
12 Exhibit C?

13 A Um, Minnehaha County Club statement.

14 THE COURT: Do you mean all four? I apologize. Do you
15 mean all four of your children like you're paying your 30
16 year olds Verizon bill?

17 THE WITNESS: Yes. They are supposed to.

18 THE COURT: Okay.

19 THE WITNESS: They're supposed to, they're supposed to,
20 they're supposed to pay me back.

21 THE COURT: Sorry, this is odd for me to see that.

22 THE WITNESS: Yeah.

23 THE COURT: So, I wanted to double check --

24 THE WITNESS: -- no, and it's --

25 THE COURT: -- if you meant all of your children.

1 THE WITNESS: That's, yeah.

2 THE COURT: Like all four of them. Okay. Got it.

3 Thanks. Go ahead, Mr. Tobin, sorry for the interruption.

4 MR. TOBIN: That's okay. I will slip a note to your
5 children to set their expectations accordingly, Your Honor.

6 THE COURT: Much lower. Thank you.

7 Q Exhibit C at Minnehaha Country Club. How long have you
8 been a member of Minnehaha Country Club?

9 A Oh, my goodness. Um, I can't even tell you for sure, ah
10 --

11 Q -- but it goes well back even before the divorce
12 happened?

13 A Yeah. JoJo has basically grown up there, yeah.

14 Q And then Exhibit C or D, would that be your energy bill?

15 A Yes.

16 Q Now, we have one bill.

17 A That is my gas. Oh, excuse me. D. Yeah, that is my
18 gas bill.

19 Q Gas bill, I'm sorry.

20 A Um-hum.

21 Q We have one gas bill, but when you went through your
22 bank statements to figure out what the average was going to
23 be, did you look at more charges per month for MidAmerica?

24 A Yes.

25 Q And then Exhibit E that is your energy bill?

1 A Correct.

2 Q And the same, we have one here, but did you actually go
3 through and look at about five or six different months of
4 payments to come up with that average?

5 A Yeah, I did. This one, this is actually low, yeah.

6 Q And then Exhibit F again, this is for your Sioux Falls
7 Utilities, but you looked at multiples to come up with the
8 average?

9 A Yep, water bill.

10 Q And then Exhibit G, that is the registration for your
11 vehicle?

12 A Yes.

13 Q And that would show what you have to pay every year to
14 reregister it every year?

15 A Correct.

16 Q And then Exhibit H, is that the bill for your --

17 A -- car insurance.

18 Q For the car insurance. How often do you pay the car
19 insurance?

20 A Um, twice a year.

21 Q And then if we look at Exhibit I, is this a snapshot of
22 some accounts and your mortgage?

23 A Um, yes, it is.

24 Q So, this looks like it was printed and, and captured on
25 September 16th?

1 A Correct.

2 Q And as of September 16, in your checking account, how
3 much money did you have?

4 A \$2972.38.

5 Q And how much money do you have in your savings account?

6 A \$4.02.

7 Q And then what was your mortgage bal -- mortgage balance
8 as of that day?

9 A The mortgage balance was \$287,118.77.

10 Q Then if we turn to Exhibit J, is that some additional
11 information on your mortgage?

12 A Um, yeah. That's the breakdown, and it's my payment and
13 principal plus escrow and the balance.

14 Q And, and kind of the upper part, well, maybe more in the
15 middle, but it says that the duration of your mortgage is
16 from January of 2020 to February of 2050?

17 A Yes.

18 Q So, the marital house was sold in January of 2020?

19 A Correct.

20 Q And then did you then move and reside where you're
21 currently residing?

22 A Yes.

23 Q And when you did that, you took out a 30 year mortgage?

24 A Yes.

25 Q But for the alimony, how would you ever be able to make

1 these mortgage payments?

2 A I would not.

3 Q And then if we turn to Exhibit K. What is Exhibit K?

4 A That would be my car payment.

5 Q And your car payment is almost \$700 a month?

6 A Yes.

7 Q And you have almost \$11,000 remaining on that?

8 A Yes.

9 Q Now, the other items that are on your budget, Exhibit A,
10 for example, your, your medical insurance?

11 A Yes.

12 Q We have that at \$590 a month?

13 A Yep, correct.

14 Q And who do you have your medical insurance through?

15 A Um, you mean as far as hospital, Sanford, Sanford
16 Health.

17 Q And then you've got dental insurance, vision insurance,
18 and then you also have various prescriptions that total
19 almost \$630 a month?

20 A Correct.

21 Q But the other items in here such as your travel, your
22 personal care, your clothing, groceries, the numbers that
23 show up on Exhibit A, that comes from you going through your
24 bank statements, Exhibit M?

25 A Yes.

1 Q So, do you believe that Exhibit A is a fairly accurate
2 good faith effort to itemize your monthly expenses?

3 A I feel like it is a fairly accurate, yes.

4 Q If you look in the other binder, if we go to the very
5 end.

6 THE COURT: In defendant's binder, Mr. Tobin?

7 MR. TOBIN: Yes, Your Honor.

8 THE COURT: Okay.

9 (Exhibit 32 was marked for identification.)

10 Q Exhibit 32. Would these be a series of your bank
11 accounts from U.S. Bank?

12 A Yes.

13 Q And again, if we look at the first page, the statement
14 period is what?

15 A Um, the statement period is December 22nd through
16 January 23rd.

17 Q And then if you go to the end of Exhibit 32, what is the
18 statement period?

19 A It is April 20th through May 21st.

20 Q All right. So, we have roughly five or six months'
21 worth of statements, and they're for you?

22 A Yes.

23 MR. TOBIN: Your Honor, we would offer defendant's
24 Exhibit 32.

25 MS. MOORE: No objection.

1 THE COURT: Defendant's Exhibit 32 will be admitted in
2 to the record without objection from the defendant.

3 (Exhibit 32 was admitted into evidence.)

4 THE COURT: I don't think I've ever said that before,
5 and I just had to say it. Go ahead and continue, Mr. Tobin.

6 Q At the very bottom right hand corner, there is what we
7 call a Bates number, and it says Janelle, and then there's a
8 series of numbers. That's in real small prints so you're
9 going to need your glasses.

10 A Ah, yes, on, on the first --

11 Q Yep. They're on everyone now.

12 A Yep.

13 Q So, if you page ahead to what I'm going to call page
14 three.

15 A Okay.

16 Q At the very top, it's the account summary for the
17 statement from December '22 through January '23?

18 A Yes.

19 Q Okay. And this account summary is tracking in summary
20 form all the deposits and then all the card withdrawals,
21 other draws and checks that are paid?

22 A Yes.

23 Q Okay. So, you're beginning balance was what?

24 A Um, \$716.25.

25 Q And then the deposits and credits totaled how much?

1 A 16,000 and 722.16.

2 Q And of that would almost all of it consist of the
3 alimony and the child support that you received?

4 A I would say yes, almost all of it.

5 Q And then as we go through all the withdrawals, what was
6 your ending balance?

7 A \$806.94.

8 Q So, in that particular month, which includes Christmas
9 and New Years, you went through roughly almost \$16,700?

10 A Correct.

11 Q So, as we look at that then in comparison to your budget
12 from that particular month, your budget's a little low?

13 A Yes.

14 Q Okay. Now, if we page ahead to the next month, which is
15 page eleven with that little print in the bottom.

16 A Okay.

17 Q That statement period is from January 24 to February 22?

18 A Yes.

19 Q And on that account summary, what was your beginning
20 balance?

21 A 806.94.

22 Q What were the deposits and credits you received?

23 A Um, 17,061.

24 Q And then what was your ending balance?

25 A 190.93.

1 Q So, in that particular month you went through a little
2 over \$17,000?

3 A Yes.

4 Q So, again, that is a little higher than your budget?

5 A Yes.

6 Q Now, what would be some things that you're going to do
7 every month, and I'm thinking of O'Gorman that would maybe
8 start to impact this that's not on your budget?

9 A Oh, my goodness.

10 Q Well, let me ask you this, do you pay the tuition?

11 A Yes.

12 Q Do you pay that monthly?

13 A Yes.

14 Q Putting money in her lunch account?

15 A Yes.

16 Q Paying for some dance activities?

17 A Yes.

18 Q Okay. But in that particular month, again, what you
19 actually went through is a little higher than the budget on
20 Exhibit A?

21 A Yes.

22 Q Okay. Let's page ahead to page 19, and that's the
23 statement from February 23 to March 21, and again, what was
24 your beginning balance?

25 A Um, my beginning balance was 190.93.

1 Q And what was the total amount of the deposits and
2 credits?

3 A Um, 16,623.56

4 Q And then what was your ending balance?

5 A 587.64.

6 Q So, in that particular month, again, you went through,
7 approximately, \$16,000?

8 A Correct, yes.

9 Q Now, just so we're all, I don't think it's really in
10 dispute, but if you looked a little further down on that
11 page, there is a deposit on February 29 of \$13,500?

12 A Yes.

13 Q And is that the alimony you received?

14 A Yes, it is.

15 Q And right below it is an electronic deposit from the
16 South Dakota DSS for \$1500?

17 A Yes.

18 Q And is that your child support?

19 A Yes, it is.

20 Q So, the alimony and child support are definitely hitting
21 this account every month?

22 A Yes.

23 Q Okay. I'm going to do this just a couple more times, so
24 let's page ahead to page thirty.

25 A Okay.

1 Q And that's from the end of March to April 19th?

2 A Yes.

3 Q And again, your beginning balance was?

4 A \$587.64.

5 Q And the deposits and credits total what?

6 A \$18,105.09.

7 Q And your ending balance was what?

8 A \$719.76.

9 Q So, about \$18,000 that month? Correct.

10 A Correct.

11 Q And then if page ahead to page thirty-eight, that's the
12 statement from the end of April to the end of May?

13 A Yes.

14 Q And, again, what was your beginning balance?

15 A \$719.76.

16 Q The deposits and credits totaled what?

17 A 16,762.85.

18 Q And your ending balance was what?

19 A 281.25

20 Q So, in that month, again, you went through over \$16,000?

21 A Yes.

22 Q So, when we look at your budget, sometimes when we get
23 in these sorts of proceedings, people like to really inflate
24 their budgets, and make them look as heavy as possible, but
25 in this particular case, your budget that you've set forth

1 trying to capture primarily the expenses for you, it's just a
2 little over \$14,000?

3 A Yes.

4 Q You're actually going through even more money than that?

5 A Yes.

6 Q Janelle, I'm gonna have you look at, Exhibit L. Yep, in
7 the small binder, correct.

8 A Okay.

9 Q Before I turn to Exhibit L, we just looked in a summary
10 fashion at about five or six different months' worth of
11 statements. Do you believe that the spending that would be
12 captured on those statements would be any materially
13 different from what you were spending back in 2019 when the
14 divorce was resolved?

15 A No, not really.

16 Q I mean did you think, I mean, I'm sorry, did you think
17 about when the divorce was resolved to the present, has there
18 been any material increase or decrease in your lifestyle or
19 spending?

20 A No.

21 Q Does it remain pretty much the same?

22 A Yes.

23 Q Now, if we turn to Exhibit L, from what -- what's your
24 understanding of what Exhibit L is?

25 A Exhibit L is the summary synopsis of my retirement

1 account.

2 Q And the beginning balance on this statement, what does
3 that total?

4 A Um, \$587,006.05.

5 Q And this statement up at the very top captures what time
6 period?

7 A July 31st through August 30th of this year.

8 Q Now, if you turn to the second page, that total amount
9 is comprised of six different accounts, do you see that?

10 A Yes.

11 Q And the top one, you should probably just close it
12 right, it's got \$0.35 in it?

13 A Correct.

14 Q But the others have the value that then totals the
15 583,961?

16 A Yes.

17 Q Do you have any other accounts, retirement accounts, or
18 investment accounts beyond what is showed here with Raymond
19 James on Exhibit L?

20 A No.

21 Q So, this \$583,000, would represent what I call your nest
22 egg?

23 A Correct.

24 Q So, other than this account and any equity that you will
25 slowly build over time in your house, do you have any other

1 meaningful assets of any kind?

2 A No.

3 Q When Dr. Peery did not make some payments, what -- did
4 you have to draw on some of those accounts to continue to
5 maintain your lifestyle?

6 A Sadly, I did, yeah.

7 Q And if you turn to Exhibit R, Exhibit R is an IRA that
8 is one of those five accounts we just looked at on the other
9 exhibit. And down under the activity under this statement,
10 did you have to make a withdrawal?

11 A Yes.

12 Q And how much did you withdraw for this statement?

13 A 16,000.

14 Q And up at the top, what is the date range that this
15 statement covers?

16 A July 31st through August 30th.

17 Q And on the year-to-date, how much did you have to
18 withdraw from that IRA?

19 A 39,000.

20 Q And why are you having to withdraw funds out of your IRA
21 from your nest egg?

22 A Because Curtis, ah, didn't pay me.

23 Q To access the funds in your IRA, do you know, are you
24 going to have to pay penalties, and taxes, and other items
25 like that?

1 A I absolutely am.

2 Q When you had to access those funds, did you find that to
3 be a difficult, or drawn out, or, or challenging process?

4 A No.

5 Q I mean, did you work with your professional advisors?

6 A I did.

7 Q And they assisted you?

8 A I did, yes.

9 Q Now, you've sat here today, and you've seen the
10 documents where Curtis and his retirement vehicles has about
11 \$950,000?

12 A Yes.

13 Q Do you believe it's fair that you have to cannibalize
14 and eat your nest egg because he is not providing the money
15 on the alimony that he agreed to and that the court has
16 ordered?

17 A Um, say that one more time? I -- say that again.

18 Q Do you believe it's fair to you that you have to use up
19 and cannibalize your nest egg to meet your needs because
20 Curtis won't make the alimony obligations he's required to
21 pay?

22 A No.

23 Q How does that make you feel, knowing that you've got a
24 nest egg that's a finite amount, and you're having to
25 cannibalize that because Curtis won't keep his word from what

1 he said and signed on June 19 of 2019?

2 A Well, it's a little frightening, and, um, quite
3 honestly, it's teaching me a very valuable lesson.

4 Q You're 54?

5 A Yes.

6 Q And under the terms of the agreement, you would receive
7 about another year and a half at the 13,500 level?

8 A Correct.

9 Q That would go until January of 2026?

10 A Correct.

11 Q And then after that you would get nine years at \$7000?

12 A Correct.

13 Q So, if we do that math, how old will you be when
14 Curtis's alimony obligation ends?

15 A I'll be 64.

16 Q You're essentially at retirement age?

17 A Yes.

18 Q Was it your plan when you resolved your divorce that you
19 were basically going to live on the alimony to keep your
20 standard of living what it was and postpone dipping into the
21 nest egg for as long as possible?

22 A Yes.

23 Q And your basic life for your adult life, the, the only
24 years you meaningfully worked were about six years early in
25 your marriage?

1 A Yes.

2 Q As you sit here, do you have any idea what your Social
3 Security benefit will be?

4 A No.

5 Q Do you expect it to be very much?

6 A No.

7 Q So, as you look forward to your twilight years, like I
8 like to call them, what do you believe was the necessary
9 thing to make to meet, to make your ends meet in those
10 twilight years?

11 A My retirement account.

12 Q If hypothetically, if, for at least a couple months,
13 Curtis paid 3500 a month?

14 A Yes.

15 Q And for easy math, if we just say that's a \$10,000
16 deduction or reduction in what he's supposed to pay, and if
17 he doesn't make those payments, and let's say he only makes
18 the 3500 going forward. So, you're not getting the
19 additional \$10,000 for the next few years? That would be
20 \$120,000 that you would not be receiving from July of 2024
21 till July of 2025?

22 A Yes.

23 Q And if you wanted to maintain the standard of living
24 that you've maintained for the last 25 years of your life,
25 well, you have to then access your nest egg and pull out

1 120,000?

2 A I would absolutely have to.

3 Q And then if we just continue to do that math out into
4 the future. How long will that nest egg last?

5 A Not very long.

6 Q When you resolved the divorce?

7 A Yes.

8 Q And you knew these payments were going to be made for 15
9 years?

10 A Yes.

11 Q Did that give you some confidence and some security,
12 knowing that the nest egg would then be there for your
13 twilight years?

14 A It did.

15 Q What do you recall, Janelle, about the money you
16 received for alimony in July of this year?

17 A Um, in July this year, um, I recall getting a check from
18 Curtis. I normally do, didn't open it right away, um, went
19 to the bank the end of the month and tried to deposit it.
20 Well, first I should say I guess the bank and I opened it and
21 noticed that it was for 75 hundred, 7500 instead of the
22 normal 14,500, and deposited it, tried to deposit it, and the
23 bank told me that I would not be able to deposit the check.

24 Q And did the bank give you any explanation as to why that
25 check could not be deposited?

1 A They said I need to contact the person who had the check
2 drafted.

3 Q And did you have some communication with Curtis about
4 that \$7500 check?

5 A I did.

6 Q Did that conversation or communication involve as to why
7 it could not be deposited?

8 A Um, it did. Dr. Peery, Curtis told me that it was an
9 error on the bank's part and that he had no intention of me
10 cashing that check.

11 Q Were you ever able to cash or deposit that \$7500 check
12 for July?

13 A No.

14 Q Did you receive any other monies from Curtis for July to
15 make up, or substitute, or otherwise meet his alimony
16 obligations for July?

17 A No, not that I recall.

18 Q But he specifically communicated to you that it was a
19 bank error, and he had no intention of making that payment?

20 A Correct.

21 Q And then for August, did you receive any money for
22 alimony?

23 A I believe I received \$3500.

24 Q Did you ever agree to forego alimony in July or only
25 accept 3500 in August?

1 A I did not.

2 Q And then how much did you receive for September?

3 A I believe 3500 again.

4 Q So, as you sit here for the months of July, August, and
5 September, you've received a total of 7000, and not the
6 13,500 each month that was legally, legally required?

7 A Correct.

8 Q And to make up for that shortfall, you had to access
9 funds in your nest egg?

10 A I did. I had, yeah. I was not prepared.

11 Q As you sit here today and look into the reasonably
12 foreseeable future, do you anticipate any meaningful change
13 in your budget and your need for the alimony?

14 A No.

15 Q You're gonna continue to have your mortgage well into
16 the future?

17 A Yes.

18 Q You're gonna continue to have to pay for your health
19 insurance?

20 A Yes.

21 Q You're going to have to continue to pay for your
22 vehicle?

23 A Yes.

24 Q For the insurance on the vehicle?

25 A Yes.

1 Q And all the other expenses and items that we noted on
2 your, on your budget, Exhibit A?

3 A Yes.

4 MR. TOBIN: That's all the questions I have, thank you,
5 Your Honor.

6 THE COURT: All right. Thank you, Mr. Tobin. All
7 right. Cross-examine, Ms. Moore.

8 MS. MOORE: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 Q (BY MS. MOORE) Ms. Rabenberg, the two binders that you
11 have in front of you, if you could please grab the larger one
12 please, and then turn to Exhibit 1. And once you're there,
13 please let me know and then I'll give you more details.

14 A Okay. Okay.

15 Q Thank you. Mr. Tobin asked you a series of questions
16 with regard to the mediation that occurred in this case,
17 correct?

18 A Correct.

19 Q And he asked you a series of questions about the
20 division of the assets and the debts of the parties in
21 addition to the alimony discussions, correct?

22 A Correct.

23 Q As far as the division of the parties' assets, is that
24 also included in Exhibit 1 to the best of your knowledge?

25 A To the best of my knowledge.

1 Q And let me ask you a better question rather than you
2 flipping through it. I'll, I'll try to make it easier. As
3 far as what you and Curtis owned during the marriage, those
4 were divided as part of your divorce, correct? Such as your
5 home, for example?

6 A Yes.

7 Q And pursuant to the stipulation and agreement, you
8 agreed that you would sell that home, and that you would
9 divide the proceeds equally, correct?

10 A Yes.

11 Q And until such time as the house was sold, Curtis paid
12 \$19,250 a month to ensure that the mortgage was made,
13 correct?

14 A Correct.

15 Q And, in fact, you asked, ah, that you be given
16 approximately six months in the home to ensure that you could
17 build up credit for a credit history that would have then
18 enabled you to look at purchasing your own home, correct?

19 A I don't recall that, but...

20 Q Okay. If it says that in your agreement, would you have
21 any reason to dispute it?

22 A I guess not, no.

23 Q Thank you. In addition to the house, Curtis also had a
24 retirement account through Sanford, correct?

25 A Yes.

1 Q And I'll have you look at page eight of Exhibit 1,
2 please, specifically, Section 13.

3 A Page eight of Exhibit 1?

4 Q Yes, please.

5 A Okay.

6 Q And I'll have you look at Section 13 at the bottom. Do
7 you see that?

8 A I do.

9 Q And that's labeled retirement accounts and investment
10 accounts, correct?

11 A Correct.

12 Q And in that it would be five or six lines up from the
13 bottom indicates that as part of the divorce you received
14 pursuant to an order \$465,697 from that retirement account,
15 correct?

16 A Correct.

17 Q And you did in fact receive that?

18 A I did.

19 Q And you had some other investment accounts with Raymond
20 James; is that correct?

21 A Correct.

22 Q And you also received two out of the three of the
23 existing accounts there, correct?

24 A Correct.

25 Q And in addition to that, ah, Dr. Peery continues to pay

1 for a life insurance policy on which you were the designated
2 beneficiary in the amount of \$750,000, correct?

3 A I don't believe that's correct anymore. I can't
4 remember exactly, but at one point a couple years ago Curtis
5 told me he didn't feel he should pay for that anymore, and I
6 believe I took that over, I mean...

7 Q And you're talking about --

8 A -- sure.

9 Q And I apologize, I didn't catch that last part.

10 A I, I guess I'm not sure.

11 Q You're not sure as you sit here today, but you would
12 agree with me that the stipulation and agreement contained a
13 paragraph relating to that, correct?

14 A I believe so.

15 Q And if he represents that he has, in fact, paid those
16 amounts, do you have any evidence to the contrary, as you sit
17 here?

18 A No.

19 Q So that was also provided for your benefit here,
20 correct?

21 A Correct.

22 Q And as it relates to the specifics of the spousal
23 support payments, you would agree with me that there were
24 certain conditions under which those payments would
25 terminate, correct?

1 A Correct.

2 Q So, by way of example, if you were to remarry, he would
3 no longer have an obligation to pay alimony?

4 A Correct.

5 Q If you and a significant other decided to live together,
6 whether in your home or the other person's homes, the
7 obligation would terminate, correct?

8 A Correct.

9 Q If either one of you were to pass away unexpectedly or
10 earlier than obviously one would like, the obligation would
11 terminate, correct?

12 A Correct.

13 Q And also in the event that Dr. Peery ever realized a
14 certain percentage of monies on a patent that he had, if he
15 were to receive a \$1,000,000, that obligation would
16 terminate, correct?

17 A Correct.

18 Q So, is it fair to state that at the time that this
19 agreement was mediated, you understood that certain
20 circumstances might arise in life wherein you would not be
21 guaranteed 15 years of alimony?

22 A I am, to be honest, I knew, um, I put that in there
23 about the patent, but I believe we both knew that that was
24 probably never going to come to fruition. I think all of us
25 did when we were mediating that day. So, no, I, when I went

1 into the agreement at mediation, I was under the belief that,
2 you know this is what I was going to get for this number of
3 years.

4 Q But nevertheless you did agree to the inclusion of those
5 particular items that would terminate alimony?

6 A I did agree to that. I apologize.

7 Q And I apologize, I don't mean to talk over top of you,
8 so...

9 A Sorry.

10 Q As far as your marriage, you talked about having
11 education in the area of a dental hygienist, correct?

12 A Correct.

13 Q Does that job require continuing education or training?

14 A Yes, it does.

15 Q Have you kept that up over the years?

16 A I have not.

17 Q Could you do so at this point?

18 A I could not.

19 Q Why not?

20 A Um, when we were going through the divorce proceedings,
21 we looked into that. I looked into that. We talked to the
22 professors and my license had lapsed many, many years before,
23 and, and I would have to go back to take college courses
24 again. To be -- to practice, I'd have to basically start
25 over to practice hygiene at that point.

1 Q Okay. Is that something that's palatable to you at this
2 point?

3 A Hum, I don't know, it might have to be.

4 Q Have you worked at all since the divorce?

5 A I have not.

6 Q Have you looked for employment in any field?

7 A I have not.

8 Q Since the divorce?

9 A I have not.

10 THE COURT: I'm sorry. I'm just going to have to ask
11 you to wait to answer until she's done with her question --

12 THE WITNESS: Oh, sorry, okay.

13 THE COURT: -- and then we don't talk over each other.
14 That's okay.

15 Q Some of it is my cadence, too. I tend to pause a little
16 bit, but I'll try to do my best not to talk over top of you.

17 A Okay.

18 Q So, thank you. So, you haven't sought out any
19 employment in any field since the time of divorce?

20 A I have not.

21 Q Do you have any plans to do so?

22 A Um, at this point, no. Not while, yeah, no, not with my
23 daughter at home. No.

24 Q And she's a senior at O'Gorman this year, correct?

25 A She is, um-hum.

1 Q And will be graduating in May, approximately, of next
2 year?

3 A Yes.

4 Q Any reason to believe she's not in good academic
5 standing that she won't graduate?

6 A No.

7 Q And then do you expect her to go to college at that
8 point in time?

9 A I do.

10 Q And so at that point she most likely, at least for the
11 academic year, would be moving out of your home?

12 A Yes.

13 Q Ms. Rabenberg, I'm going to turn you back to the smaller
14 binder, please. And if you could open it to Exhibit A,
15 please. I want to walk through some of the specific line
16 items with you, and my apologies if you testified to this
17 earlier. I wanted to make sure I caught it correctly, as it
18 relates to the car insurance, for which you have denominated
19 \$112.32 per month?

20 A Yes.

21 Q Did you indicate whether that amount includes insurance
22 only for you or is it inclusive of others as well?

23 A It's only for me.

24 Q Okay. Thank you for that. As far as the Verizon line
25 item for the cell phone, I believe you indicated that your

1 children are supposed to pay you back for their respective
2 shares of that monthly bill. Do your children, in fact,
3 reimburse you for that?

4 A Um, some of them do, and some of them not so much,
5 some of them don't.

6 Q So, is it fair to state you've continued to pay it
7 regardless of whether they compensate you for it?

8 A Um, it's a little more complicated than that, but yes.

9 Q And how long have you been paying those expenses for
10 them?

11 A Um, since Curtis and I divorced.

12 Q So, no change, in any event, since the time of the
13 divorce you continue to pay their cell phone bills?

14 A I -- the Verizon bill is less expensive for everyone.
15 So, we're all on a family plan. So, we decided that they
16 would each pay me individually for their portion of the bill.
17 Does that -- do each of them always get that paid, no.

18 Q But you did make the decision to continue to pay the
19 bill irrespective of whether they pay you?

20 A I, I guess, yes. It's not that, it's not that simple,
21 but, yes, yes.

22 Q Okay. There's a line item for Country Club on here in
23 the amount of \$1712 per month. Is that Minnehaha Country
24 Club?

25 A Yes, it is.

1 Q Okay. And as far as that \$1712 per month, what does
2 that consist of?

3 A Ah, food. Entertainment. Golf, tennis lessons.

4 Q Is it primarily food and activities as opposed to a
5 membership fee?

6 A Um, no. There is a membership fee included in there.

7 Q Okay. And do you know how much that membership fee is
8 per month?

9 A Well, it's, um, a couple thousand dollars every,
10 quarterly, every three months.

11 Q So, annually, we're looking at what for the membership
12 dues?

13 A I can't even. It's not, I don't even want to guess. I
14 don't have it in front of me. It just changed.

15 Q Okay. And so the membership fee does not include food,
16 correct?

17 A No.

18 Q So, if you go out there and dine in the restaurant, or
19 sit in the bar area, you're going to incur a bill on top of
20 what you pay to be a member at Minnehaha County Club?

21 A Yes. We have a food minimum, but yes.

22 Q Okay. And in terms of the activities as well, ah, do
23 you have, what kind of membership do you have? Do you have a
24 full certificate membership with full access?

25 A I have a membership that I had with doctor, I keep

1 saying doctor with Curtis.

2 THE COURT: We're just recording the proceedings.

3 THE WITNESS: Yeah, I'm sorry.

4 THE COURT: So then it messes it up if we need a
5 transcript.

6 THE WITNESS: Yeah, I'm sorry.

7 THE COURT: That's okay. Go ahead and continue your
8 answer at this point.

9 A No, repeat your question.

10 Q Okay. This is a tough way to have a conversation. I
11 fully acknowledge that. As far as the membership type that
12 you have at the country club, what all does it include?

13 A It is considered, it's called a social plus membership,
14 and it includes, you know, any social activities. It
15 includes pool. It includes some, a little bit of golf, and
16 it includes tennis.

17 Q Do you consider a country club membership to be
18 necessary?

19 A Um, and for me, yes.

20 Q Why?

21 A I do. I mean, um, it, I don't even know if I, when
22 Curtis and I, um, divorced, it was the one place that I could
23 continue to go that I knew I was not going to run in to him
24 and whomever he was with. So, it, it was important to me at
25 the time, and it was very important to my children. They,

1 you know, they weren't out there just because I started the
2 country club or joined when -- after our divorce. They've
3 been out there from -- for years.

4 Q At the time of your divorce, how many of your children
5 were still under the age of 18?

6 A Um, I can't remember, if Ceceila was 18 yet. I, I'm so
7 nervous. Someone do the math for me. She's 24 now, so, um,
8 JoJo.

9 Q Okay. So, as far as then your other children taking
10 advantage of the club, they would have been adults at the
11 time, correct?

12 A Yes, if they are on, yes, they're on my membership until
13 they're 23.

14 Q Okay. And so you'd be paying for their benefits out
15 there as well?

16 A Correct.

17 Q Would you dispute the fact that if you relinquish your
18 country club membership that that would say you an
19 appreciable amount of money on an annual basis?

20 A No.

21 Q So, you don't think \$1712 --

22 A -- no, I'm saying, yes, it would. I mean can you ask me
23 the question again? Go ahead and say it again.

24 Q Sure.

25 A So, I can make sure I'm answering correctly.

1 Q Sure. Thank you. So, as far as the \$1712 that you're
2 spending per month at Minnehaha Country Club, would you agree
3 with me that if you relinquished your membership, that would
4 be a significant savings to you on an annual basis?

5 A Yes.

6 Q Is that something you're willing to do?

7 A Um, no. I mean, again, I might if I have to.

8 Q You have a line item here for groceries, food, and
9 DoorDash in the amount of \$2078. Do you consider food to be
10 what you would consumer at home or does that include
11 restaurants and eating out?

12 A Um, a little bit of both.

13 Q Okay. So, how does that differ than from the next line,
14 which includes entertainment, lift, and restaurants for \$830?

15 A Um, actually, it, it doesn't really. I mean it could be
16 included in the, we just did it for breakdown purposes, I'm
17 not sure, but yeah.

18 Q And then as I understood your testimony earlier in
19 regard to at least the categories of personal care, clothing,
20 shoes, etcetera, entertainment, lift, and restaurants, and
21 groceries, food, and DoorDash. You do include Jo as being
22 supported by those amounts?

23 A Yes.

24 Q Anyone else that you include in those particular
25 categories?

1 A Um, yes. I mean I, my children live in town. I have a
2 close relationship with them, and children come over for
3 dinner. We go out for dinner, spend time together. So, yes.

4 Q Okay. So, you would consider these amounts, in other
5 words, to include more than just two people?

6 A Some of them, yes.

7 Q When you say some of them, which ones?

8 A Um, I would say entertainment, restaurants, dining.

9 Q Okay. I was curious about clothing and personal care,
10 too, if there were more than two people involved in those
11 categories.

12 A No.

13 Q Okay.

14 A No, not unless I mean it's, I mean, sorry, I'm just so
15 frazz -- it's, I am a mother. Are you a mother, Meredith?

16 Q I'm not.

17 A No, okay. So --

18 THE COURT: I'm going to shut this down. Cause we're
19 short on time, I'm going to have you keep going with question
20 and answer style.

21 THE WITNESS: Okay. Okay.

22 THE COURT: I understand you're nervous.

23 THE WITNESS: Okay. Yeah --

24 THE COURT: -- it's okay. Take a deep breath --

25 THE WITNESS: -- um, it, it --

1 THE COURT: -- take a moment if you need to.

2 THE WITNESS: Okay. It's just --

3 THE COURT: Do you need a brief recess?

4 THE WITNESS: No, I don't.

5 THE COURT: Okay.

6 THE WITNESS: It, it's just hard to, some of these to
7 answer exactly yes or no, but I will try.

8 THE COURT: Okay.

9 Q Let me ask you a different question. As far as
10 everything that's listed on Exhibit A, which you've
11 represented to be actually a lower estimate of your monthly
12 expenses, as I understand it. Do you consider all of those
13 items, and all of those amounts to be necessary?

14 A Yes.

15 Q Ms. Rabenberg, I'm going to have you switch back to that
16 larger binder, please.

17 A Okay.

18 (Exhibit 33 was marked for identification.)

19 Q And I'm going to make you flip all the way to the back,
20 it's Exhibit 33 or Tab 33, please. And is this a copy of
21 your Capital One credit card statement that your attorney
22 would have provided to me earlier this year?

23 A Yes.

24 Q And the date on this, if you can see at the top, is
25 December 18th, 2023, to January 17th, 2024. If you need your

1 glasses, by all means, please put it on. It's small.

2 A Mine is, mine says February 11th. No, I'm sorry. Excuse
3 me, yes, you're correct.

4 Q Thank you. And I understand February 11th is the due
5 date for the required payment, so but we're talking about
6 this would have been the time point, time period for December
7 18th through January 17th, 2024, correct?

8 A Correct.

9 Q And so what was the balance at the time of this
10 statement?

11 A Um, previous balance, 23,239.39.

12 Q Do you know as you sit here today what your balance is
13 on that credit card?

14 A I do not.

15 MS. MOORE: Your Honor, I'd move for the admission of
16 Exhibit 33.

17 THE COURT: Any objections, Mr. Tobin?

18 MR. TOBIN: No, Your Honor.

19 THE COURT: All right. Exhibit 33 will be admitted in
20 to evidence without objection.

21 MS. MOORE: Thank you.

22 Q Ms. Rabenberg, do you generally carry a fairly large
23 credit card balance like that?

24 A Um, yes.

25 Q And is that something that would be consistent with the

1 time of your marriage as well?

2 A And, yes.

3 Q So, and I, I heard you to testify you really haven't
4 changed your lifestyle, or your spending habits since the
5 time of your divorce, correct?

6 A Correct.

7 Q Ms. Rabenberg, would you agree with me that when two
8 people get divorced, the expectation is that they'll start
9 their separate lives and essentially start two separate
10 households?

11 A Yes.

12 Q And as a result of that, both parties have two sets of
13 expenses, or each party has his or her own expenses?

14 A Yes.

15 Q And things oftentimes change after divorce in terms of
16 one party's ability to maintain a similar lifestyle; is that
17 fair?

18 A I guess so.

19 Q And is it fair to state that in this particular case,
20 you essentially want to continue to live as if you were still
21 married to Dr. Peery in terms of budget?

22 A Um, I, I, I am, I have the money that he has given me
23 that we divided at the divorce, during the divorce
24 proceedings, or whatever. I'm living my life the way I want
25 to. I mean, we're not here because I'm asking for more. So,

1 I'm not quite sure what you're getting at.

2 Q You want to continue to live the same life that you did
3 during the marriage?

4 A I was, I've lived this life for quite a while, yes.

5 Q And up until July of this year, you would agree with me
6 that Dr. Peery made all of the payments that were set forth
7 in the agreement, correct?

8 A Correct.

9 Q And he also made payments for your daughter's health
10 insurance?

11 A He was obligated to do so, yes.

12 Q But he made all those payments?

13 A I believe so.

14 Q Provided for an allowance for her?

15 A He, yes, because he wanted to, yes.

16 Q And so --

17 A -- I didn't ask for that, yeah.

18 Q And so in that regard, as a general matter, he lived up
19 to the bargain that he originally made under the agreement
20 until July of this year, correct?

21 A Yes.

22 Q Do you believe that he is intentionally underemployed
23 himself to essentially get out from underneath his alimony
24 obligation to you?

25 A Um, he has made reference to me many times that he

1 would love to come back to court to revisit this issue.

2 Q Do you believe that he has intentionally underemployed
3 himself to get out from underneath his alimony payment?

4 A I believe that he left a very busy practice, and his
5 children and family to join something that he was not sure of
6 what his financial situation was going to be. Yeah, I, I
7 don't know. I don't know what his intentions were.

8 Q This wasn't the first time Dr. Peery had considered
9 joining private practice, correct? He had, in fact, had an
10 opportunity during your marriage in approximately November of
11 2017?

12 A I'm not sure what practice that would be. You'd have to
13 remind me.

14 Q Certainly. Do you recall discussions about actually
15 buying into a practice in Lincoln, Nebraska?

16 A Um, barely.

17 Q But you don't dispute that that happened?

18 A I dispute that we may have had discussions, um, it's a
19 former college buddy of his, I believe.

20 Q Okay. But you don't dispute that, that was just --

21 A -- I don't dispute that there may have been some --

22 THE COURT: -- you, you've got to wait --

23 THE WITNESS: -- I'm so sorry --

24 THE COURT: -- until she finishes answering or finishes
25 the question.

1 THE WITNESS: My apologies.

2 THE COURT: That's okay. That's all right. We'll just
3 push pause and go ahead and --

4 THE WITNESS: -- I, I --

5 THE COURT: -- ask it a --

6 A THE WITNESS: -- I, I don't see that.

7 Q Okay. So you were familiar with the private practice
8 model before?

9 A Um, somewhat.

10 Q And I think you alluded to the fact that this was an
11 individual who owned this particular medical practice in
12 Lincoln who was a college friend of Dr. Peery's; is that
13 correct?

14 A If I recall something like that, yes.

15 Q Okay. And you understood at that time that it was
16 possible that his income would in fact decrease from what it
17 was at Sanford, correct?

18 A My understanding was the private practice model from
19 when we were married, most of the practitioners that I know
20 that were in private practice did considerably better than in
21 a hospital setting.

22 Q And what's said understanding based on?

23 A Um, conversations with Curtis.

24 Q In this particular case, do you recall why that
25 opportunity to purchase into the private practice didn't

1 occur?

2 A I do not.

3 Q I don't have any further questions for you. Thank you,
4 Ms. Rabenberg.

5 THE COURT: Redirect, Mr. Tobin.

6 MR. TOBIN: Very briefly, Your Honor.

7 REDIRECT EXAMINATION

8 Q (BY MR. TOBIN) Janelle, some questions about whether
9 you should give up the country club. Ah, I know we went over
10 this, but you and your family were members of the country
11 club for years before the divorce ever happened?

12 A Yes.

13 Q And you've maintained the membership at the country club
14 post-divorce, even when Dr. Peery still lived in Sioux Falls?

15 A Yes.

16 Q And were -- when you were thinking about your needs when
17 you were getting this case settled in 2019, was that one of
18 the things amongst a whole lot of others that went into your
19 decision about what amount you should accept in alimony?

20 A It was in my budget that they received, yes.

21 Q Do you believe that you should have to give up and
22 sacrifice part of your standard of living because Dr. Peery
23 has made decisions to go from \$870,000 in income to very
24 little?

25 A I do not, no.

1 Q Especially when he has 1.5 million of other assets that
2 he can access?

3 A Yes.

4 Q You were asked if he lived up to the bargain. If he
5 lived up to the bargain, would we be here today?

6 MS. MOORE: Objection, that wasn't the question.

7 A No, we would not.

8 THE COURT: I'll sustain it. It was qualified a little
9 bit.

10 Q Did you understand that the bargain that was struck in
11 June of 2019 was alimony for 15 years?

12 A Yes.

13 Q Have we gone through 15 years of alimony?

14 A No.

15 Q Do you still need it?

16 A Yes.

17 MR. TOBIN: Nothing further, Your Honor.

18 THE COURT: All right. Any recross?

19 MS. MOORE: No, Your Honor.

20 THE COURT: All right. Ms. Rabenberg, you go ahead and
21 step down from the stand.

22 (The witness was excused.)

23 THE COURT: And then, Mr. Tobin, do you have any other
24 evidence or witnesses?

25 MR. TOBIN: No, Your Honor.

1 THE COURT: Any rebuttal, Ms. Moore?

2 MS. MOORE: No, Your Honor.

3 THE COURT: You guys proved me right. There you're done
4 and it's only 3:40 or you proved yourselves right and proved
5 me wrong. I said that incorrectly, I'm sorry.

6 MR. TOBIN: It's just a lot of pressure because the next
7 time both of us or one of us are in front of you and we say
8 that and now we prove it wrong.

9 MS. MOORE: As long as you're wrong, I'm okay with that.

10 THE COURT: I'm probably the one who's most antsy at any
11 given point to make sure we get through everything, whether
12 it's jury trial, or court trial, so that's part of the nature
13 of, of it, so I apologize, that's just is that I'm probably
14 the one who's most antsy to make sure we get through it all.
15 Would you like to give closing comments, rely on your
16 filings? What would you prefer to do?

17 MR. TOBIN: I would like, I intend to be brief, but I
18 think a relatively brief closing presentation, Your Honor,
19 would be my preference.

20 THE COURT: All right. Are you comfortable with that,
21 Ms. Moore?

22 MS. MOORE: I am, Your Honor.

23 THE COURT: Either party like a break at all before you
24 give those comments?

25 MS. MOORE: I would appreciate five minutes to get some

1 water, so you don't have to listen to what my voice is
2 becoming.

3 THE COURT: That's fine. You guys have had to listen to
4 me struggle all day. So, I certainly understand. Let's go
5 ahead and take about ten, and then I'll start with you, Ms.
6 Moore, when we come back since you have the burden.

7 MS. MOORE: Thank you, Judge.

8 (Recess 3:43 p.m.)

9 (Resume 3:53 p.m.)

10 THE COURT: We'll go back on the record in divorce file
11 19-18. Both counsel and their respective clients are present
12 again, both sides having rested. And at this time, I'll go
13 ahead and hear closing arguments beginning with you, please,
14 Ms. Moore.

15 MS. MOORE: Thank you, Your Honor. This matter came on
16 for hearing today before this court on two separate motions,
17 which from a legal and factual standpoint are really
18 inextricably intertwined. My client has made a motion to
19 modify the alimony obligation that was originally set in the
20 parties' stipulation from June of 2019, which he has become
21 financially unable to continue to meet both in the short term
22 and ultimately in the long term.

23 And Mr. Tobin's client as a result of having to make
24 lesser payments for the last several months has made a motion
25 for contempt. And contempt requires a finding that the

1 obligor under any particular agreement has the financial
2 ability to pay. And so in that regard, that is the
3 commonality between the two motions before the court,
4 ultimately, is there a financial ability to pay? The tone of
5 the questions today from Mr. Tobin, and the implication of
6 some of those, as well as the, as the answers, has been that
7 when this particular stipulation and agreement was negotiated
8 and ultimately executed in June of 2019, the expectation, and
9 not only the expectation, but the absolute, unmodifiable
10 obligation was an award of alimony for 15 years. That's not
11 the plain language of the agreement, and that was not what
12 was ultimately memorialized. There's no designation of
13 permanent alimony. There's no designation of non-modifiable
14 alimony and, in fact, there were certain circumstances that
15 were in fact contemplated that may ultimately result in the
16 termination of alimony. That alimony obligation was also
17 negotiated in the context of the division of the parties'
18 other assets and debts, which ultimately were divided more so
19 in Ms. Peery's favor or Ms. Rabenberg's favor, excuse me,
20 than they were in favor of my client. And so in that regard,
21 when we look at this, we can't simply say that this is a 15
22 year mandatory obligation to pay spousal support, and the law
23 recognizes that as well. The South Dakota Supreme Court has
24 indicated that even though a court may have approved an
25 award, whether that be by virtue of trial or stipulation

1 between the parties, that the court thereafter retains the
2 jurisdiction and the ability to modify it, and that is
3 irrespective of whether it is a negotiated agreement, a tried
4 agreement, or one wherein the parties expected to be able to
5 perform for a longer period of time that they ultimately
6 were.

7 And so ultimately the standard is a change in
8 circumstances. And what the South Dakota Supreme Court has
9 indicated is that change in circumstances refers to a change
10 in the necessities of the recipient and the financial ability
11 of the obligor. So, it is a twofold inquiry ultimately. And
12 in that regard, what I think is important to note here, too,
13 is that there's also case law that talks about you can't
14 negotiate your way out of a bad deal, or you cannot later
15 expect that the court will relieve you of something that you
16 regret having entered into. And I think you heard Dr. Peery
17 said today that he wishes he would have done things a little
18 differently in June of 2019, but I also think you heard him
19 say that he has done everything he can to pay his obligations
20 over the years. And when you look at the affidavit that was
21 filed in support of this, as well as the testimony from the
22 parties, he did make his payments. He paid over a \$104,000
23 for the period of June of 2019 to January of 2024. He paid
24 over \$700,000 between February of 2020 and June of 2024.
25 That's just in spousal support. That doesn't include the

1 child support, and the other obligations which we aren't here
2 to talk about today in terms of modifying those or any
3 contempt thereon. I point that out only because this is an
4 individual who, despite having made some changes in his
5 personal and professional life, did everything he could up
6 until recently to continue to make good on those obligations.
7 And, ultimately, I think that is something that absolutely
8 needs to be taken into consideration here. And it also shows
9 that he's taken the time and thought through these things in
10 a way that he's not coming to you and saying I want out of
11 this deal because it's just not convenient for me at this
12 point in time, or because I want to change my own lifestyle
13 and live more extravagantly. What he's saying is I needed to
14 make some changes in my life, and that prompted me to leave a
15 work environment that he didn't think was conducive to either
16 his continued professional success or ultimately his mental
17 health, which is significant, particularly coming off COVID,
18 particularly having practiced for as long as he had. And so
19 in that regard, this isn't a situation of deliberate
20 underemployment. This isn't a situation wherein he took the
21 absolute cheapest paying job out there, even though that's
22 what's been insinuated, ah, so that he could essentially
23 thwart any obligations that he had. That's simply not the
24 case. He made those decisions. He did so voluntarily. He's
25 indicated that, yes, those did not pan out the way that he

1 wanted to, but he's looking to do the best that he absolutely
2 can to continue to provide. He wants to ultimately do that.
3 And to a certain extent, he was lambasted a bit for
4 commentary to the court regarding doing what's fair. And I
5 think that's in large part because he understands that there
6 was an alimony obligation that was agreed upon that can't be
7 disputed, and there is a dollar amount that's necessary to
8 provide for some support. But to continue it at a level of
9 \$13,500 a month right now is absolutely unfeasible. And it's
10 not that he somehow gave his new partner a better deal and
11 that he paid her obligations as opposed to those. This was a
12 business arrangement wherein he saw this as an opportunity to
13 start his own practice, but to do so with lesser expenses,
14 and he did so having looked at other potential opportunities
15 available to him through other hospitals, or clinics, and not
16 having that. His testimony specifically was that he has not
17 had an offer for employment that would reach the level of
18 \$650,000 or above for that matter, and in that regard to
19 continue to pay not only his own expenses, but to try to
20 develop his own practice so that he can be back in a position
21 to ultimately be profiting, and to be providing support not
22 only to his kids like he wants to do, and to pay for college
23 education as he wants to do, but also for himself, and the
24 evidence shows that he's living in a one room apartment at
25 this point in time. That he's trying to do a great deal to

1 tighten his own belt so that he could continue to provide
2 support up until the time of the summer. And there's nothing
3 in the case law or the law that specifically indicates that
4 he is required to liquidate all of his own retirement
5 accounts. Nor is there anything in the case law that
6 requires that he continue to work at a pace, or at a level,
7 or in a place simply because it pays the most money. That's
8 not an equitable result either. And that's not a, that's not
9 a result that's ultimately demanded by or dictated by the
10 case law. And so what we've got here is a situation in which
11 because of Dr. Peery's current circumstances, he does not
12 have the ability to continue to pay at the rate set in the
13 stipulation. He has asked in his affidavit that he be
14 allowed to essentially pay \$4000 a month going forward. The
15 stipulation originally provided for spousal support plus an
16 additional \$500 that was deposited in to an account of Ms.
17 Rabenberg's choosing, I think as designated by her financial
18 advisor, and our ask was that the amount be \$4000 total, and
19 then to the extent that Ms. Rabenberg would want to invest a
20 portion of that to the extent that she's able, that's
21 obviously a choice that she can then make. But to
22 essentially combine the \$500 monthly, excuse, excuse me,
23 monthly payment with the spousal support amounts.

24 We're also asking for a shortening of the overall
25 alimony obligation to a shorter term of years. This is

1 already one that is set to terminate under certain
2 circumstances, which admittedly has not happened at this
3 point in time, but this is something where Dr. Peery has
4 testified that he doesn't know that he'll ever attain the
5 level at which he was before, and even when we look at
6 reducing that number in another year and a half or whatever
7 the timeframe is under that stipulation and agreement, at
8 that point in time, it's still going to be too much at that
9 point. So, what we're asking for ultimately is for the \$4000
10 a month going forward, and a reduced term of five years
11 overall.

12 I think the evidence ultimately shows that he is unable
13 to pay at this point in time, and he does not have the
14 financial ability.

15 And one of the other things that I think came through is
16 that when we look at the other components of that change in
17 circumstances test, which is a change in the necessities of
18 the recipient, Ms. Rabenberg testified that she has not
19 changed her lifestyle since the time of the divorce. She has
20 not changed her spending since the time of the divorce, and I
21 believe her testimony was that she essentially negotiated to
22 be able to do that, but that doesn't mean that those are
23 necessities at the end of the day. We look at necessities
24 under the law as being food, clothing, housing,
25 transportation, things that are ultimately necessary for a

1 person to get by on a day-to-day basis. Despite the fact that
2 someone was once able to afford a country club membership, or
3 to afford eating out, or more, ah, lavish or desired types of
4 spending doesn't make those necessities at the end of the
5 day. And also there are certain choices that have obviously
6 been made, not only in regard to maintaining a country club
7 membership or spending nearly \$3600 a month on food, but to
8 support adult children as well. And I think it's every
9 parent's desire to obviously do that, at some point, but it
10 doesn't mean that that's a necessity, nor does that mean
11 that's the reality of the situation. And the other thing
12 that I think ultimately came through here, too, is that Ms.
13 Rabenberg is not looking at potentially ever having to work
14 or ever having to employ herself, and that's a rather unique
15 circumstance any time that someone gets divorced at any age,
16 that the expectation is that they will essentially be able to
17 live the same lifestyle that was ultimately a product of a
18 marriage between two people with one household when that
19 household has been split and divided legally.

20 And so in that regard, I don't think that she has shown
21 that the expenses identified on Exhibit A are all
22 necessities. And I also don't think that she has shown that
23 she is not able to make some of those choices in her life, to
24 tighten her own belt, and to look or avail herself of other
25 opportunities to identify an income that to the extent she

1 wants to do some of those other things such as maintain a
2 country club membership or pay for other things for her
3 children, that she may have to look at ways in which to
4 supplement her income. Because if that were to happen then
5 there isn't necessarily a need to look at some of those other
6 assets which she received the bulk of ultimately during the
7 divorce. And so these are difficult cases, Your Honor,
8 because obviously you're presented with very competing cases,
9 competing opinions. There's understandably emotion on all
10 sides. It's understandably stressful. There probably is
11 nothing that is perhaps a bigger driver of strife in marriage
12 or outside of marriage than money. And the concern about
13 one's ability to continue to pay for monthly expenses, and I
14 think you saw that here today from both parties, is that this
15 is obviously weighed on both of them for an extended period
16 of time and will continue to do so because these are two
17 individuals who are in their 50s, who ultimately someday
18 would like to retire and have something there saved for them.
19 And right now are looking at very significant events in their
20 lives that will make that ultimately more difficult, but the
21 bottom line is that both of them have made choices. Both of
22 them will continue to make choices. And here Dr. Peery
23 shouldn't be punished for his choice to look at a different
24 path in life that he still considers to be a viable path.
25 It's simply something that he's going to take him more time -

1 ultimately to achieve what he wants to achieve.

2 And so for those reasons, Your Honor, we do think that
3 the test for modifying alimony has been met. We do believe
4 that Dr. Peery cannot be held in contempt because he does not
5 have the ability to continue paying these amounts, and we
6 further believe that the modification and the shortening of
7 the duration is appropriate, and I appreciate the court's
8 time in accommodating us today and, and working through these
9 issues, and understand the difficult decision, but I do think
10 it is appropriate at this point, five years removed from this
11 marriage to ultimately take a look at the circumstances here.
12 Know they're not a product of anyone's intentional acts to
13 subvert, subordinate, or otherwise disrespect in any way,
14 shape, or form, a court order, but ultimately a product of
15 simply sometimes what happens in life, even when one's
16 intentions are to make the best decisions for all involved.

17 So I thank the court for its time and attention.

18 THE COURT: Thank you, Ms. Moore. Mr. Tobin.

19 MR. TOBIN: Thank you, Your Honor. This is one of these
20 cases where I think this burdens of proof, and the standards,
21 and the guides from the South Dakota Supreme Court really
22 provide the path for this court's decision-making and
23 resolution. And I want to start with the basics, Your Honor,
24 because some of these words that are repeated ad nauseam by
25 the South Dakota Supreme Court are just so key, and they're

1 so vital to some of these issues. But when we're talking
2 about a change in circumstances, and these -- this language
3 is in dozens of South Dakota Supreme Court decisions. The
4 change in circumstances that will justify a modification of
5 alimony award refers to the change in the necessities of the
6 recipient, not the necessities. A change. We're not
7 contending there's a change. We're not asking for more
8 alimony. So right there the whole idea that we can look at
9 country club memberships, dining with adult children, and
10 trying to somehow make noise about that is just improper and
11 it's irrelevant because we are not asking for any additional
12 alimony. There is no change in my client's necessities.
13 None. They don't even have any evidence or make an argument
14 that her necessities have changed. They're the same. Not
15 only are they the same from when the divorce occurred, but
16 they are the same for years during this marriage. So there
17 is no change in my client's necessities. That is vital
18 because I think that takes the whole what's my client doing
19 completely off the table.

20 And then the other aspect of the change in circumstances
21 is the financial ability of the obligor to pay. Doesn't say
22 income. Doesn't say money. The financial ability of the
23 obligor to pay. Now, that makes sense, and I cited some of
24 these cases in our brief. That's why the South Dakota
25 Supreme Court has said not even retirement can justify in all

1 cases a termination of alimony, and there are cases where the
2 obligor in those cases had significant assets, had
3 significant other holdings for which they could continue to
4 make these payments.

5 So, their effort to tie it solely to income I think is,
6 is way too narrow and out of step with what the South Dakota
7 Supreme Court has made clear. It's the financial ability to
8 make those payments.

9 Now, the other language that is just directly on point
10 and I think really comes in and makes clear what's going on
11 here is that a modification proceeding is not the vehicle to
12 essentially redo alimony. South Dakota Supreme Court has
13 made that abundantly clear. No question about it. So
14 whether this court believes the original agreement and the
15 original judgment was right, wrong, fair or unfair, it
16 doesn't matter. South Dakota Supreme Court has made clear
17 that courts are not allowed to factor the equities of the
18 original agreement into its decision-making.

19 The Supreme Court has made clear that this is not a
20 vehicle to relieve a party of a bad bargain. And I would
21 submit to you, Your Honor, that is 100% why we are here
22 today. And I can say that with such confidence because Dr.
23 Peery told me twice during his testimony with me that that's
24 exactly what is going on. I asked him about this fairness
25 issue, and I asked him, so you're asking this court to redo

1 alimony in to something that's fair. And he candidly looked
2 at me and said that's correct. That's not allowed. The law
3 on that is black and white and very clear. It's not allowed.

4 I then asked him another time if he was basically using
5 this as a way to renegotiate alimony because he didn't like
6 the original deal. He again said yes. He can't do that.
7 Now, I appreciate his honesty. I appreciate his candor, but
8 that really kind of explains why we are here.

9 So on those particular issues, Your Honor, we have great
10 guidance from the South Dakota Supreme Court. We've got very
11 clear law that I don't believe that Mister -- or Dr. Peery in
12 this particular case can navigate through because what he's
13 trying to do here isn't allowed.

14 Now, the other issue from the South Dakota Supreme Court
15 that is such a great guide is I cannot find a case where the
16 South Dakota Supreme Court endorsed someone getting out of an
17 alimony obligation because they voluntarily reduced their
18 income. In fact, the opposite is true, and I cited these
19 cases that the, that the South Dakota Supreme Court has
20 charged the trial courts to be extra suspect of people who
21 are trying to get out of alimony when they have done some,
22 you know, done things with their income. That's precisely
23 what we have here, Your Honor. And what they're trying to do
24 for all those reasons is just simply not permissible.

25 As this court knows, when this court does an alimony

1 analysis, it has to consider what the property division is as
2 well. That happens all the time, whether a case is tried to
3 a judge or whether parties are resolving it privately in
4 negotiations.

5 Well, here my client doesn't get a chance to go redo
6 that. She doesn't. Now, I candidly concede that alimony is
7 modifiable. No question about that. But it's the Supreme
8 Court puts these guardrails in place to allow people or to
9 prevent people from making a deal and then reneging. That's
10 what we have here because the law is crystal clear that once
11 a property division is done, that's sacrosanct. My client
12 has no ability to come in and say, well, if he's weaseling
13 out of this obligation, then I want to do something different
14 on property, and that's precisely why I think the Supreme
15 Court guards these issues so carefully is to make sure we're
16 not dealing with scenarios of opportunity and taking
17 advantage of people.

18 So, and, and that's why I can't find the case where
19 someone voluntarily reduced their income and the South Dakota
20 Supreme Court said, I guess that's okay. I haven't found
21 one. The cases are actually in the other direction because
22 they don't even allow it sometimes when people retire.

23 So, here the other thing that is, that is lacking and I
24 think is, is a shortcoming is if he wants to say he needed to
25 leave Sanford, okay, but where's the evidence? He wants to

1 talk about mental health? Where's the evidence? I'm not
2 aware of any physician, counselor, therapist who said you
3 need to leave this environment? You should go. There's
4 nothing like that. It's a convenient thing to come into
5 court and say I was really not happy in my job. Well, there
6 are many times I'm not happy in my job. I would respectfully
7 submit that everyone in this room has times when they're not
8 happy in their job. It doesn't mean we just get to pull up
9 stakes and leave. Why? Because we have priorities, and we
10 have obligations. So did Dr. Peery. Dr. Peery's obligations
11 to Janelle were not just contractual, they were part of a
12 judgment. He's an educated man. A very smart man. He knew
13 exactly what he was agreeing to, to the term of years and all
14 the amounts. He knew that. He knew he was saying I'm going
15 to settle this divorce and I'm going to pay alimony for 15
16 years. There's no question about that.

17 Now he wants to make changes in his life. Okay. But
18 where did he prioritize this court's judgment? Where did he
19 prioritize his obligations to his ex-wife? Well, they
20 clearly were at the very bottom. No question about that.
21 They're at the very bottom. And that's what is not allowed
22 under the law. I mean, Dr. Peery wants you to believe that
23 he could go in the span of less than a year and a half of
24 making \$850,000 plus per year to maybe 100. I don't know. He
25 hasn't had any evidence as to his projection. He has no

1 evidence as to what it will be, but we know it's not going to
2 be \$850,000. He willfully made a decision to walk away from
3 that super established successful career, cut it by 45% to
4 start over with the first option in Texas. Despite his
5 claims that he did all this due diligence, that went south
6 overnight. And then he then joins a practice where the only
7 benefit I can see is Dr. Keli, and good for her, good for
8 her. She's been chugging along for three or four years in
9 her practice, paying X, Y, Z amount in expenses every month,
10 and she found someone to come on and say I'll take half of
11 them. She's the only winner in this whole entire thing.
12 She's getting a check for 22,000 or more a month. And he
13 somehow thinks that that then excuses him from honoring what
14 this court said in the judgment and what he agreed to to my
15 client.

16 It was an intentional, willful decision. No, I'm not
17 going to go so far as to say it was so sneaky that he's doing
18 it to try to get out of his alimony obligation, because it
19 doesn't matter. It simply doesn't matter. He had one of the
20 most successful surgical careers probably in the country.
21 He's very well respected. He teaches other physicians. He's
22 in the prime of his career. He's 55 years old and he wants
23 this court to think that the only options available to him
24 were taking on half the expenses for another physician or
25 opening his own practice. There's absolutely no evidence

1 outside of his word that that is true. There's no one.
2 There's no consultant. There's no headhunter. There's
3 nothing like that to come in here and say that, yeah, one of
4 the most respected bariatric surgeons in the country, there
5 just isn't a market for him really anymore. There's nothing
6 like that. And if there was some substance to that, they
7 could have brought forth that evidence to meet their burden,
8 and they didn't do that. They didn't do it at all.

9 Their request is also interesting because they want it
10 to end after five years. Why? What is that tied to? Even
11 Dr. Peery, by the most charitable version of his testimony,
12 thinks he's going to turn this around and go, great in a few
13 years. So, why would it need to be ended in five? There's
14 absolutely no rhyme or reason to that other than it was just
15 picked out of the air. There's nothing. If he was going to
16 retire in five years. If his license couldn't be renewed,
17 something, it may make some sense, but he is just randomly
18 picking five years, and then this \$4000 number.

19 Conversely, Your Honor, to go back to kind of where I
20 began, my client's need remains the same. There's no
21 question about this. So, if this court is going to do what
22 Dr. Peery's asking, it raises this fundamental issue, and
23 that is who should pay the price for some very bad career
24 decision-making. Should my client have to consume and eat
25 her nest egg or should Dr. Peery? Well, the obligations to

1 make these payments are on him, they're not on my client. It
2 was obviously structured to get my client to 64. Some Social
3 Security would then kick in and she would have this large
4 nest egg to then get her through her twilight years. If this
5 court does what Dr. Peery is asking, my client will
6 essentially be out of money before she's 60. And then what?
7 And then what? Dr. Peery's earning capacity remains huge.
8 My client's earning capacity is zero. If they thought my
9 client had some meaningful opportunity to rejoin the
10 workforce, they could bring in the evidence to that. They
11 could have had my client meet with the vocational
12 rehabilitationist. They could have done something to say
13 that she should have or could have go get a job, but there's
14 nothing out there that would support that, Your Honor. She
15 hasn't worked in over 20 some years. And during the course
16 of this marriage, that was just fine. That's how Dr. Peery
17 wanted it. When he agreed to these alimony payments, he
18 fully knew that Janelle was not gonna return to the
19 workforce. He knew that. And that's why he agreed to these
20 payments.

21 So, what he's asking now, in September of 2024, is to
22 materially and meaningfully upset what they decided in June
23 of 2019. He doesn't get the second bite of that apple. My
24 client certainly doesn't, and he shouldn't either. Now, the
25 contempt and these next comments, they certainly go to his

1 ability to pay, but he has \$950,000 in IRA's and other
2 investment accounts just sitting there. My client had to
3 access it. The evidence is in that she had to do that. It's
4 not a challenge to have your financial advisor fill out the
5 paperwork to withdraw that money. My client had to do it.
6 He doesn't think he should have to. He thinks that despite
7 having that money there and despite having these legal
8 obligations, it shouldn't be touched. He's fine with my
9 client consuming hers, but he thinks he shouldn't have to do
10 it. He has two properties in Sioux Falls with hundreds of
11 thousands of dollars in equity. He could sell those.
12 Generate all kinds of money that would get through this
13 little he has to figure it out stage while also continuing to
14 make the payments that he is legally required to do.

15 So, when we think about his financial ability to pay
16 those accounts, those assets are front and center. Had those
17 accounts and those assets not been here, I would still be
18 here saying that the court should not let him do this, but it
19 becomes all the more acute when he's sitting on \$1.5 million
20 of assets, almost a million of which is liquid and he's now
21 going to contend that he can't pay, of course he can. He
22 just doesn't want to. The money's been there and it's
23 sitting there. And that's why it's contempt. For contempt,
24 he has to show that he has an inability to comply. He had
25 every ability to comply. All he had to do was tell a

1 financial advisor I'm going to need some money out of this
2 account. It's that simple. He chose not to. That's
3 contempt, and that's why we filed the motion, Your Honor.

4 So, from our position, Your Honor, we believe that the
5 motion should be denied. The motion to modify. He could
6 turn around and fund these payments tomorrow. There's no
7 doubt about that. We do believe this is contempt. We
8 request that that motion be granted, and we then request an
9 award of attorney's fees even separate from the contempt, but
10 also with it, as my client doesn't have the money to sit here
11 and pay lawyers to come in and have to defend an agreement
12 that was negotiated that resolved the divorce and that should
13 not be imperiled at this time.

14 So, we would make that request as well, Your Honor.
15 Thank you.

16 THE COURT: Thank you. Anything else from you, Ms.
17 Moore, that you believe you need to say today?

18 MS. MOORE: Briefly, Judge.

19 THE COURT: Go ahead.

20 MS. MOORE: The thing that strikes me about Mr. Tobin's
21 initial argument regarding the standard for modification was
22 that he talked about needing to show change, and claims that
23 there's been no change. You have to read the phrase as a
24 whole. You can't parse it too finely. We can't read words in
25 isolation. And what it says is a change in necessities. And

1 there's also not a single South Dakota Supreme Court case
2 that talks about some of the budgets of this size that
3 includes some of the things that are in this budget.
4 Ultimately being necessities. So, in that regard that has
5 been a change shown. We also have set forth in the initial
6 brief that was provided what some of the other changes have
7 been in terms of the sale of the parties more expensive home.
8 They did have another child, who was a minor at the time, who
9 is no longer a minor. There most certainly have been
10 changes, and there most certainly are not necessities
11 outlined on Exhibit A that was in evidence today.

12 Modification is absolutely allowed, and it's
13 permissible, and you can absolutely talk about it in some
14 respects in terms of what I would describe as my client's
15 hindsight about this, and perhaps he wishes he would have
16 thought about things a little differently. This court has
17 the ability not only to modify alimony, but even to terminate
18 it. We didn't ask to terminate it and made that very clear
19 from the beginning and tried to get this motion filed and
20 heard as quickly as possible so that we would not be several
21 months down the road and in the position that we currently
22 are.

23 And so in that regard, again, when we're talking about
24 the agreement, we cannot simply view it in isolation. And
25 there is absolutely nothing in that agreement that obligated

1 to my client to remain with the position simply because it
2 was in the best interests of Ms. Rabenberg at the end of the
3 day. And as far as there being no evidence of the reason why
4 he moved, his testimony is evidence. And I think it's
5 offensive to make fun of mental health at the end of the day,
6 particularly for an individual who has had some challenges in
7 his own family and has had a brother who devastatingly
8 committed suicide.

9 So, there are absolutely things that need to be taken
10 into consideration, and there's nothing that dictates that we
11 continue to work for the remainder of his career for someone
12 else's needs, and that's ultimately why this motion was
13 brought. Again, there's no ill intent or mal intent here to
14 harm Ms. Rabenberg. It's an acknowledgement of the parties'
15 circumstances and where they're at in life. And so I would
16 simply ask that the court take all of that in to
17 consideration when evaluating the party's request. Thank
18 you.

19 THE COURT: All right. Thank you. You have the same
20 face that she had when you got done talking, so I'll turn it
21 back over to you.

22 MR. TOBIN: I, I certainly, the only thing I'm going to
23 say is I didn't make fun of anyone mental health. I wouldn't
24 do that. All I said is that there's no evidence other than
25 him saying that he needed to get out of here for his mental

1 health. I don't think that's making fun of anything. We're
2 in a court of law where we need proof and we need evidence,
3 and if his mental health was such that it was so important
4 that he relocate a 1000 miles away and start over, then I'm
5 just simply asking where is the proof? Where is the evidence
6 to support that? I'm not making fun of anyone's mental
7 health, Your Honor. I would never do that.

8 THE COURT: Understood. All right. Anything else from
9 either party?

10 MS. MOORE: No, Your Honor, thank you.

11 MR. TOBIN: No, Your Honor.

12 THE COURT: All right. Thank you. I think I'm going to
13 have to get back to the parties. I really wanted to try, and
14 I worked over the lunch hour to give you at least a decision
15 from the bench here today so you didn't have to wait so
16 everyone would know how they're moving forward, but I want to
17 look at some other items before I do that. Um, do the
18 parties wish me to issue a written decision or come back and
19 have me give it orally. I guess you're going back to Texas
20 or your client's probably going back to Texas. So, I can
21 also issue a shorter memorandum or longer findings of fact
22 and conclusions of law. What's your preference?

23 MS. MOORE: I'll defer to the court, Your Honor, if you
24 don't object to my client not being personally present, and
25 it's something that makes things easier for you with regard

1 to your schedule, I, I'm certainly happy to come back and,
2 and set a future date for that. I think my client is
3 agreeable to that to the extent that if you want to do a
4 written opinion, we certainly don't object to something
5 shorter or whatever is most efficient for the court, but if
6 you're agreeable to allowing me to appear without my client
7 or allowing him to be present telephonically or something
8 along those lines, we would certainly make that work.

9 THE COURT: Okay. Mr. Tobin, any preference?

10 MR. TOBIN: I would largely echo, um, what Ms. Moore
11 said. I would defer to you, um, makes no difference to me,
12 Your Honor.

13 THE COURT: Okay. All right. I think I can get a, ah,
14 at least a shorter, ah, memorandum opinion done here in the
15 near future, and then following that, I'll allow the parties,
16 if you'd like to submit supplemental findings and conclusions
17 based upon that, I'll give you time to do that. And the other
18 party time to object, of course, if you're not, not happy
19 with that decision either way, so that's how we'll proceed
20 for my decision.

21 Anything else, Ms. Moore?

22 MS. MOORE: No, Your Honor, thank you.

23 THE COURT: All right. Mr. Tobin.

24 MR. TOBIN: No, Your Honor.

25 THE COURT: All right. Are all exhibits still up in

1 that exhibit book? Nobody took any back to their desk, did
2 they?

3 MS. MOORE: I'll double check ours.

4 THE COURT: Just to make sure. I had that happen at my
5 trial a few weeks ago so I just wanted to double check. Okay.

6 MR. TOBIN: My binder is.

7 MS. MOORE: Mine are all there as well, Judge.

8 THE COURT: All right. Thank you for checking that.

9 Um, and you did the protective order for exhibits, right?

10 MS. MOORE: We did. And for the record I did mark all
11 of the (inaudible, not by a mic).

12 THE COURT: Okay.

13 MS. MOORE: Exhibits 2 through 33 (inaudible, not by a
14 mic).

15 THE COURT: And you're comfortable with that?

16 MR. TOBIN: I am. I didn't put a confidential mark on
17 any of my exhibits.

18 THE COURT: And you wanted them to be confidential?

19 MR. TOBIN: I, I think that was my understanding because
20 some of my exhibits are, we tried to avoid some duplication,
21 but there was some duplication. So, yes, it would be my
22 request that my A through V also be held as confidentially,
23 Your Honor.

24 THE COURT: Any objection to that?

25 MS. MOORE: I have no objection to that, Your Honor,

1 because I know there are some account numbers and other
2 things that will likely prompt the clerk to send them back
3 anyway if we don't mark them that way.

4 THE COURT: You're right. So, we will get all entered
5 into the record. I will give them to the clerk to have
6 everything for both plaintiff and defense exhibits except for
7 plaintiff's Exhibit A to be confidential.

8 MS. MOORE: Actually, it would defendant's Exhibit 1.

9 THE COURT: Defendant's Exhibit 1?

10 MS. MOORE: Yes, sorry about that.

11 THE COURT: I'm so used to plaintiff being numbers and
12 defendant being letters.

13 MS. MOORE: We knew we threw that off because we knew
14 I'd have more exhibits, so I went with numbers.

15 MR. TOBIN: Yeah, we chatted to avoid the double A's,
16 double I's, so I said, Meredith, you take the numbers and she
17 said we'll do.

18 THE COURT: And she said, yes, we'll confuse the judge
19 terribly. It will be hilarious.

20 MS. MOORE: Not our intention.

21 THE COURT: No, that's fine, it doesn't take much, but
22 all right. If there is nothing else for the record, again,
23 I'll make sure the exhibits get down to the clerk and get in
24 to the electronic file in this case. I appreciate everyone's
25 time today. I know it's a long day to get everything in, but

1 I appreciate everyone's candor, testimony, and comments, and
2 I will take that under advisement and issue a written
3 opinion.

4 MR. TOBIN: Thank you, Judge.

5 MS. MOORE: Thank you, Judge.

6 THE COURT: All right. Thank you everyone, take care.

7 (Proceedings concluded at 4:37 p.m.)
8
9
10
11
12
13

CERTIFICATE

Dated at Sioux Falls, South Dakota, this 22nd day of
January, 2025.

/s/ Roxane R. Osborn
Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2030

STATE OF SOUTH DAKOTA)
 :SS
 COUNTY OF LINCOLN)

IN CIRCUIT COURT
 SECOND JUDICIAL CIRCUIT

JANELLE PEERY,
 Plaintiff,

vs.

CURTIS PEERY,
 Defendant.

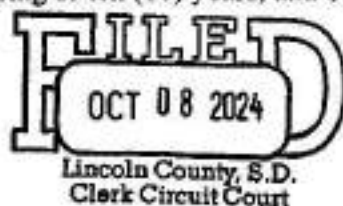
41DIV19-18

MEMORANDUM DECISION
 AND ORDER ON MOTIONS

This matter came before the Court on September 27, 2024, for a hearing on Defendant's Motion to Modify Alimony and Plaintiff's Motion for Contempt. The Plaintiff was personally present with counsel Michael F. Tobin, and the Defendant was personally present with counsel Meredith A. Moore. The Court has reviewed the record, heard testimony from the Plaintiff and Defendant, heard argument from counsel, and received and reviewed the stipulated exhibits. The Court now issues this Memorandum Decision as its findings of fact and conclusions of law.

BACKGROUND

The Plaintiff and Defendant were married on May 27, 1993, and had four children during their marriage. Their divorce decree was filed on June 25, 2019, and it incorporated the parties' Stipulation and Agreement dated June 17, 2019. The Stipulation provided for alimony from the Defendant to the Plaintiff in the amount of \$19,500 per month until their marital home sold (which occurred in February of 2020). Thereafter, the spousal support was reduced to \$13,500 per month for six (6) years, and then the parties agreed to further reduce it to \$7,000 per month for nine (9) years. The Defendant also agreed to pay \$500 a month to a Roth IRA of Plaintiff's choosing or ten (10) years, and \$1,500 per month in child support. The parties also agreed to



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divide their real and personal property, including their retirement and investments accounts. The Plaintiff received approximately \$465,000 from the Defendant's Sanford retirement account. There has not been a significant change in assets for either party since the divorce. Both parties were represented by counsel to reach this agreement.

At the time of the Stipulation, the Defendant was employed with Sanford Health and making between \$650-750,000 per year. The Defendant was making roughly \$850,000 per year when he voluntarily left Sanford in January of 2023 to relocate to Texas and join an established bariatric medical practice called Bariatric Experts. The Defendant had been frustrated with Sanford for "many years," and believed that with this move he would be able to better control his own medical practice and surpass his Sanford income within a year. This business venture did not work out, and by March of 2024 he separated from Bariatric Experts and entered into a management services agreement with Inspire Bariatrics. Throughout his time in Texas, the Defendant has been doing consulting work, general surgical calls, and networking with hospitals and health insurance companies.

The Defendant's income in 2023 was roughly \$575,000, which was less than he was making at the time of the parties' divorce in 2019. The Defendant reduced living costs and down-sized his living space to a one-bedroom apartment and tried to "tighten his belt" to make ends meet. He needed and still needs significant extra funds each month to pay his input and expense costs under the management services agreement with Inspire Bariatrics. Due to the alimony obligations, the Defendant was not able to secure the \$300,000 operating loan he believed would cover his living expenses, overhead, and support payments while he got his bariatric practice established. The Defendant continues to work full-time hours even though he does not believe he is in the financial or social position he should be in as a 55-year-old surgeon.

The Defendant has not yet made a profit with Inspire Bariatrics, but his partner does show monthly profit.

The Defendant made all monthly support payments through June of 2024. Since joining Inspire Bariatrics his monthly overhead expense is roughly \$22,000, which is \$7,000 more each month than his support obligations to the Plaintiff. The Defendant knew when he entered into the Inspire Bariatrics agreement that he would not be able to meet all his financial obligations in the future, and that he would have to dip into his own savings or assets while building his practice. At this point the Defendant has used his saved "nest egg" of money, the \$100,000 available to draw on his life insurance policy, and is using his business line of credit to make payments. The Defendant has not cashed in any retirement or investment accounts or sold either of the two residences he owns in Sioux Falls, South Dakota.¹

The Plaintiff has remained in Sioux Falls since the divorce. She testified to living a "very nice" lifestyle and that it is relatively the same lifestyle she had been living prior to the parties' divorce in 2019. The Plaintiff was a dental hygienist and worked in that capacity for the first six (6) years of marriage to the Defendant. During this time the Defendant was finishing medical school requirements and starting his medical career. The Plaintiff transitioned to a stay-at-home mother and homemaker while pregnant with the parties' third child, and she continued to contribute to the family in this capacity until and after the divorce.

During the marriage the Plaintiff relied on the Defendant's financial contributions to the family. At the time of the divorce, the Plaintiff would have had to go back to school for additional training to rejoin the workforce as a dental hygienist. There was limited testimony on

¹ The Defendant was unsuccessful with a prior attempt to sell one of the Sioux Falls residences. Both residences have mortgages but also over \$300,000 in equity between them.

the Plaintiff securing any other form of employment at the time of the divorce, but also no evidence that the Plaintiff was or is physically or mentally incapable of working. The Plaintiff's only source of ongoing income since the divorce is the \$15,000 monthly spousal support and child support, which is enough to cover her \$14,000 per month budget.

The Defendant's non-payment of spousal support obviously contributed the Plaintiff's inability to meet her budget. However, the Plaintiff's financial documents show that she is regularly spending \$16-18,000 per month, which also may contribute to current budget issues and debts. The Plaintiff has had to pull money from her retirement investment accounts to cover Defendant's missed payments and potentially her regular spending in excess of the amount of alimony and child support from the Defendant. The Plaintiff did not articulate a plan or budget for herself for anything less than \$14,000 per month.

LAW AND ANALYSIS

"Circuit courts have continuing jurisdiction to modify permanent alimony as circumstances may require." *Moore v. Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d 536, 540 (citing *Saxvik v. Saxvik*, 1996 S.D. 18, ¶ 11, 544 N.W.2d 177, 180); see also SDCL § 25-4-41 ("... and the court may from time to time modify its orders in these respects."). "A party seeking modification of an alimony award must establish a change in circumstances." *Barton v. Barton*, 2012 S.D. 44, ¶ 14, 815 N.W.2d 555, 557 (citing *Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540). "Although the change need not be substantial, mere proof of a change is insufficient to mandate modification." *Id.* Rather, "[t]he change in circumstances refers to a change in the necessities of the recipient and the financial ability of the obligor." *Leedom v. Leedom*, 2020 S.D. 40, ¶ 20, 947 N.W.2d 143, 149, (citing *Barton*, 2012 S.D. 44, ¶ 15, 815 N.W.2d at 558 (quoting *Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540)). "The role of the trial courts in

modification proceedings is not to relieve a party of his or her bad bargain.” *Barton*, 2012 S.D. 44, ¶ 14, 815 N.W.2d at 557 (citing *Moore* 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540). Therefore, “[w]hen a trial court considers evidence as to a change in circumstances, it must be careful to confine its review to changes occurring *since the time of the divorce*.” *Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d at 540 (citing *Olson v. Olson*, 1996 S.D. 90, ¶ 9, 552 N.W.2d 396, 399) (emphasis in original).

When the parties decide the financial terms of their divorce through stipulation and agreement, as here, there are no findings of fact regarding the financial conditions of the parties at the time of the divorce. The evidence establishes that each party was represented by an attorney and voluntarily entered into the agreement regarding alimony and other property division in June of 2019. The parties each argued how the language and terms of the stipulation support their respective position when looking at the connection between the alimony amount and property settlement.

“While some forms of alimony are subject to modification, alimony awarded as part of a division of property is not.” *Vandyke v. Choi*, 2016 S.D. 91, ¶ 14, 888 N.W.2d 557, 564. “Whether an obligation imposed by a court order incorporating a separation agreement is modifiable depends on whether the obligation is in the nature of support or property division, ...” *Id.* In the present case, “[n]othing in the language of the agreement indicates that alimony was agreed to in lieu of property.” *Id.* at ¶ 15, 565 (citing *Oman v. Oman*, 2005 S.D. 88, ¶ 12, 702 N.W.2d 11, 15).

As in *Choi*, the alimony in this stipulation is for monthly payments over a fixed period of time and contains standard termination clauses of remarriage, cohabitation, or death. The alimony section is also separate and distinct from other property division sections such as life

insurance, retirement and investment accounts, and real and personal property.² Therefore, the alimony agreement in this case is separate and distinct from the property settlement agreement, and the Court has authority to modify alimony if certain circumstances exist.

As noted above, “[t]o justify a change in alimony payments there must merely be a change in circumstances from the circumstances which exhibited at the time of the original decree.” *Leedom*, 2020 S.D. 40, ¶ 20, 947 N.W.2d at 149 (citing *Horton v. Horton*, 503 N.W.2d 248, 252 (1989)). The Defendant has the burden to show that he has a reduced ability to pay, and that the Plaintiff has a change in necessities because “[b]oth income and expenses of the parties must be considered.” *Barton*, 2012 S.D. 44, ¶ 15, 815 N.W.2d at 558. Further,

[c]ourts may evaluate the following factors: the intentional reduction of gross income; an inquiry into earning potential when a party is under- or unemployed; the intentional inflation of expenses; and the offsetting effect of cohabitation on expenses.”

Id.

The Defendant's Ability to Pay

“The court is not to reflect on whether the decree was ‘equitable’ when entered, but only whether the economic circumstances of the parties have changed since the award such that the original amount is now either insufficient or excessive.” *Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d at 540. The Defendant remained at the same employment for roughly three and a half years following the stipulation. During this time his earning capacity and income was sufficient to pay alimony. It was once the Defendant chose to relocate to Texas that his income decreased significantly. It is undisputed that there is an economic change in the Defendant’s circumstances. However, “mere proof of a change is insufficient to mandate modification.”

² The only item of property specifically connected to alimony is that alimony would terminate if Plaintiff’s share of an intellectual property profits reached \$1,000,000, and this clause is not in dispute.

Barton, 2012 S.D. 44, ¶ 14, 815 N.W.2d at 558 (quoting *Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540).

Courts are cautioned to look at an obligor's intentions when an obligor is requesting a reduction in alimony. See *Leedom*, 2020 S.D. 40, ¶ 21, 947 N.W. 2d at 149 (citing *Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d at 540). Here, the Defendant's testimony regarding his employment struggles and current financial condition is credible and supported by the evidence. The Defendant's relocation and change in employment was not an attempt to become under- or unemployed, nor did he intentionally reduce his income or earning capacity. It appears the Defendant was not trying to get out of a "bad bargain" of alimony, but that he made a "bad business decision," and that this decision was not intentional or that he sabotaged the business opportunity. Other evidence supports the finding that the Defendant has been trying to increase his earnings: the Defendant faithfully made alimony payments until he believed his access to liquid assets could no longer cover the payments, that he did not leave either employment position without having new employment lined up to begin immediately, and that he has taken on extra work by taking call in hospitals and consulting.

The Plaintiff's Financial Necessities

"When assessing increases in the recipient's need for alimony, the trial court must consider both increases in the actual expenses of the recipient and changes in the recipient's non-support income." *Moore*, 2009 S.D. 16, ¶ 16, 763 N.W.2d at 541 (citing *Olson*, 1996 SD 90, ¶ 13, 552 N.W.2d at 400. Courts have recognized when an alimony recipient has had a change in need due to health conditions. See, e.g., *Leedom*, 2020 S.D. 40, ¶ 24, 947 N.W. 2d at 150 (recipient had ongoing health issues that worsened since the time of the divorce); *Moore*, 2009 S.D. 16, ¶ 16, 763 N.W.2d at 541 (recipient became unable to work due to MS).

In the present case, the Plaintiff contributed to the care of the children and the home for almost two decades prior to the divorce. The Plaintiff indicated that she has not worked or sought out any type of employment since the time of the divorce. There is not a physical or mental issue present that have increased Plaintiff's expenses or would prevent her from working. The Plaintiff simply does not plan to look for work until her youngest child is out of the home, or at least a year from now.

The Plaintiff testified on both direct and cross-examination that she needed the full \$13,500 a month for expenses for her and the children. The Plaintiff has rightly relied on that amount as part of the stipulation she entered into with the Defendant to maintain the same lifestyle she enjoyed during their 26-year marriage. The Plaintiff submitted a monthly expense exhibit and documents in support of her needs, indicating that the only difference between June of 2019 and now is that the children are older.

While the Plaintiff's testimony supports her desire to maintain her current lifestyle, her testimony and submitted evidence do not support a credible claim of necessity. The Court does not analyze what the Plaintiff has done with her prior alimony payments, but it looks to her current claim of necessity considering the obligor Defendant's change in ability to pay. In this light, the Plaintiff's budget includes items she pays for or believes are necessary for her adult children, such as a country club membership and cell phone expense that adult children can pay for themselves rather than be part of the Plaintiff's budget necessities. Other expenses are not realistic necessity amounts for a household that now consists of just the Plaintiff and one minor child, e.g., \$2,850 in clothing and personal care, and \$2,900 in groceries, door dash, and entertainment expense per month.

Generally, the Court agrees with the Plaintiff that allowing an obligor to make an agreement to spousal support as part of a divorce stipulation, and then come back and say the amount is not “necessary” would deter parties from reaching agreements. However, the second prong of the analysis – that the obligor must establish a change in circumstances that is not purposeful – alleviates this concern. See *Leedom*, 2020 S.D. 40, ¶ 20, 9447 N.W.2d at 149. If the Defendant had the ability to pay, then the Plaintiff’s spending and budget would not even be considered.

Contempt

“The required elements for ... civil contempt are (1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order.” *Taylor v. Taylor*, 2019 S.D. 27, ¶ 39, 928 N.W.2d 458, 471 (citing *Keller v. Keller*, 2003 S.D. 36, ¶ 9, 660 N.W.2d 619, 622). There is no dispute that an order exists and that the Defendant knows of the order. The ability to comply with the order and whether that noncompliance was willful are in dispute between the parties. The Plaintiff claims the Defendant has significant assets he can liquidate in order to continue making spousal support payments under the terms of the June, 2019 stipulation. The Defendant claims that he simply cannot pay the previously agreed-upon amount.

“When a party claims inability to comply, the burden shifts to that party to show ‘a complete and detailed financial position statement for the court’s review.’” *Taylor*, 2019 S.D. 27, ¶ 40, 928 N.W.2d at 471 (citing *Muenster*, 2009 S.D. 23, ¶ 35, 764 N.W.2d at 721. This means the Court must look at more than just the Defendant’s testimony. See *id.* As noted above, the Defendant’s claim of reduced income is supported by the evidence presented. Further, the reduction in his income was not willful or contumacious. This case is unlike the facts in

Leedom, where the Defendant's net assets had increased significantly since the time of the divorce. 2020 S.D. 40, ¶ 23, 9447 N.W.2d at 150. Here, nothing in the agreement ties the alimony award to the property division, and therefore the Defendant is not required to liquidate the retirement and investment accounts he received as part of the property settlement to pay alimony. See *Vandyke*, 2016 S.D. 91, ¶ 14-15, 888 N.W.2d at 564-65.

CONCLUSION AND ORDER

At the time of the divorce, the Defendant was making significantly more income than he has been over the past 18 months. The Defendant has not purposefully reduced his income and has met his burden to show there has been a change in his ability to pay alimony. The Plaintiff has rightly relied upon the Defendant's agreement to pay over the past five years and is still in need of spousal support. However, the Defendant made a credible showing that Plaintiff's necessities do not require a continued monthly support obligation of \$13,500 and \$500 investment contribution.

Based upon the above findings and conclusions, and considering the Defendant's ability to pay and Plaintiff's necessities, the Court hereby,

ORDERS that Defendant's Motion to Modify Alimony be GRANTED and the alimony award is modified to begin payment of \$6,000 per month as of January 1, 2025, and thereafter remain consistent with the terms of the Stipulation and Agreement filed on June 18, 2019. The Court further,

ORDERS that the additional \$500 per month payment into Plaintiff's IRA will terminate at the end of the 2024 calendar year. The Court further,

ORDERS that the Plaintiff's Motion for Contempt is DENIED in its entirety.

Dated this 8th day of October, 2024.



Rachel R. Rasmussen
Circuit Court Judge

ATTEST:
Brittan Anderson,
Clerk of Courts.

By: 

Clerk/Deputy Clerk.



STATE OF SOUTH DAKOTA) :SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JANELLE PEERY,
Plaintiff,

vs.

CURTIS PEERY,
Defendant.

41DIV19-18

ADDENDUM TO 10/08/2024
MEMORANDUM DECISION
AND ORDER ON MOTIONS

This matter came before the Court on October 15, 2024, for a hearing to clarify the Court's intentions in its Memorandum Decision and Order on Motions. The Plaintiff and her attorney Michael F. Tobin appeared by zoom, and attorney Meredith A. Moore appeared by zoom on behalf of the Defendant. The Court reviewed its October 8, 2024 Memorandum Decision and, after discussion with counsel, issues the following points of clarification to serve as an addendum to that Memorandum.

It is hereby ORDERED that the Defendant shall pay Plaintiff alimony in the amount of \$13,500 per month until the modification to \$6,000 per month begins on January 1, 2025. It is further.

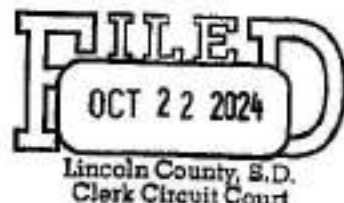
ORDERED that alimony shall thereafter remain at \$6,000 per month until it would otherwise end in accordance with the timeframe and termination clauses in the June 8, 2019 Stipulation and Agreement.

Dated this 17th day of October, 2024.


Rachel R. Rasmussen
Circuit Court Judge



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ATTEST:

Brittan Anderson,
Clerk of Courts.

By: JBaker,
Clerk/Deputy Clerk.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30909

JANELLE PEERY,

Appellant,

v.

CURTIS PEERY,

Appellee,

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Rachel R. Rasmussen
Circuit Court Judge

APPELLEE BRIEF

Notice of Appeal: November 27, 2024
Notice of Review: December 12, 2024

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant Janelle Rabenberg f/k/a Peery (“Janelle”) has appealed the Circuit Court’s October 8, 2024 Memorandum Decision and Order on Motions granting Defendant/Appellee’s Motion to Modify Alimony and denying Appellant’s Motion for Contempt, and the October 17, 2024 Addendum to October 8, 2024 Memorandum Decision and Order on Motions (collectively referred to as the “Decision”). Notices of Entry were filed on November 5, 2024. (SR 810). Janelle timely filed her Notice of Appeal on November 27, 2024.

By Notice of Review dated December 12, 2024, Defendant/Appellee Curtis Peery (“Curtis”) seeks review of one issue, namely the date on which the modification of alimony he requested and received was ordered to take effect. Curtis submits the Circuit Court’s Decision modifying alimony should have taken effect on August 1, 2024, consistent with SDCL § 25-7-7.3.

STATEMENT OF LEGAL ISSUES

1. Whether the Circuit Court abused its discretion in granting Curtis's Motion to Modify Alimony.

The Circuit Court granted Curtis's Motion to Modify Alimony, concluding Curtis met his burden to show a change in his ability to pay and that Janelle's necessities did not require a continued monthly support obligation at the amount set in the parties' Stipulation and Agreement.

Leedom v. Leedom, 2020 S.D. 40, 947 N.W.2d 143

Moore v. Moore, 2009 S.D. 16, 763 N.W.2d 536

Savage v. Savage, 2003 S.D. 46, 661 N.W.2d 762

2. Whether the Circuit Court clearly erred in denying Janelle's Motion for Contempt.

The Circuit Court denied Janelle's Motion for Contempt, concluding Curtis was unable to pay the amount set in the parties' Stipulation and Agreement and that his actions were neither willful nor contumacious.

Evens v. Evens, 2020 S.D. 62, 951 N.W.2d 268

Talbert v. Talbert, 290 N.W.2d 862 (S.D. 1980)

3. Whether the Circuit Court abused its discretion in establishing January 1, 2025, as the date on which Curtis's reduced alimony obligation would take effect.

The Circuit Court determined the modification in alimony payments would commence on January 1, 2025.

SDCL § 25-7-7.3

Steffens v. Peterson, 503 N.W.2d 254, 259 (S.D. 1993)

Kier v. Kier, 454 N.W.2d 544, 546 (S.D. 1990)

STATEMENT OF THE CASE

Curtis and Janelle were married in 1993. (SR 612). Janelle filed for divorce from Curtis in February 2019. (SR 6). On June 17, 2019, Janelle and Curtis entered into a Stipulation and Agreement, which was accepted by the Circuit Court and incorporated into a Judgment and Decree of Divorce on June 18, 2019 (the "Judgment"). (SR 34-37; 51). Pursuant to the Judgment, Curtis paid Janelle alimony. In June 2024, Curtis filed a Motion to Modify Alimony and supporting papers ("Motion to Modify") (SR 75). He had moved to Texas, changed employment, and could no longer pay the entirety of the ordered alimony amount. (SR 75-76; 77; 85). A hearing on the Motion to Modify was scheduled for September 27, 2024, and noticed on July 2, 2024. (SR 199). On September 10, 2024, Janelle filed a Motion for Contempt and Opposition to the Motion to Modify. (SR 201; 204-221). The Circuit Court issued its Decision on October 8, 2024, granting the Motion to Modify in part and denying the Motion for Contempt. (SR 612). Following the Decision, the parties sought clarification from the Circuit Court on several issues. A hearing was held on October 15, 2024, after which the Circuit Court clarified certain aspects of its Decision in an Addendum dated October 17, 2024. (SR 784).

STATEMENT OF FACTS

Janelle and Curtis married in 1993. (SR 612). After their marriage, Janelle worked as a dental hygienist, while Curtis completed medical school and a surgical residency in Sioux Falls. (Janelle App. 94:1-6). Following completion of his residency, Curtis and Janelle moved to Des Moines, Iowa, for two years prior to returning to Sioux Falls, where Curtis began working at what is now Sanford USD Medical Center ("Sanford") as a bariatric surgeon. (Janelle App. 95:5-9). During their marriage, they

had four children. Janelle stopped working as a dental hygienist after the parties' third child was born, working to raise the parties' children and manage their home. (Janelle App. 94:8-25; 95: 1-9).

Janelle filed for divorce from Curtis on February 14, 2019. SR 612. During the divorce, on April 24, 2019, the parties entered into an Interim Stipulation and Agreement to formalize payments made by Curtis to Janelle for expenses, spousal support, and child support. (SR 19). Curtis agreed to pay Janelle \$19,250.00 per month until the parties' home sold, the divorce was finalized, or upon further Order of the Court. (SR 33).

The parties successfully mediated their divorce on June 17, 2019. They signed a Stipulation and Agreement (the "Stipulation") that addressed the division of marital property, assumption of financial obligations, custody, child support and alimony. (SR 34). Pursuant to a Qualified Domestic Relations Order, Janelle received \$465,697 from Curtis's retirement account, two out of three of the parties' investment accounts, and the benefit of an insurance policy, among other items. (SR 34). On June 18, 2019, the Court entered a Judgment incorporating the terms of the Stipulation, which was filed on June 25, 2019. (SR 51). Notice of Entry of Order was filed with the Clerk of Court on June 28, 2019. (SR 56).

Section 2 of the Stipulation addresses alimony. It provides:

It is hereby agreed, Curtis shall continue to pay to Janelle, \$19,250.00 until such time as the home sells. Both parties recognize this is a combined payment of alimony and support payments for the children, including a consideration for Janelle paying expenses, rent, and allowances for adult children. Janelle will continue to pay the expenses as she was per the Interim Agreement until the home [sells].

Upon the sale of the home, Curtis shall pay to Janelle, an alimony payment of Thirteen Thousand Five Hundred Dollars (\$13,500.00) per month commencing the first of the month following the sale of the home. This alimony shall continue for a period of six (6) years, at which time the alimony shall be reduced to Seven Thousand Dollars (\$7,000.00) per month for a period of nine (9) years. These payments shall be through an automatic deposit into Janelle's account. In addition, Curtis shall pay an additional Five Hundred (\$500.00) per month into a Roth IRA of Janelle's choosing for a period of ten (10) years.

(SR 35-36).

During the majority of the parties' marriage, Curtis practiced general and bariatric surgery at Sanford USD Medical Center in Sioux Falls. (SR 86 at ¶ 7). Needing a change both personally and professionally, he left his practice at Sanford in January 2023. (Janelle App. 33:6-13; 175:5-25; 1-2). He moved to Texas where he had already been doing consulting work and where he had family, including his brother and cousins, in the area. (Janelle App. 31:17-25; 32:1-6; 175:10-25; 176:1-2).

Curtis did not leave Sanford without having secured new employment. (Janelle App. 34:3-10). He joined The Bariatric Experts as a contract physician. (SR 86 at ¶ 8; Janelle App. 34:3-10). He also continued his consulting work, forming First Creek Surgical Solutions, PLLP. (Janelle App. 32:6-13). Following his move, his annual income decreased from approximately \$870,000 in 2022 to approximately \$575,000 for 2023. (SR 86 at ¶ 9; Janelle App. 59:9-19; SR 374; 418; 479).

Despite the reduction in income, he believed his earnings would eventually exceed what he made at Sanford, having been presented with a prospectus showing his income could exceed his 2022 income in as little as a year after joining the practice. (Janelle App. 35:3-25; 36:1-7). Because of his reduced income, he tightened his belt,

reduced his personal living expenses, and continued to pay the ordered alimony in the ordered amount.

Unfortunately, continued employment with The Bariatrics Experts was not workable; Curtis's contract was not renewed for 2024. He signed a separation agreement effective as of December 15, 2023. (SR 579; Janelle App. 41:12-18).

Even before entering into the separation agreement, Curtis looked for new opportunities. (Janelle App. 43:3-25; 44:1-8; 49:1-23). In March 2024, Curtis joined another physician who had an existing practice, Inspire Bariatrics, located in McKinney, Texas. (SR 86-87 at ¶ 10; Janelle App. 44:2-8; 45:1-10). He also continued his consulting work. (SR 86-87 at ¶ 10; Janelle App. 46:17-19).

Curtis and the founding physician of Inspire Bariatrics entered into a Managed Services Agreement ("MSA") wherein each pays Inspire Bariatrics for the clinical services provided. (SR 588; Janelle App. 45:13-20). Before doing so, Curtis sought the existing practice manager's assistance in developing a business plan and preparing detailed projections and expense calculations. (Janelle App. 48:4-13). The projections established that Curtis's share of the expenses was approximately \$22,000 per month. (SR 584; 585; Janelle App. 51:1-25; 52:1-7). Until expenses are paid, he does not generate income. (SR 87 at ¶ 11). However, Curtis testified he would have been unable to develop a solo practice because his expenses would likely have been double what they were with Inspire Bariatrics. (Janelle App. 170:19-25; 171:1-2). He also testified he did not have viable options for large-scale hospital or clinic system employment that would have compensated him similarly to his employment with Sanford nor did he believe that

type of environment was sustainable for him personally or professionally. (Janelle App. 170:12-16).

Curtis testified that developing a new practice takes time, often requiring two to three years of operations before a practice is profitable. (SR 87 at ¶ 13; Janelle App. 34:12-13). Here, however, Curtis believed Inspire Bariatrics presented a better opportunity for faster development because of the existing practice and its lean operating practices. (Janelle App. 48:21-25). While he would not generate much by way of income initially, he believed it would come. At the time of hearing in September 2024, Curtis had not generated income from his association with Inspire Bariatrics. (SR 87 at ¶ 12; SR 606; 608; 609; 610; 611; Janelle App. 72:2-25; 1-25; 74:1-8). However, he continued to do consulting work, took call at several hospitals, and regularly engaged in networking with other surgeons and insurers. (SR 87 at ¶ 12; Janelle App. 52:18-25; 53:1-23).

Recognizing the need for capital for both his business and personal obligations, and based on his projected expenses, Curtis sought a line of credit in the amount of \$300,000. (SR 87 at ¶ 14; Janelle App. 47:5-8). He believed that amount would carry him through until his new practice became profitable. (Janelle App. 92:7-14). The amount of the loan for which Curtis was eligible was impacted by the amount and duration of his alimony obligation, ultimately meaning he was unable to obtain as sizable of a line of credit as he needed. (SR 87 at ¶ 14; Janelle App. 74:15-24; 85:16-25; 72:1).

Curtis reduced his personal living expenses upon moving to Texas, first at the time of his initial move and then again when he started his new practice. (SR 87 at ¶ 15; SR 686; Janelle App. 86:1-14). Among other efforts to reduce monthly living expenses, he moved from a 2-bedroom apartment to a 1-bedroom apartment to reduce his rent.

(Janelle App. 86:6-14).

Curtis does not have much by way of income-generating assets. (SR 87 at ¶ 17). In addition to the line of credit he obtained, he borrowed against the \$100,000 cash value of his life insurance policy. (SR 87 at ¶ 20; Janelle App. 47:2-8; 75:9-15). He used that amount, in part, to pay his alimony obligation. (Janelle App. 58:10-25; 59:1-8). At the time the Motion to Modify was filed in June 2024, he had approximately \$33,000.00 remaining in cash value for use. At the hearing in September 2024, that amount had been exhausted. *Id.*

Curtis also attempted to sell one of the two houses that he owned in Sioux Falls; however, he was unsuccessful in doing so. Instead, upon advice of his realtor, he entered into a long-term lease agreement. (Janelle App. 80:3-13;16-22). Both houses generate sufficient rent to pay the respective mortgages; however, absent a sale, they do not produce income. (Janelle App. 79:9-25; 80:1-2, 5-13).

At the time the Motion to Modify was filed, Curtis was depleting his available cash resources far too quickly given the expected timeline for the anticipated profitability of his practice. (SR 87 at ¶ 20). His net income for 2024 from his consulting work was approximately \$100,00 from January through July. (Janelle App. 77:2-5). He was unable to continue paying the alimony obligation. (Janelle App. 81:20-25; 82:1; 82:23-25; 83:1-4; 85:16-26; 92:21-25; 93:1-2). He requested that his alimony obligation be reduced from \$14,000 (which amount is inclusive of the \$500 investment contribution) to \$4,000. (SR 76; Janelle App. 83:1-4). He also requested that the duration of his alimony be shortened and terminated after four more years. (SR 76).

To date, and in addition to the property settlement identified in the parties' Stipulation, Curtis has paid more than \$854,000.00 in alimony and additional sums for child support, which payments commenced in February 2020. (SR 87 at ¶ 18). Curtis has also contributed to his minor daughter's health insurance, car insurance, her college fund, a monthly allowance, and her dance expenses. (Janelle App. 88:6-14). In total, Curtis had paid \$16,690.72 a month since approximately February 2020 and until June 2024. (SR 87 at ¶ 18).

At hearing, Curtis testified his personal monthly expenses are approximately \$10,000, which include his rent payment, car payment, a motorcycle payment, insurance, food, gas, and clothing. (SR 686; Janelle App. 86:15-25; 87:1-20; 88:1-17).

Janelle testified her monthly budget is approximately \$14,000 and her monthly expenses are in the range of \$16,000 to \$18,000, excluding private tuition expenses for the parties' youngest daughter at O'Gorman High School. (Janelle App. 204:6-14; 205:1-25; 206:5-9). Her monthly expenses include expenses for her adult children and a country club membership. (Janelle App. 224:1-25; 225:1-25; 226:11-25; 227:1-16; 228:18-25; 229:1-8). She also testified it is not unusual for her to carry credit card debt of over \$20,000 from month to month. (Janelle App. 231:4-11). She is not presently employed, has not been since well before the parties' divorce, and, at least at the time of hearing, did not plan to consider employment until at least after the parties' then-minor daughter had graduated high school. (Janelle App. 222:18-25; 223:1-9).

All of the parties' children are now adults (with the last turning 18 years-old on March 13, 2025). (Janelle App. 183:14-25; 184:1-15). At the time of the Motion to

Modify and subsequent hearing, the parties' fourth and youngest child was still a minor. (SR 36). Curtis is 55 years-old. Janelle is 54-years old. (Janelle App. 188:3-6).

The Circuit Court reduced Curtis's alimony obligation from \$13,500 per month to \$6,000 a month, and eliminated the additional monthly payment of \$500 to an investment account, with the modification taking effect on January 1, 2025. (SR 621). The Circuit Court further ordered that the alimony obligation of \$6,000 per month would remain in effect and "end in accordance with the timeframe and termination clauses in the June 8, 2019 Stipulation and Agreement." (SR 784).

STANDARD OF REVIEW

A circuit court's decision to modify an alimony award is reviewed for abuse of discretion. *See Leedom v. Leedom*, 2020 S.D. 40, ¶ 11, 947 N.W.2d 143, 147 (citing *Barton v. Barton*, 2012 S.D. 44, ¶ 9, 815 N.W.2d 553, 557). This Court "will not disturb an award of alimony . . . unless the trial court clearly abused its discretion." *Steffens v. Peterson*, 503 N.W.2D 254, 257 (S.D. 1993) (citing *Peterson v. Peterson*, 434 N.W.2d 732, 734 (S.D. 1989)). It will "not determine whether [it] would have made an original like ruling, but whether 'a judicial mind, in view of the law and the circumstances of the particular case could reasonably have reached such a conclusion.'" *Id.* "Abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Taylor v. Taylor*, 2019 S.D. 27, ¶ 14, 928 N.W.2d 458, 465 (quoting *Godfrey v. Godfrey*, 2005 S.D. 101, ¶ 11, 705 N.W.2d 77, 80). An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Thurman v. CUNA Mut. Ins. Society*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616 (quoting *State v.*

Lemler, 2009 S.D. 86, ¶ 40, 774 N.W.2d 272, 286).

This Court reviews a “circuit court’s findings of fact under the clearly erroneous standard” and reviews “conclusions of law de novo.” *Leedom*, 2020 S.D. 40 at ¶ 11 (quoting *Lowe v. Schwartz*, 2007 S.D. 85, ¶ 9, 738 N.W.2d 63, 66-67).

Similarly, this Court reviews “a trial court’s findings as to contempt under a clearly erroneous standard.” *Taylor*, 2019 S.D. 27 at ¶ 15, 928 N.W.2d at 465 (quoting *Muenster v. Muenster*, 2009 S.D. 23, ¶ 15, 764 N.W.2d 712, 717) (additional citation omitted). “The trial court’s findings of fact are presumptively correct and the burden is upon appellant to show error.” *Taylor*, 2019 S.D. 27 at ¶ 15 (quoting *Grode v. Grode*, 1996 S.D. 15, ¶ 19, 542 N.W.2d 795, 801)).

ARGUMENT

The Circuit Court’s Decision reducing Curtis’s alimony obligation and declining to hold him in contempt is justified by and consistent with reason and evidence. The Circuit Court was presented with extensive testimony by and evidence from both parties. It was not only able to judge the credibility of the witnesses, but in the best position to do so, and accorded their testimony the weight it deserved.

I. The Circuit Court Properly Exercised its Discretion When it Granted Curtis’s Motion to Modify.

Curtis proved a change in circumstances in both his income and Janelle’s necessities. He further proved that while his departure from Sanford was voluntary, it was not done for the avoidance of his obligations. The Circuit Court properly applied the law to the facts and evidence presented at hearing. Simply stated, there is nothing arbitrary or unreasonable about the Circuit Court’s Decision. It was and remains well

within the range of permissible choices.

A. Curtis proved a change in circumstances.

Alimony is modifiable or terminable upon a showing of changed circumstances since the time of entry of the divorce decree. This Court has held: “[o]nce a court approves an alimony award, it can modify it. This authority of a trial court is not affected by the fact [that] the original divorce judgment was based on an agreement between the parties[.]” *Savage v. Savage*, 2003 S.D. 46, ¶ 13, 661 N.W.2d 762, 765–66 (quoting *Paradeis v. Paradeis*, 461 N.W.2d 135, 137 (S.D. 1990) (citing *Connolly v. Connolly*, 270 N.W.2d 44 n.2 (S.D. 1978)). “[A] stipulation in the nature of spousal support or maintenance [is] not contractual in nature, but rather . . . subject to modification or termination on a showing of changed circumstances.” *Harding-Moyer v. Harding*, 2000 S.D. 126, ¶ 13, 616 N.W.2d 899, 902 (citing *Saxvik v. Saxvik*, 1996 S.D. 18, ¶ 9, 544 N.W.2d 177, 179).

“The change in circumstances refers to a change in the *necessities* of the recipient and the *financial ability* of the obligor.” *Moore v. Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d 536, 540 (quoting *Horr v. Horr*, 445 N.W.2d 26, 28 (S.D. 1989) (citing *Dougherty v. Dougherty*, 76 S.D. 318, 77 N.W.2d 845 (1956); *Guintier v. Guintier*, 72 S.D. 554, 37 N.W.2d 452 (1949)) (emphasis added). The change demonstrated “need not be substantial,” although it must be more than “mere proof of a change.” *Lowe v. Schwartz*, 2007 S.D. 85, ¶ 13, 738 N.W.2d 63, 68. The moving party bears the burden of establishing a change. *Id.*

Following the divorce, Curtis moved from Sioux Falls to Texas, ending his employment with Sanford and accepting a role as a contract physician with The Bariatric

Experts. (Janelle App. 34:3-10). He took no time off between employers. (Janelle App. 67:12-23). Prior to the move, he was making approximately \$870,000. (SR 86 at ¶ 9; Janelle App. 59:15-22). His new position had a base salary of \$420,000, which he supplemented with consulting work through his professional corporation, making approximately \$575,00 in 2023. (Janelle App. 59:22-25).

In December 2023, The Bariatrics Experts did not renew Curtis's contract. (SR 579; Janelle App. 41:12-18.) Curtis anticipated the termination of the relationship; he looked for new opportunities even before the non-renewal. (Janelle App. 43:3-25; 44:1-8). Unfortunately, there were few opportunities, and his extensive efforts did not come to fruition.

He joined an existing solo practice called Inspire Bariatrics in March 2024. (Janelle App. 45:15-20). When he elected to partner (although not in a legal sense) with the physician operating Inspire Bariatrics, Curtis and the existing physician entered into an agreement that set forth their respective obligations for the costs of operation. (SR 588). He did not generate income with his new role at Inspire Bariatrics but continued consulting work and picked up calls at two hospitals. (Janelle App. 58:22-25; 59:1-8). Through July 2024, he had made approximately \$100,000 from his consulting and other work.

The evidence shows Curtis's circumstances changed materially when he first moved to Texas in 2023 and again when he joined Inspire Bariatrics in March 2024. His income was more than halved. Through his testimony and exhibits, Curtis showed he was not generating sufficient revenue to fully pay his share of the expenses, let alone profit. (SR 608; 609; 610; 611). He reduced his personal living expenses, but he

struggled to pay his professional and personal expenses, Janelle's expenses, child support, and his daughter's health insurance and dance expenses. He leveraged the cash value of an insurance policy he had, took out a line of credit, and attempted to sell one of the properties he owned. Even then, his income did not cover his own expenses, let alone Janelle's. He was rapidly depleting his cash reserves and taking on debt in the form of a line of credit.

Despite his circumstances, Curtis did not seek to terminate his alimony obligation. He instead sought to reduce it. He testified that he wanted to be fair but also reduce an obligation he could no longer continue to pay. Curtis's situation clearly showed a change in circumstances. Janelle did not dispute his reduced income. She did, however, assert that the reduction in income alone was insufficient to meet Curtis's legal burden. She instead argued Curtis intentionally underemployed himself and because of his actions should have continued to invade his assets to pay alimony. See Janelle's Brief at pp. 13-18. These arguments are unavailing considering the entire record.

1. Curtis did not change employment and reduce his income to avoid alimony.

Janelle argues there is no change in circumstances because Curtis chose to join Inspire Bariatrics as opposed to remaining with Sanford or seeking similar employment as an employee with another large hospital or clinic system. This Court has stated it "does not condone voluntary reduction in income for the express purpose of avoiding alimony and support payments." *Straub v. Straub*, 281 N.W.2d 260, 261 (S.D. 1986) (citing *Herndon v. Herndon*, 305 N.W.2d 917 (S.D. 1981); *Nauman v. Nauman*, 320 N.W.2d 519 (S.D. 1982); *Simmons v. Simmons*, 67 S.D. 145, 290 N.W. 319 (1940)).

Critically, however, it further stated “[t]here is a vast difference . . . between a disinclination or unwillingness to pay alimony and an inability to pay.” *Straub*, 281 N.W.2d at 262 (citing *Kuehn v. Kuehn*, 74 S.D. 521, 55 N.W.2d 70 (1952)).

Curtis did not make the decision to move and seek new employment without considerable deliberation. (Janelle App. 33:1-18). There is no evidence that Curtis made the decisions he did with mal-intent or any intent to ignore the Judgment. To the contrary, Curtis initially believed he would make more money with The Bariatrics Experts than he had at Sanford because of both the potential for greater income and the opportunity to own an interest in a practice following the existing physician’s retirement. (Janelle App. 35:7-25; 36:1-22; 39:12-18). When he did not increase his income and his contract with The Bariatrics Experts was terminated, he actively pursued other opportunities. He took on call at several hospitals, aiming to take between 7 to 8 calls a week and he continued his consulting work. (Janelle App. 63:24-25; 64:1-25; 65:1-20). In addition to change in his own circumstances, Curtis also spoke to changes within his specialty, indicating that the prolific use of weight loss drugs had caused the number of bariatric surgeries to decline at a national level. (Janelle App. 91:1-11). While he not only hoped, but actively worked to address the change in his own income as well as counter those changes within his specialty, it proved incredibly difficult. (Janelle App. 170:12-18).

Janelle also argues Curtis chose to pay the original physician at Inspire Bariatrics as opposed to fulfilling his alimony obligation. See Janelle’s Brief at p.15. That argument is a distortion of the facts and not representative of the reality of an individual physician attempting to start a new practice. Curtis’s MSA with Inspire Bariatrics

represented his agreement to pay his monthly share of expense for a clinic space, equipment, staff, and nearly everything needed to support a practice. These were not gratuitous payments to another person but his share of the overhead costs of a business. And as Curtis testified, going it alone would have nearly doubled those expenses.

A comparison of Curtis's circumstances and employment decisions with those made by the moving parties in the cases of *Olson v. Olson*, 1996 S.D. 90, ¶ 16, 552 N.W.2d 396, and *Simmons v. Simmons*, 67 S.D. 145, 290 N.W. 319 (1940) is instructive. Both cases analyze the intent of the obligor in not only seeking a reduction of payment, but essentially manipulating the facts and circumstances to support the claimed reduction.

In *Olson*, this Court considered a fact pattern in which the parties had a thirty-year marriage prior to divorce, ex-wife was granted a divorce on the ground of extreme mental cruelty, and she was awarded alimony. 1996 S.D. 90 at ¶ 3, 552 N.W.2d at 398. Obligor ex-husband sought to reduce his monthly obligation; ex-wife sought an increase. *Id.* at ¶ 4. The trial court denied the obligor's request for a reduction and granted his ex-wife's requested increase, concluding that the obligor had "voluntarily reduced his available income by increasing overhead costs in his business." *Id.* at ¶ 5. On appeal, this Court stated it:

may consider whether the obligor has either acted with the primary goal of reducing his gross income or has artificially reduced the net income available after expenses through exaggerating personal expenses or inflating overhead costs of a business owned, at least in part, by the obligor.

Id. at ¶ 12. There, this Court agreed with the trial court that the obligor "acted to intentionally reduce his income by inflating the overhead expenses associated with his

dental practice.” *Id.* at ¶ 16, n.3 (holding there was evidence obligor created “artificial results” through “manipulation.”).

In *Simmons*, the Court noted that the obligor spouse also sought to manipulate the evidence in support of his request for a reduction, making changes to his business operations to inflate expenses. *Simmons*, 290 N.W.2d at 321. The Court noted the obligor made “no bona fide effort to comply with the mandate of the court” and “sought means of evading payment.” *Id.* at 319. To the contrary, the obligor’s own testimony showed that “his earnings have contributed substantially to the acquisition of a dwelling and other property by his present wife.” *Id.* There was a “persistent evasion of payment [that] manifest[ed] his attitude and willful disregard for the mandate of the court.” *Id.*

Circuit courts are authorized, and even reminded by this Court’s caselaw, to consider the intentions of the obligor. *See Leedom*, 2020 S.D. 40 at ¶ 21. It did exactly that here, concluding Curtis did not choose to sabotage his career and business opportunities. (SR 618). The Circuit Court found Curtis’s testimony regarding his change in employment and financial situation credible. (SR 618). It stated: “[i]t appears the Defendant was not trying to get out of a ‘bad bargain’ of alimony, but that he made a ‘bad business decision,’ and ‘that this decision was not intentional’ and he did not ‘sabotage[] the business opportunity.’” (SR 618). It further stated:

Other evidence supports the finding that the Defendant has been trying to increase his earnings: the Defendant faithfully made alimony payments until he believed his access to liquid assets could no longer cover the payments, that he did not leave either employment position without having new employment lined up to begin immediately, and that he has taken on extra work by taking call in hospitals and consulting.

(SR 618).

Curtis's mindset and actions since his move to Texas are not those of someone seeking to voluntarily or intentionally under-employ himself or engage in an act of sabotage against Janelle. As the trial court noted, Curtis may have made a poor business decision, but it was not an intentional act on his part and certainly not one aimed at trying to shirk his obligations pursuant to the Judgment. (SR 618). Instead, despite a poor business decision, he continued to work as hard at the age of 55-years old as he had much earlier in his career. The Circuit Court properly thus concluded Curtis did not act with the primary goal of reducing his income or exaggerating his circumstances to evade his support obligation.

2. Curtis is not required to divest his retirement to pay alimony.

Curtis paid his alimony obligation until he could no longer do so. He used certain of his assets to do so, but he is not required to continue doing so, particularly when Janelle has not proven that the amount she seeks is for ordinary needs and necessities. This is not a situation in which Curtis has significant income-earning assets that allow him to maintain both his lifestyle as well as Janelle's, in addition to his medical practice. To that end, Janelle's argument that the reduction in Curtis's income is of no consequence because Curtis should be required to invade his investments further to pay alimony is not only untenable, but inconsistent with the law.

The cases in which this Court has considered assets as a means by which to pay support are factually dissimilar to the instant case. For example, in the *Leedom* case, 2020 S.D. 40, 947 N.W.2d 143, Cindy filed for divorce from David after twenty-years of marriage. David's annual income for the four-years preceding the divorce ranged from \$200,000 - \$385,000. *Id.* at ¶ 2. Cindy "worked sporadically" during their marriage. *Id.*

Following trial, the trial court ordered David to pay Cindy alimony in the amount of \$3,000 until any of the following occurred: (1) Cindy remarried, (2) David became eligible for social security, and (3) David's income increased "substantially." *Id.* at ¶ 4.

David consistently paid his alimony following the divorce. He retired shortly after attaining the age of 62. He thereafter stopped paying Cindy alimony. *Id.* at ¶ 7.

Cindy "filed a motion to restore alimony." *Id.* at ¶ 8. David argued "he was no longer obligated to pay alimony . . . after he became eligible for social security and retired." *Id.* He further argued that was unable to pay because he was not earning an income.

The trial court held that David's alimony obligations did not automatically terminate and ordered David to pay arrearages to Cindy; however, it further reduced David's obligation from \$3,000 to \$1,750. *Id.* at ¶ 9. David appealed, arguing the trial court abused its discretion when it modified, rather than terminated, his alimony obligation. *Id.* at ¶ 18.

On appeal, this Court analyzed changes in David's income and assets, noting that his earnings reached a high of \$475,000 following the marriage and that he chose to forego receipt of social security in order to increase his monthly allotment in future years. *Id.* at ¶ 22. It further noted that David had two homes, with values of \$662,676 and \$755,000, respectively, as well as investment accounts valued at \$4,046,670. *Id.* His monthly budget was \$16,847 and he maintained it by "liquidating assets." *Id.*

In comparison, Cindy had worked several different jobs since the divorce. *Id.* at ¶ 24. The highest annual income she achieved was approximately \$51,000. *Id.* She also had medical expenses that prompted her to deplete her 401K and was forced to live with

her son because of poor financial condition. *Id.*

This Court affirmed the trial court's finding that modification, and not termination, was appropriate. *Id.* at ¶ 24. In reaching that conclusion, this Court agreed that David's obligation should not be terminated when he "was able to maintain two high-end homes and a monthly budget of over \$16,000." *Id.* In contrast, "Cindy's monthly budget was less than one-third of David's budget [] and [s]he had also acquired significant debt since the divorce and was living with her son to stretch her monthly income." *Id.* at ¶ 25.

In *Kuehn v. Kuehn*, 74 S.D. 521, 526–27, 55 N.W.2d 70, 73 (1952), this Court took a dim view of the obligor's personal conduct, concluding his actions required consideration and use of his assets to pay his support obligation. The obligor argued he was unable to meet his obligation to pay alimony without "encroaching upon the assets of his estate," 55 N.W.2d at 526-27. However, as this Court noted, the obligor's "failure to earn a substantial income" was "induced by his intemperate habits." *Id.* at 527. But for "the excessive use of liquor[.]" the obligor could have continued to meet his ex-spouse's need for alimony. This Court noted that if the corpus of a spouse's estate must be invaded, it should be that of the party at fault. *Id.*

Neither of these cases is factually analogous to the instant case. Curtis did not retire. He is not living a lavish lifestyle with considerable equity built up in homes and vacation homes. With the exception of the two investment properties, he has what he received in the divorce in terms of insurance, retirement, and investment accounts. (Janelle App. 81:12-16). His \$10,000 budget for his personal expenses is, outside of support and work obligations, considerably less than Janelle's budget. He also has not

engaged in irresponsible spending or actions that dissipated his income or assets. Again, as noted by the Circuit Court, it found Curtis's testimony about his employment and financial situation "credible and supported by the evidence." (SR 618). Curtis has already invaded his assets to manage his personal and professional obligations, including those to Janelle. Continuing to do so is not supported by this record and ultimately unsustainable.

B. Curtis has proved a change in Janelle's necessities and also demonstrated many of her expenses are not necessities.

Janelle's necessities have changed since the divorce. When "considering the financial necessities of Wife and the ability of Husband to pay, both income and expenses of the parties must be considered." *Moore*, 2009 S.D. 16 at ¶¶ 14-15, 763 N.W.2d at 540 (quoting *Horr*, 445 N.W.2d at 28. This Court has stated its "decisions have closely scrutinized the gross income and expenses which might affect the obligor's ability to pay or the recipient's need." *Id.*

The Judgment set spousal support and child support at \$19,250.00 per month until the marital home sold. That Judgment contemplated the mortgage and expenses for the marital home, child support and adult children then living with Janelle. (SR 51). The sale of the marital home caused a reduction of the original amount of \$19,250 to \$13,500 per month, but then created a specific child support obligation of \$1,500 per month, and added a \$500.00 per month payment to an investment account of Janelle's choosing.¹

¹ The Circuit Court rejected Janelle's contention that the alimony award stood in the stead of property division, noting Janelle received equity from the sale of the parties' marital home, investment accounts, and a share of Curtis's Sanford retirement account, which itself was nearly \$500,000. (Janelle App. 218:9-24). It properly concluded that the alimony section was "separate and distinct from other property division sections such as

Curtis also paid for other expenses for his minor child.

Since the divorce, Janelle lives in a different home with only one minor child for whom she receives child support and other assistance with expenses, such as contributions toward the minor child's dance expenses, health insurance, and car insurance. Janelle does not acknowledge these changes, instead arguing her standard of living has not changed and should not change. This is significant. Janelle's focus is on her desired standard of living and not whether she can afford necessities or ordinary expenses. Her monthly budget is greater than Curtis's. As noted in *Lampert v. Lampert*, 388, N.W. 2d. 899, 903, the focus should not only be on whether the obligor has sufficient funds to pay, but also whether the "dependent spouse continued to need the money to meet ordinary expenses[.]"

While Janelle's testimony and evidence shows that her expenses exceed the amount she's receiving for spousal support, it does not mean her expenses are ordinary or necessary. Simply because she says she continues to live her life how she wants to and has not changed her spending habits does not mean her needs have not changed. As noted by the Circuit Court, it needed to look at "Janelle's current claim of necessity considering [Curtis's] change in ability to pay." (SR 619). It stated:

While the Plaintiff's testimony supports her desire to maintain her current lifestyle, her testimony and submitted evidence do not support a credible claim of necessity. The Court does not analyze what the Plaintiff has done with her prior alimony payments, but it looks to her current claim of necessity considering the obligor Defendant's change in ability to pay. In

life insurance, retirement and investment accounts, and real and personal property." (SR 616-617). "Therefore, the alimony agreement in this case is separate and distinct from the property settlement agreement, and the Court has authority to modify alimony if certain circumstances exist." (SR 616-617).

this light, the Plaintiff's budget includes items she pays for or believes are necessary for her adult children, such as a country club membership and cell phone expense that adult children can pay for themselves rather than be a part of the Plaintiff's necessities. Other expenses are not realistic necessity amounts for a household that now consists of just the Plaintiff and one minor child, e.g., \$2,850 in clothing and personal care, and \$2,900 in groceries, door dash, and entertainment expense per month.

(SR 619).

It bears repeating: Curtis did not request termination of his alimony obligation nor did the Circuit Court terminate his alimony exception. While he requested modification to a lesser amount than that determined by the Court, he is still paying alimony in the amount of \$6,000 per month. This modification is consistent with Curtis's ability to pay and Janelle's ordinary needs. It was and remains supported by a well-developed record and law.

II. The Circuit Court Properly Declined to Hold Curtis in Contempt.

Curtis lacked the ability to pay his alimony in full. He did not purposefully create his lack of income to avoid paying alimony. In that regard, Janelle did not meet her burden to show Curtis willfully or contumaciously disobeyed the alimony portion of the Judgment.

The law discussing civil contempt is well established. This Court has held:

A party is not guilty of contempt of court in failing to pay amounts required by a divorce judgment if he is unable to do so and did not voluntarily create the disability for the purpose of avoiding such payment, and where a party seeks to satisfy the court that his failure to render obedience to the mandate of the court was due to his inability to comply, without fault on his part, the burden is on him to establish such disability.

Nauman v. Nauman, 320 N.W.2d 519, 521 (S.D. 1982) (quoting *Simmons*, 290 N.W. at 321). There are four elements of civil contempt. They are "(1) the existence of an order;

(2) knowledge of the order, (3) ability to comply with the order, and (4) willful or contumacious disobedience of the order.” *Evens v. Evens*, 2020 S.D. 62, ¶ 47, 951 N.W.2d 268, 283; *see also Taylor*, 2019 S.D. 27 at ¶ 39; *see also Keller v. Keller*, 2003 S.D. 36, ¶ 9, 660 N.W.2d 619, 622.

The parties do not dispute that the record shows the first two elements are met. The record does not support a similar finding on elements 3 and 4. It does not demonstrate Curtis willfully disregarded the Judgment or acted in bad faith.

Janelle’s request for contempt focused on Curtis’s payment of a reduced amount of alimony after June 2024. He paid in full for June 2024, but then did not make a payment in July because of an error and then made a payment of \$4,000 in August 2024. (Janelle App. 165:19-25; 166:1-25; 167:1-18). He had attempted to work with Janelle to address spousal support following his separation from The Bariatrics Experts; however, they were unable to agree. His Motion to Modify was necessary and filed in June, with a hearing scheduled for the end of September 2024. (Janelle App. 81:20-25; 82:1-22). At that point, his income had already decreased and he was using his assets and a loan to pay personal and professional expenses and support.

Until July 2024, Curtis consistently made payments of spousal support and child support, as well as paying other expenses for his remaining minor child. While he did accept lower compensation when he signed on with the Bariatrics Experts, he did so believing he could or would be making over \$1,000,000 within a year. (Janelle App. 35:7-18). He thought the decrease in his income would be short-lived. (Janelle App. 41:19-25; 42:1-11). Unfortunately, it was not. In his testimony, he said he wanted to help his family, he wanted to be fair; however, he simply could not afford the full amount of

spousal support on his income. His testimony establishes he was attempting to start a new practice, continuing with his consulting work, and picking up call at several different hospitals. He testified he was working as hard at the age of 55 as he was earlier in his career. He further indicated that as of the time of filing of his Motion to Modify, he had used all but \$33,000 of the cash value of his life insurance policy to pay spousal support and other expenses. By the time of hearing on September 27, 2024, he had exhausted that amount. He had made efforts to sell one of his rental properties without success, but when the listing did not prove fruitful, he pursued a long-term lease agreement in order to cover the mortgage and expenses. (Janelle App. 80:3-13;16-22).

Compare these facts to those of *Talbert v. Talbert*, 290 N.W.2d 862 (S.D. 1980). In *Talbert*, this Court emphasized the lack of good faith effort on the part of the obligor. In affirming the trial court's finding of contempt, it stated:

We see no good faith on the part of plaintiff when he insists upon maintaining high monthly payments for a new house and a sports car while his medical practice is unable to meet expenses and his former wife receives welfare in Massachusetts. The defense of absolute inability must be proved by the party who asserts it.

Talbert, 290 N.W.2d at 863-64; *see also Bailey v. Bailey*, 77 S.D. 546, 95 N.W.2d 533 (1959). Curtis has not indulged in "expensive luxuries," which indulgences have prevented him from meeting his obligations. (Janelle App. 86:15-25; 87: 1-20). To the contrary, he is working as hard, if not harder, than earlier in his career. Curtis did not miss a spousal support or child support payment since the parties' divorce was finalized in June 2019 until July 2024. He made all payments of \$19,250 per month and then all payments of \$13,500 a month, plus the \$500 retirement account payment, through June 2024. (Janelle App. 83:25; 84:1-25; 85:1-15). Curtis testified that he made payment in

full until he could not, at which time he made a reduced payment. (Janelle App. 82:23-25; 83:1-4; 85:16-26).

As of hearing, Curtis had \$177,000 left on his line of credit, which he was using for living and business expenses. (Janelle App. 90:4-11). He had already exhausted the \$100,000 in cash value that he had on an insurance policy. He had to make an adjustment to be financially solvent. He has also acknowledged he cannot retire at the age of 65. (Janelle App. 91:19-22). He intends to continue working and understands that he needs to do so. At base, Curtis wanted and continues to want “people to get along, and enjoy our children,” but he simply cannot continue to pay at the level set in the Judgment. (Janelle App. 92:21-25; 93:1-2.) Curtis testified that this is not a place he wants to be in his life at the age of 55-years old; he did not intentionally reduce his income. (Janelle App. 41:1-25; 41:1-11). These are not the actions nor is this the mindset of someone seeking to willfully disregard his obligations.

This Court has repeatedly stated it recognizes the “primacy of the court’s fact-finding role and [its] inclination to reverse only those findings that are clearly erroneous.” *Hiller v. Hiller*, 2018 S.D. 74, ¶ 22, 919 N.W.2d 548, 555. Indeed, “[t]he credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the circuit court and we give due regard to the circuit court’s opportunity to observe the witnesses and the evidence.” *Id.* (quoting *McCollam v. Cahill*, 2009 S.D. 34, ¶ 6, 766 N.W.2d 171, 174). The Circuit Court’s findings that Curtis met his burden to prove his inability to pay and that his inability was not done to purposefully avoid his alimony obligation are not clearly erroneous.

III. The Circuit Abused its Discretion in Delaying Reduction of Curtis's Alimony Obligation until January 2025.

By notice of review, Curtis alleges the Circuit Court should have made the reduction in alimony effective as of August 1, 2024,² or alternatively, following the September 27, 2024 hearing.

South Dakota Statute authorizes modification of past-due support payments during that period when a petition for modification is pending. The applicable statute provides:

Any previously ordered support payments that have become due, whether paid or unpaid, are not subject to modification by a court or administrative entity of this state, except those accruing in any period in which there is pending a petition for modification of the support obligation, but only from the date that notice of hearing of the petition has been given to the obligee, the obligor, and any other parties having an interest in such matter.

SDCL § 25-7-7.3. Past-due support payments are not retroactively modifiable except when a motion for modification is pending. *See, e.g., Taecker v. Taecker*, 527 N.W.2d 295 (S.D. 1995) (movant can seek to modify alimony only from the time a petition is pending); *Steffens v. Peterson*, 503 N.W.2d 254, 259 (S.D. 1993) (same). *See also Faulk v. Faulk*, 2002 S.D. 51, 644 N.W.2d 472 (holding modification of child support obligation could only be made after obligor had filed a request to modify); *Jopling v. Jopling*, 526

² Pursuant to the Judgment, Curtis's support payments were due on or before the first of each month. While the Motion was filed in June 2024, the Notice of Hearing was filed on July 2, 2024, while the parties discussed workable dates. The case law discussing modification indicates past-due payments are modifiable so long as a petition is pending, which it was in June. However, the applicable statute states retroactive modification is permissible from the date the notice of hearing of the petition was given, which is July 2. As a result, Curtis submits that, at a minimum, the language in the statute authorizes retroactive modification to at least August 1, 2025.

N.W.2d 712 (S.D. 1995) (holding trial court did not abuse discretion when it allowed modification of past due child support payments from date petition for modification filed); *Gunn v. Gunn*, 505 N.W.2d 712 (S.D. 1993) (holding support obligations that are past-due are retroactively modifiable from the date of filing of the petition).

Curtis filed his Motion to Modify on June 6, 2024. In his Motion, he requested that modification be granted retroactively. Following the filing of the Motion, the parties worked together to schedule a hearing on said motion, after which Notice of Hearing was served and filed on July 2, 2024. Hearing was held on September 27, 2024. In its Decision, the Circuit Court granted Curtis's motion for modification in part, ordering that his alimony award "is modified to begin payment of \$6,000 per month as of January 1, 2025[.]" (SR 621).

Following issuance of the Decision, the parties requested clarification on several matters, after which a second hearing was held on October 15, 2024. (Curtis App. 004-011). One of the issues for discussion at the October 15 hearing was the amount of Curtis's support obligation from the time of filing of his petition until January 1, 2025. (Curtis App. 005:18-25; 006:1-6). The Circuit Court clarified that the \$13,500 alimony obligation (and \$500 payment to an investment account) would continue until January 1, 2025. As support for its ruling, the Circuit Court stated:

The alimony award is modified to begin payment of \$6,000 per month as of January 1st, and so he is still responsible to be paying everything just the same, and then it changes as of January 1st. I did not want to backdate it because I believe that would put Ms. Rabenberg in a very difficult position, and I believe that she should have time to get all of those things figured out as well.

(Curtis App. 005:24-25; 006:1-6). On October 17, 2024, the Circuit Court clarified its earlier findings in an Addendum, stating “that the Defendant shall pay Plaintiff alimony in the amount of \$13,500 per month until the modification to \$6,000 per month begins on January 1, 2025.” (SR 784).

The circumstances of this case are difficult. The record establishes Janelle relied solely on the alimony received to support her lifestyle. However, the record also establishes that Curtis’s ability to pay had changed dramatically, which change required a review of Janelle’s necessities. In that regard, the Circuit Court found Curtis’s testimony to be credible and granted his requested modification. Compassion and consideration for Janelle’s circumstances cannot support a Decision that appears outside the range of permissible choices given the record and the findings made thereon. Accordingly, and consistent with statute, the modification should have been effective at least as of August 1, 2024, which was the first month following the Notice of Hearing. The evidence presented at hearing, and accepted by the Circuit Court, established Curtis was financially unable to meet his payment obligations at the time he filed his Motion to Modify in June 2024 (and even before although he continued to make payment as best as possible), at the time he served Notice of Hearing on said Motion on July 2, 2024, and at the time of hearing on September 27, 2024. *See Steffens*, 503 N.W.2d at 25 (holding “past-due support payments are not retroactively modifiable under SDCL § 25-7-7.3 except for that period in which a petition for modification is pending.”); *Kier v. Kier*, 454 N.W.2d 544, 546 (S.D. 1990) (same). It was an abuse of discretion to delay implementation of the modification until January 1, 2025.

Alternatively, the modification of alimony should have been effective as of the date of the Circuit Court's October 2024 Decision for the same reasons that the evidence presented at hearing, and accepted by the Circuit Court, established Curtis was financially unable to meet his payment obligations at the time he filed his Motion for Modification in June 2024, at the time he served Notice of Hearing on that Motion on July 2, 2024, and at the time of hearing on September 27, 2024. The Circuit Court abused its discretion when it concluded that Curtis had met his burden to show a change in circumstances, but then delayed modification for nearly six months after the Motion was filed.

CONCLUSION

Curtis respectfully requests that the Circuit Court's modification of his alimony obligation and its denial of Janelle's Motion for Contempt be affirmed. He further requests that the granted modification be made effective at least as of August 1, 2024.

Dated this 18th day of April, 2025.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Meredith A. Moore
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Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply and Response Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 8,369 words, exclusive of the table of contents, table of authorities, statement of legal issues on review, any addendum materials, and any certificates of counsel.

/s/ Meredith A. Moore

Meredith A. Moore

CERTIFICATE OF SERVICE

I, Meredith A. Moore one of the attorneys for Appellee do hereby certify that on this 18th day of April, 2025, I have electronically filed the foregoing with the Supreme Court Clerk using the Odyssey File & Serve system which will send notification of such filing to the following:

Michael Tobin
Kristin N. Derenge
Boyce Law Firm, LLP
300 S. Main Ave.
Sioux Falls, SD 57104
Attorneys for Appellant

/s/ Meredith A. Moore

Meredith A. Moore

APPENDIX TABLE OF CONTENTS

1.	Defendant's Objections to Findings of Fact and Conclusions of Law	001-003
2.	October 15, 2024 Hearing Transcript	004-011

STATE OF SOUTH DAKOTA
COUNTY OF LINCOLN

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JANELLE PEERY Plaintiff, vs. CURTIS PEERY Defendant.	41DIV19-000018 DEFENDANT'S OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW
----------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------

Defendant, Curtis Peery, by and through his undersigned counsel of record, hereby respectfully submits the following objections to the Findings of Fact and Conclusions of Law contained in the Court's Memorandum Decision and Order on Motions dated October 8, 2024, and the Court's Addendum to 10/08/2024 Memorandum Decision and Order on Motions (collectively, the "Memorandum Decision and Order"):

1. Defendant objects to the legal conclusion and any related factual findings supporting said conclusion in the Memorandum Decision and Order that Defendant's current alimony obligation under the parties' Stipulation and Agreement shall remain at \$13,500.00 per month until January 1, 2025, at which time said obligation shall be modified to \$6,000.00 per month. Defendant asserts that any modification should be effective as of August 1, 2024, as the evidence presented at hearing established he was financially unable to meet his payment obligations at the time he filed his Motion for Modification in June 2024, served Notice of Hearing on said Motion on July 2, 2024, and at the time of hearing on September 27, 2024. Defendant respectfully submits the existing findings of fact contained within the Memorandum Decision and Order support modification effective as of August 1, 2024. *See* SDCL § 25-7-7.2

(providing previously ordered support payments are subject to modification when there is “pending a petition for modification of the support obligation, but only from the date that notice of hearing of the petition has been given[.]”); *see also Steffens v. Peterson*, 503 N.W.2d 254, 259 (S.D. 1993) (holding “past-due support payments are not retroactively modifiable under SDCL 25-7-7.3 except for that period in which a petition for modification is pending.”); *Kier v. Kier*, 454 N.W.2d 544, 546 (S.D. 1990) (same).

2. Alternatively, the modification of alimony should be effective as of the date of the Memorandum Decision and Order for the same reasons that the evidence presented at hearing established Defendant was financially unable to meet his payment obligations at the time he filed his Motion for Modification in June 2024, served Notice of Hearing on that Motion on July 2, 2024, and at the time of hearing on September 27, 2024. *See* SDCL § 25-7-7.2[.]”); *see also Steffens v. Peterson*, 503 N.W.2d 254, 259 (S.D. 1993) (holding “past-due support payments are not retroactively modifiable under SDCL 25-7-7.3 except for that period in which a petition for modification is pending.”); *Kier v. Kier*, 454 N.W.2d 544, 546 (S.D. 1990) (same).

Dated this 6th day of November, 2024.

CUTLER LAW FIRM, LLP
Attorneys at Law

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PO Box 1400
Sioux Falls, SD 57101-1400
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CERTIFICATE OF SERVICE

I, Meredith A. Moore one of the attorneys for Defendant do hereby certify that on this 6th day of November, 2024, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

Michael Tobin
Boyce Law Firm, LLP
300 S. Main Ave.
Sioux Falls, SD 57104

/s/ Meredith A. Moore
Meredith A. Moore

COPY

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STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF LINCOLN)

SECOND JUDICIAL CIRCUIT

JANELLE PEERY,

Plaintiff,

OTHER HEARING

-VS-

CURTIS PEERY,

Defendant.

41DIV.19-000018

BEFORE:

The Honorable Rachel R. Rasmussen
Circuit Court Judge
Second Judicial Circuit
Canton/Sioux Falls, South Dakota
October 15, 2024

APPEARANCES:

Mr. Michael Tobin
Attorney at Law
P.O. Box 5015
Sioux Falls, South Dakota
VIA ZOOM

For the Plaintiff;

Ms. Meredith Moore
Attorney at Law
P.O. Box 1400
Sioux Falls, South Dakota
VIA ZOOM

For the Defendant.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

1 (The following was held via zoom with the attorneys and
2 the court at 11:44 a.m.)

3 THE COURT: All right. So, officially on the record in
4 Divorce file 19-18, Peery versus Peery, and I'll have counsel
5 notes your appearances.

6 MR. TOBIN: Michael Tobin, Your Honor, with Janelle
7 Rabenberg.

8 MS. MOORE: Meredith Moore appearing for Curtis Peery.

9 THE COURT: Thank you. I'll turn it back over to you,
10 um, to start going through those four areas, Mr. Tobin.

11 MR. TOBIN: Thank you, Your Honor. Is it, you want me
12 to lay out all four just right away or do you want to go

13 through them one at a time?

14 THE COURT: Do they tie in with each other?

15 MR. TOBIN: I'm going to guess they probably do.

16 THE COURT: All right. You can go ahead and just start
17 with the first one and we'll go from there.

18 MR. TOBIN: Okay. So, our first area of clarification
19 is what if -- what is your decision, what's the alimony
20 obligation essentially from July 1 to the present. Ah, I
21 think the testimony was is that he had not paid what was
22 otherwise there. So I think that was one question is, is
23 what is due with anything from July 1 to the present?

24 THE COURT: That is, it's due the same when I granted
25 the motion to modify alimony. The alimony award is modified

1 to begin payment of 6000 per month as of January 1st, and so
2 he is still responsible to be paying everything just the
3 same, and then it changes as of January 1st. I did not want
4 to backdate it because I believe that would put Ms. Rabenberg
5 in a very difficult position, and I believe that she should
6 have time to get all of those things figured out as well.

7 MR. TOBIN: Okay.

8 THE COURT: So, everything is the same throughout 2024,
9 and the modification starts January 1st.

10 MR. TOBIN: Okay.

11 THE COURT: Does that make sense, or do we need to go
12 further in depth?

13 MR. TOBIN: That makes sense to me. And then that takes
14 care of what I was gonna say was the second issue, which was
15 what's gonna happen for November and December, but I think
16 what you just said answers that as well.

17 THE COURT: Right.

18 MR. TOBIN: And then the third and fourth questions I
19 think are somewhat interrelated as well. Clearly, your
20 decision is, is that it goes to 6000 effective January 1st,
21 and then you indicate that that the prior agreement I'm going
22 to, I'm going to get it right.

23 THE COURT: Remain consistent with the terms of the
24 stipulation and agreement?

25 MR. TOBIN: Yes.

1 THE COURT: Yes. So, everything else would stay the
2 same and that's why I wanted to clarify, that is, which I
3 didn't obviously clarify, is the, just the amount, but
4 everything else in that stipulation and agreement language I
5 think should remain the same. I didn't -- we didn't address
6 anything else, so nothing else would be modified, obviously
7 if Ms. Rabenberg wants to come back and ask for it to be
8 increased again, certainly then she can do that, but I think
9 everything else should stay the same. That was my --

10 MR. TOBIN: And I think you're, I'm sorry, Your Honor.

11 THE COURT: That's all right. Go ahead.

12 MR. TOBIN: So, I, I think, I think I'm tracking with

13 you, but the point I just want to make sure we're all on the
14 same page about is under the agreement, he basically had
15 about one more year at the 13,500, and then it would come
16 down to 7000 for nine years, and I think the question that I
17 had was will it be 6000 for the remainder of the time set
18 forth in the agreement or does it bump up to 7000 once that
19 trigger is hit?

20 THE COURT: I apologize, I should have made that more
21 clear. I didn't, did not address that. My intention -- did
22 you want to say anything on that, Ms. Moore? I just haven't
23 heard from you.

24 MS. MOORE: No, Your Honor. Mr. Tobin and I have had
25 the, the same questions.

1 THE COURT: Okay.

2 MS. MOORE: So, no, nothing further from me at this
3 time. Thank you.

4 THE COURT: All right. My intention was to have it then
5 6000 going forward as long as the stipulation and agreement
6 is in effect, so not go back up to 7000 at that time. Again,
7 I think there may be an opportunity for Ms. Rabenberg, I
8 would like to keep the case regardless of my location,
9 because there may be an opportunity for her to come back and
10 ask that it be increased, ah, depending on how the business
11 goes, but there isn't an indication that he's going to be at
12 the wages that he was at or making at that time. I'm going

13 to --

14 MR. TOBIN: Thank you, Judge.

15 THE COURT: Yeah, I'm going to do an addendum to my
16 order that clarifies those two things, just in case somebody
17 else has to go in and look at it later. And I apologize for
18 not getting those figured out and really do appreciate you
19 letting me know that so we can all be on the same page.

20 MR. TOBIN: Well, Your Honor, I, I -- we appreciate this
21 opportunity as Ms. Moore and I were talking and we somewhat
22 chuckled that if we were to each do our proposed findings,
23 one of us doing it one way, another the other way, and we
24 were -- we were thinking you might call us and say what
25 decision did the two of you read?

1 THE COURT: That's fair. That's fair.

2 MR. TOBIN: So, no, we, we really appreciate this
3 opportunity to have this short little hearing to clarify
4 because I think that'll be better for all of us and we now
5 know exactly what your decision is.

6 THE COURT: Yep.

7 MR. TOBIN: So, we thank you.

8 THE COURT: Yep, and I'll put that on the record again.
9 And, ah, there's one other item. Shoot, I can't think of it.
10 There was one other item that I thought of addressing with
11 you. If I think of it, I guess I can do it by e-mail, but my
12 intention would be an addendum to clarify the court's order

13 from October 8th. And then, oh, that's what it was. So, I'm
14 not obviously looking for any findings or conclusions since I
15 just did that memorandum.

16 So, if this was your total findings and conclusions
17 work, it's pretty good.

18 MR. TOBIN: Yes. No, no, we, we thank you, Your Honor.

19 THE COURT: All right. Anything else from you, Ms.
20 Moore?

21 MS. MOORE: No, Your Honor, thank you for your time as
22 Mr. Tobin indicated and also how quickly you got out that
23 decision and how detailed it was. It was very helpful for
24 both Mr. Tobin and I since we have about the same questions
25 then that we didn't want to relay things to our clients

1 incorrectly and make it worse for all involved.

2 THE COURT: Right. Absolutely.

3 MS. MOORE: So, thank you very much.

4 THE COURT: Right. Absolutely. All right. Thank you
5 both. I will go ahead, and we'll end the zoom.

6 MR. TOBIN: Thank you.

7 MS. MOORE: Thank you.

8 (Proceedings concluded at 11:53 a.m.)

STATE OF SOUTH DAKOTA)

:SS

CERTIFICATE

COUNTY OF MINNEHAHA)

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 7, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 23rd day of January, 2025.

/s/ Roxane R. Osborn

Roxane R. Osborn

Court Recorder

Notary Public - South Dakota

My commission expires: May 9, 2030

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30925

JANELLE PEERY,

Appellant,

v.

CURTIS PEERY,

Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Rachel R. Rasmussen
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED NOVEMBER 27, 2024

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ARGUMENT AND ANALYSIS

I. The Circuit Court abused its discretion in granting the Motion to Modify Alimony.

A. Curtis did not prove a change in circumstances because he was able to pay alimony.¹

Curtis claims his employment at Inspire Bariatrics, for which he receives no salary and incurs \$22,000 a month in overhead expenses, is a change in circumstances. (Appellee Brief at 9–12). But a change in employment or income alone does not establish a change in circumstances. A change in circumstances requires a change in an obligor’s “financial ability” and “a change in the necessities of the recipient.” *Vandyke v. Choi*, 2016 SD 91, ¶ 21, 888 N.W.2d 557, 567; *Leedom v. Leedom*, 2020 SD 40, ¶ 20, 947 N.W.2d 143, 149 (same). In interpreting the “financial ability” of an obligor, a court does not examine employment or income alone but examines all the obligor’s assets. When the obligor has sufficient funds to pay, or the obligor could have sufficient funds to pay if he had not voluntarily reduced his income, then there is no change in circumstances. This Court has repeatedly affirmed this principle over the last four decades.

For instance, in *Herndon v. Herndon*, a husband moved to modify alimony because he sold his business and retired. 305 N.W.2d 917, 917–918 (SD 1981). The trial court denied the motion. *Id.* This Court affirmed, stating there was evidence husband was still able to work and thus could still pay alimony, notwithstanding husband’s current lack of income. *Id.* at 918. This Court stated that “[a] person cannot voluntarily reduce his income in order to avoid alimony and support payments.” *Id.* In short, the *Herndon* Court

¹ For the Court’s convenience, this Brief uses the same defined terms as Appellant’s Brief.

set forth that lack of employment or income alone does not establish a change in circumstances. *Id.* If the obligor spouse *can* find work that allows him or her to pay alimony, but instead voluntarily retires or is underemployed, then there is no change in circumstances. *See id.*

In *Lampert v. Lampert*, a husband moved to eliminate alimony because he had multiple sclerosis, which limited his ability to work and reduced his income by 41%. 388 N.W.2d 899, 902 (SD 1986). Husband also presented evidence that he had monthly expenses of \$5,206, which surpassed his monthly income of \$4,166. *Id.* at 901. The trial court found husband's income had been reduced. *Id.* at 902. Nonetheless, the trial court declined to eliminate alimony because husband still had sufficient funds to pay alimony despite his debts and reduced income. *Id.*

This Court affirmed. *Id.* at 903. In affirming, this Court refused to consider husband's argument that, while he currently had income with which to pay alimony, he would not be able to pay alimony in the future if his MS progressed and totally disabled him. *Id.* The Court stated husband's claim that he would have no income and be totally disabled was speculative and thus immaterial to the motion. *See id.* Therefore, this Court confined its review to whether husband's funds, at the time of the motion to eliminate alimony, were sufficient to pay alimony. *Id.* Upon finding the trial court did not err in finding that husband had sufficient funds to pay alimony, this Court affirmed the trial court. *Id.*

In *Gunn v. Gunn*, a husband moved for modification of alimony based on his disability, his retirement, and wife's new employment. 505 N.W.2d 772, 774–75 (SD 1993). The trial court denied the motion. *Id.* at 744. This Court affirmed. *Id.* at 774–75.

This Court found the trial court properly denied husband's motion to modify alimony because husband still had sufficient funds to pay alimony. *Id.* At the time of the motion, husband received funds from social security disability payments, his pension, and from the sale of real property, which allowed him to pay alimony. *Id.* Because husband was able to pay alimony, this Court affirmed the trial court properly denied husband's motion to modify alimony. *Id.*

In *Jameson v. Jameson*, husband and wife entered a divorce settlement, in which husband agreed to pay alimony. 1999 SD 129, ¶ 4, 600 N.W.2d 577, 579. A trial court issued a judgment incorporating the terms of the divorce settlement. *Id.* Over two decades later, husband retired and moved to eliminate alimony based on his retirement. *Id.* ¶ 9, 600 N.W.2d at 580. Husband argued that, because "he no longer had any W-2 income, . . . he no longer owed alimony, even though there was no provision in the [divorce settlement adopted in the court's judgment of divorce] providing such relief." *Id.* The trial court agreed to reduce but not eliminate alimony. *Id.* ¶ 10, 600 N.W.2d at 581.

This Court reversed, stating, as it has in other cases, that a voluntary job change is not "automati[cally]" a change in circumstance. *Id.* ¶¶16, 21, 600 N.W.2d at 581–582. This Court further stated that an obligor spouse who claims inability to pay "must produce complete and detailed evidence of his financial position showing an inability to pay." *Id.* ¶16, 600 N.W.2d at 582. Because husband did not produce detailed documentation showing inability to pay, or show a change in his wife's necessities, this Court found the trial court abused its discretion by modifying alimony. *Id.* ¶16, 600 N.W.2d at 581–582. This Court also affirmed that the role of trial courts "in modification

proceedings [is not] to relieve a party of his or her bad bargain.” *Id.* ¶ 20, 600 N.W.2d at 582.

Most recently, in *Leedom*, this Court affirmed that an obligor must present detailed financial evidence showing inability to pay to establish a change in circumstances. *See Leedom*, 2020 SD 40, ¶¶ 18–26, 947 N.W.2d 143, 149–51. In *Leedom*, a husband was ordered to pay alimony by judgment of the court. *Id.* ¶ 1, 947 N.W.2d at 145. The judgment provided that alimony could be modified in the future upon husband’s retirement. *Id.* ¶ 5, 947 N.W.2d at 146. Over a decade later, husband retired and stopped paying alimony, and wife filed a motion to restore alimony. *Id.* ¶¶ 7–8, 947 N.W.2d at 146. Husband argued he was not able to pay alimony because he no longer received any income. *Id.* ¶ 8, 947 N.W.2d at 146. The trial court reduced, but did not eliminate, alimony upon finding that, despite husband’s retirement, he was able to pay alimony. *Id.* ¶ 9, 947 N.W.2d at 146–47.

This Court affirmed. It held the trial court “conducted a detailed analysis of the parties’ financial circumstances both at the time of the divorce and at the time of the modification hearing.” *Id.* ¶ 22, 947 N.W.2d at 150. The trial court found that husband no longer received income due to his retirement. *Id.* However, husband had sufficient funds to pay alimony because he had bank and investment accounts totaling over \$4,000,000 as well as significant equity in two homes. *Id.* ¶ 23, 947 N.W.2d at 150. The trial court further found husband had a monthly budget of over \$16,000, which he maintained by liquidating some of his substantial assets. *Id.* This Court then affirmed that the trial court properly denied husband’s request to eliminate alimony upon finding husband was not

unable to pay alimony and upon finding wife's necessities had not changed since the divorce settlement. *Id.* ¶¶ 21–26, 947 N.W.2d at 149–51.

Here, in accordance with established law, to establish a change in circumstances, Curtis must show inability to pay alimony based on a detailed accounting of his finances and a change in Janelle's necessities. Further, in considering Curtis's finances, the Court does not speculate on Curtis's future earnings. *See Lampert*, 388 N.W.2d at 903. On this review, Curtis cannot show an inability to pay. Curtis had approximately \$1,500,000 in assets at the time he filed the Motion to Modify Alimony, consisting of two investment properties with \$370,000 in equity between them, interest in a trust worth \$87,500, \$58,000 in investment accounts, and approximately \$900,000 in liquid retirement accounts. (SR 965–69).

Additionally, Curtis had \$177,000 in a line of credit at the time of the motions hearing and another \$33,000 in life insurance he could borrow against to pay alimony. (SR 897; Appellee Brief at 23). Curtis was also spending \$10,000 a month on personal expenses and paying \$22,000 to Inspire Bariatrics. (SR 88, 585, 686; Janelle App. 87). On this record, there is no question Curtis had sufficient resources to pay alimony in full should he have chosen to comply with the judgment of divorce. As such, the Circuit Court abused its discretion in granting the Motion to Modify Alimony.

Curtis argues that his payments to Inspire Bariatrics were not gratuitous but necessary for his employment. (Appellee Brief at 13–14). Janelle disputes that these payments were necessary because Curtis has not shown he was incapable of finding more lucrative employment than his work at Inspire Bariatrics. (*See infra*, Part I.B). Regardless, assuming without conceding that these payments were necessary, Curtis's

payments to Inspire Bariatrics do not show inability to pay. The fact remains that Curtis had \$1,500,000 in assets, \$33,000 in available cash from a life insurance policy, and \$177,000 in available cash from a line of credit, and was paying \$10,000 for personal expenses at the time he moved to modify alimony. (SR 88, 585, 686, 897, 965–69; Appellee Brief at 23; Janelle App. 87). On this record, Curtis had not shown inability to pay.

B. Secondly, Curtis cannot show a change in circumstances because he voluntarily reduced his income.

Because Curtis did not show inability to pay, this Court should find the Circuit Court abused its discretion in granting the Motion to Modify Alimony. No further analysis is required. However, even if Curtis had shown an inability to pay, he could not establish a change in circumstances because he voluntarily reduced his income. As a matter of law, a voluntary job change does not show a change in circumstances.

Curtis argues he did not change his employment to avoid his alimony obligations. (Appellee Brief at 13–15). But regardless of whether Curtis changed jobs to seek a reduction in alimony, he changed positions voluntarily. Voluntary job changes do not create a change in circumstances regardless of the obligor's motive for the change. In *Herndon*, this Court affirmed that, unless a husband proved he was unable to find work and earn an income, he had not shown a change in circumstances, notwithstanding that husband presently lacked an income. *Herndon*, 305 N.W.2d at 918. This Court stated, “[a] person cannot voluntarily reduce his income in order to avoid alimony and support payments.” *Id.* Likewise, in *Jameson*, the Court affirmed lack of income is not automatically a change in circumstances, especially if an obligor spouse can pay alimony with other assets. *See Jameson*, 1999 SD 129, ¶ 16, 600 N.W.2d at 581. Like South

Dakota, other states have held that a voluntary reduction in income, through job change, retirement, or otherwise, is not a change in circumstances. *See, e.g., Wheeler v. Wheeler*, 548 N.W.2d 27, 30–31 (N.D. 1996); *In re Marriage of Rietz*, 585 N.W.2d 226, 229–30; *Wallenhurst v. Wallenhurst*, 116 Ohio App. 3d 823, 828, 689 N.E.2d 586, 589; *Yangco v. Yangco*, 901 So. 2d 217, 219; *Lee v. Gornbein*, 124 S.W.3d 52, 56 (Mo. Ct. App. 2004).

Curtis testified that when he accepted work at Inspire Bariatrics, he knew he would incur \$22,000 a month in expenses and would not earn a salary in his first year of work. (SR 88, 585, 852–53, 859). Therefore, Curtis would have known he could not satisfy his alimony obligations from income alone if he accepted work at Inspire Bariatrics. (*See id.*). But Curtis took the job anyway. (SR 88, 590–91, 600). Then he moved to modify alimony three months later stating he could no longer pay alimony due to the position he had put himself in. (*See* SR 86–91, 75–76).

At the same time, Curtis presented no evidence that he could not find work with a guaranteed salary. Curtis is a well-respected bariatric surgeon. (SR 838, 950–51). Because of his expertise, he has a successful consulting practice, which allows him to travel nationally and internationally to speak on bariatric issues. (SR 838, 950–51). Curtis also has two decades of experience at a large hospital system, at the end of which he was making nearly \$800,000 a year. (SR 839, 915, 994–95). Curtis testified he sought employment outside of Inspire Bariatrics to some extent after he left Sanford. (SR 961–63, Janelle App. 170). But he provided no information on how many jobs he applied to or how many other job offers he obtained. (*See id.*). Curtis only testified that he did not receive any job offers that provided a salary of \$650,000 or more since leaving Sanford.

(Janelle App. 170). Curtis further conceded he did not apply to any hospital systems in Minneapolis, Sioux Falls, Des Moines, or Omaha. (SR 961–62).

On this record, Curtis does not allege or present any evidence that he is unable to obtain work that would permit him to pay alimony as set forth in the divorce decree. Instead, he admitted that he knowingly accepted a position with no salary and that incurred over \$22,000 in expenses each month. (SR 88, 585, 852–53, 859). Curtis’s intentional and voluntary choices—whether well-intentioned or not—cannot show a change in circumstances.²

Curtis cites *Olson v. Olson*, 1996 SD 90, 552 N.W.2d 396, and *Simmons v. Simmons*, SD 145, 290 N.W. 319 (1940), for the proposition that a court properly denies a motion to modify alimony when an obligor falsely inflates expenses or falsely reduces income to support the motion. (Appellee Brief at 14–16). Janelle does not disagree with this proposition. But here, where Curtis had sufficient assets to pay alimony, and voluntarily reduced his income by accepting work at Inspire Bariatrics, the Court need not consider Curtis’s motive for accepting that work. As set forth above, an obligor cannot establish a change in circumstances if he or she had sufficient assets to pay

² Upon finding that Curtis was able pay alimony or that he voluntarily reduced his income, this Court should find the Circuit Court abused its discretion in granting the Motion to Modify Alimony. And there is no need for this Court to review the Circuit Court’s finding that Curtis accepted worked at Inspire Bariatrics in good faith. (See SR 617–18). Nonetheless, Janelle disputes this finding. It is difficult to understand why a surgeon with Curtis’s specialization and resume would accept employment with a solo practitioner with the understanding that, under the terms of this employment, he would have no guaranteed salary and would incur significant debt. Moreover, only three months after taking employment at Inspire Bariatrics, Curtis moved to reduce his alimony. At the time of the motion, Curtis also had \$1,500,000 in assets, access to \$177,000 in a line of credit, and was spending \$10,000 a month for personal expenses. (SR 88, 585, 686, 965–69; Janelle App. 87). All these facts are inconsistent with Curtis’s claim that his actions were not intended to reduce alimony.

alimony or voluntarily reduced his or her income—regardless of the obligor's intent. Because Curtis was not unable to pay alimony and voluntarily reduced his income, there can be no change in circumstances.

C. Curtis is required to comply with court-ordered alimony, even if it requires borrowing from his retirement accounts.

Curtis argues that he is not required to deplete his retirement assets to pay alimony. (Appellee Brief at 16–19). But the Stipulation and divorce decree did not state that alimony would terminate or be reduced in these circumstances or otherwise contain any provision protecting Curtis's retirement funds. (SR 34–47, 51–54). Additionally, this Court has never held retirement assets, or in fact any assets, cannot be used to pay alimony.

Curtis cites two cases in support of his claim that he should not be required to borrow from his retirement to pay alimony, *Leedom v. Leedom*, 2020 SD 40, 947 N.W.2d 143, and *Kuehn v. Kuehn*, 74 SD 521, 55 N.W.2d 70 (1952). (Appellee Brief at 16–19). However, these cases, contrary to Curtis's claim, show that this Court has routinely required obligors to draw from their assets to pay alimony. In *Leedom*, this Court affirmed the trial court properly refused to eliminate alimony when husband lacked income but could pay alimony by withdrawing from his investment accounts. *Leedom*, 2020 SD 40, ¶¶ 21–26, 947 N.W.2d at 149–51. In *Kuehn*, this Court likewise affirmed that husband, who lacked in “substantial income” due to drunkenness and underemployment, was required to pay alimony from his estate assets. *Kuehn*, 74 SD at 527, 55 N.W.2d at 73. Neither these cases, nor any other cases in South Dakota, state that an obligor should not be required to use their retirement accounts to pay alimony. Curtis's argument to the contrary is inapposite.

Moreover, if Curtis does not want to deplete his retirement account to pay alimony, he has many other options. Curtis can obtain more lucrative employment, borrow from his investment accounts, sell his real property, or pay alimony from his line of credit.

D. Thirdly, Curtis cannot show a change in circumstances because he has not shown a change in Janelle's necessities.

Next, Curtis argues he has proven a change in Janelle's necessities. (Appellee Brief at 19–21). Curtis states Janelle's necessities have changed because, since the time of the divorce decree, Curtis's and Janelle's youngest child has reached adulthood, and Janelle has moved to a new home. (*Id.*). This argument, too, fails.

"To justify a change in alimony payments there must merely be a change of circumstances from the circumstances which existed at the time of the original decree." *Leedom*, 2020 SD 40, ¶ 20, 947 N.W.2d at 149. Additionally, these changes must not have been anticipated by the initial divorce settlement. *See Saxvik v. Saxvik*, 1996 SD 18, ¶ 19, 544 N.W.2d 177, 182 (finding wife's change in income was not a change in circumstances when that change was anticipated at the time of the divorce decree); *Lowe v. Schwartz*, 2007 SD 85, ¶ 16, 738 N.W.2d 63, 68–69 (same). Therefore, to show a change in Janelle's necessities, Curtis must show that Janelle's needs have changed due to circumstances that were unexpected at the time of the divorce decree.

Curtis has not done so. The changes relied upon by Curtis were anticipated at the time of the Stipulation and expressly incorporated into the divorce decree. At the time of the divorce decree, the parties anticipated that their youngest child would reach adulthood. The child support provision in the Stipulation and divorce decree accounted for this change. (SR 38, 51–54). The Stipulation provided Curtis's child support

payments would terminate when Curtis's and Janelle's youngest child reached adulthood. (SR 38, 51–54).

The selling of the couple's marital home was also anticipated at the time of the Stipulation and divorce decree, and the Stipulation likewise accounted for the selling of the marital home in its alimony provision. (SR 35–36, 51–54). The Stipulation provided that Curtis's alimony payments to Janelle would be reduced from \$19,250 a month to \$13,500 a month upon the selling of the marital home. (SR 35–36). In February 2020, after the marital home was sold and Janelle moved to a new home, alimony was reduced as set forth in the Stipulation. (SR 90).

Because Curtis cannot show an unanticipated change in Janelle's necessities since the time of the Stipulation and divorce decree, he cannot show a change in Janelle's necessities. At the time of the divorce decree and now, Janelle has relied entirely on alimony for her income. (SR 997). Janelle also maintains the same standard of living now as she had at the time of the Stipulation. (SR 997–98). The Circuit Court, by finding Janelle had a change in necessities despite these undisputed facts, abused its discretion.

E. Janelle's spending is not material to the Motion to Modify Alimony.

Finally, Curtis argues Janelle's spending is not for "ordinary and necessary" expenses. (Appellee Brief at 19–21). Therefore, he claims that Janelle cannot show her alimony award is necessary. (*See id.*). In making this argument, Curtis shifts the burden to Janelle to prove that the alimony award—as agreed to by the parties in the Stipulation—was necessary for her support.

This is improper. This Court has repeatedly stated that, in reviewing a motion to modify alimony, "the court is not to reflect on whether the [alimony award in the divorce

decree] was ‘equitable’ when entered, but only whether the economic circumstances of the parties have changed since the award such that the original award is now either insufficient or excessive.”³ *Moore v. Moore*, 2009 SD 16, ¶ 12, 763 N.W.2d 536, 540; *Olson*, 1996 SD 90, ¶ 11, 552 N.W.2d at 399 (same). The law requires the moving party, Curtis, to show a change in circumstances. *Id.* As discussed, to show this change in circumstances, Curtis must show inability to pay and an unanticipated change in Janelle’s necessities since the time of the divorce decree. Curtis has done neither, so the Circuit Court abused its discretion in granting the Motion to Modify Alimony. Further, an inquiry into the equity of the Stipulation and into Janelle’s spending habits, such as undertaken by the Circuit Court in its Decision, is improper. (*See* SR 619).

Nonetheless, Curtis cites *Lampert* for the proposition that, in determining whether there is a change in circumstances, the court’s “focus should not only be on whether the obligor has sufficient funds to pay, but also whether the dependent spouse continued to need the money to meet ordinary expenses.” (Appellee’s Brief at 20 (cleaned up)). However, *Lampert* does not support the proposition cited.

In *Lampert*, this Court affirmed the trial court’s denial of husband’s motion to modify alimony upon finding that, despite husband’s reduce income, he still had sufficient assets to pay alimony, 388 N.W.2d at 902. This Court stated, “[s]ince

³ Nonetheless, there is nothing to suggest that the Stipulation inequitably divided the parties’ assets. Both parties were represented by competent counsel during settlement. (SR 995). Further, Janelle has testified her standard of living has not increased since the divorce but has remained consisted. (SR 997–98). Curtis testified his standard of living has declined since the divorce due to choice of employment. (*See* SR 88–90, 893). However, Curtis is not entitled to a reduction his alimony because of his voluntary and intentional choices. And Janelle should not be required change her standard of living because of Curtis’s voluntarily and intentional choices.

[husband] has failed to provide the trial court with a complete detailed financial position, his ability or inability to pay is impossible to determine and therefore, he is not entitled to any relief.” *Id.* at 903. The *Lampert* Court did not require, contrary to establish law, that wife prove the alimony awarded to her in the divorce settlement was equitable and/or necessary for her daily necessities. *Id.* Rather, under *Lampert*, and other South Dakota cases, the burden remained with the party moving for modification to show a change in circumstances.⁴

II. The Circuit Court erred in denying the Motion for Contempt because Curtis willfully stopped paying alimony.

Curtis argues the Circuit Court properly denied the Motion for Contempt because he could not comply with the divorce decree requiring him to pay alimony of \$13,500 a month and because he did not willfully or contumaciously disobey the divorce decree. (Appellee Brief at 21–24). But this is untrue. Curtis ignores that he had a line of credit for \$177,000, access to \$33,000 in cash from a life insurance policy, and assets of \$1,500,000, including assets in liquid retirement accounts, at the time he alleges he was unable to pay alimony and failed to comply with the divorce decree. (SR 88, 585, 686, 965–69; Janelle App. 87). Curtis was not unable to pay alimony. Curtis merely did not want to borrow from his line of credit, sell his real property, or borrow from his retirements account to pay alimony. Because Curtis was not incapable of paying alimony

⁴ Janelle also finds Curtis’s critique of her spending suspect since he admitted to spending approximately \$10,000 a month for personal expenses. (SR 88, 585, 686; Janelle App. 87). This fact was overlooked by the trial court. (SR 612–622). Curtis’s monthly expenses included nearly \$1,000 in car and motorcycle payments, \$1000 for travel, \$500 to a money market account, and \$1,000 for entertainment. (SR 686).

in full, just unwilling, he was able to comply with the divorce decree at the time of noncompliance.

Curtis then states he did not willfully violate the divorce decree because, although he failed to make payment in full, he did not have the “mindset of someone seeking to willfully disregard his obligations.” (Appellee Brief at 24).⁵ This is also untrue. “Willfulness” only requires an obligor have knowledge of a court order and then refuse to comply with that order. *See Love’s Travel Stops & Country Stores, Inc. v. City of Wall*, 2023 SD 68, ¶ 26, 1 N.W.3d 664, 672. Here, it is undisputed Curtis had (1) knowledge of the divorce decree requiring him to pay alimony and (2) refused to comply with that order by paying alimony in full. *See id.*; *Talbert v. Talbert*, 290 N.W.2d 862, 864 (SD 1980) (providing the elements of contempt). Because Curtis had knowledge of his alimony obligation and refused to pay it, willfulness is established. The Circuit Court plainly erred in denying the Motion for Contempt.

⁵ Curtis cites *Talbert v. Talbert*, 290 N.W.2d 862 (SD 1980), for the proposition that this Court has “emphasized the lack of good faith effort on the part of the obligor” in affirming trial court’s finding of contempt. (Appellee Brief at 23). However, the *Talbert* Court did not affirm a trial court’s finding of contempt. *Talbert*, 290 N.W.2d at 864. Instead, the *Talbert* Court declined to affirm the trial court’s finding of contempt because the trial court failed to enter factual findings on each element of contempt. *Id.* Further, the *Talbert* Court did not state that “good faith” was a defense to civil contempt or that “lack of good faith” was an element of a civil contempt. *Id.* At most, the *Talbert* Court noted in dicta that it found husband’s argument that he was “absolute[ly] unable” to pay alimony unpersuasive given that husband had expended significant resources on his home and sportscar while failing to pay alimony. *Id.*

III. Without conceding the Circuit Court abused its discretion in granting the Motion to Modify Alimony, the Circuit Court did not abuse its discretion in delaying the effective date of its order granting the motion until January 1, 2025.

Because this Court should find the Circuit Court abused its discretion in granting the Motion to Modify Alimony, Curtis's claim on the effective date of the Circuit Court's order granting that motion should become moot. Regardless, assuming without conceding that the Circuit Court properly granted that motion for purposes of argument, the Circuit Court did not abuse its discretion in delaying the onset of its order.

SDCL 25-7-7.3 gives a circuit court discretion to modify a previously ordered alimony payment retroactively to the date that a notice of hearing on the matter was served:

Any previously ordered support payments that have become due, whether paid or unpaid, are not subject to modification by a court or administrative entity of this state, except those accruing in any period in which there is pending a petition for modification of the support obligation, but only from the date that notice of hearing of the petition has been given to the obligee, the obligor, and any other parties having an interest in such matter.

SDCL 25-7-7.3. There is nothing in SDCL 25-7-7.3 that requires a circuit court to retroactively modify a support award. *See id.* SDCL 25-7-7.3 merely gives a circuit court discretion to retroactively modify a support award to the date that notice of hearing is served on the matter. *See id.* This Court reviews a trial court order on modification of alimony for an abuse of discretion. *See Taecker v. Taecker*, 527 N.W.2d 295, 299 (SD 1995).

Here, the Circuit Court's Decision was not beyond the range of permissible choices. Alimony was and is Janelle's sole source of income, and she relies on it entirely for all her needs and living expenses. (SR 997). Therefore, it

was reasonable for the Circuit Court to delay the effective date of its Decision. This delay granted Janelle a brief period to adjust her lifestyle before the order took effect and cut Janelle's income by more than half. (*See* SR 621–22, 805).

Curtis argues this was an abuse of discretion because he was unable to pay alimony as set forth by the Stipulation at the time he filed the Motion to Modify Alimony. (Appellee Brief at 24–28). But again, this is untrue. Curtis had significant assets, including approximately \$900,000 in liquid retirement accounts and a line of credit of more than \$177,000, at the time the motion was filed. (SR 897, 965–69). He was also paying \$10,000 for his own personal expenses at the time he reduced his alimony payments to Janelle to \$3,500 a month in August and September of 2024 and claimed he could not pay more. (SR 88, 205 585, 686; Janelle App. 87). On this record, there was no abuse of discretion.

CONCLUSION

For the foregoing reasons, Janelle respectfully requests that the Circuit Court's Decision be reversed in full.

Dated this 14th day of May 2025.

/s/ Michael F. Tobin
Michael F. Tobin
Kristin N. Derenge
BOYCE LAW FIRM, L.L.P.
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Attorneys for Appellant Janelle Peery

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 4,958 words, Times New Roman Font, 12 point, and 24,642 characters (no spaces).

Dated this 14th day of May 2025.

/s/ Michael F. Tobin

Michael F. Tobin

CERTIFICATE OF SERVICE

I, Michael F. Tobin, do hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 14th day of May 2025, the foregoing was filed and served via Odyssey File & Serve upon:

Meredith A. Moore
CUTLER LAW FIRM, LLP
meredithm@cutlerlawfirm.com
Attorney for Appellee Curtis Peery

/s/ Michael F. Tobin

Michael F. Tobin

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30909

JANELLE PEERY,

Plaintiff and Appellant,

v.

CURTIS PEERY,

Defendant and Appellee,

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Rachel R. Rasmussen
Circuit Judge

NOTICE OF REVIEW

ATTORNEYS FOR APPELLANT:

Michael F. Tobin
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300 S. Main Ave.
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ATTORNEYS FOR APPELLEE:

Meredith A. Moore
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140 N Phillips Ave. 4th Floor
PO Box 1400
Sioux Falls, SD 57101-1400

Notice of Appeal filed on November 27, 2024.

Pursuant to SDCL § 15-26A-22, Appellee/Defendant Curtis Peery gives notice that he seeks review by the South Dakota Supreme Court of written orders of the circuit court concerning one issue, namely the date on which the modification of alimony requested by Appellee was ordered to take effect. Appellee filed his motion for modification of alimony on June 6, 2024. In his motion for modification, Appellee requested that modification be granted retroactively. The parties worked together to schedule a hearing on said motion, after which Notice of Hearing was served and filed on July 2, 2024. Hearing was held on September 27, 2024. Following the September 27, 2024, hearing, the circuit court issued its Memorandum Decision and Order on Motions on October 8, 2024. The circuit court granted Appellee's motion for modification in part, ordering that Appellee's alimony award "is modified to begin payment of \$6,000 per month as of January 1, 2025[.]" The parties requested clarification on several matters addressed in the Memorandum Decision and Order on Motions, after which a hearing was held on October 15, 2024. On October 17, 2024, the circuit issued an Addendum to 10/08/2024 Memorandum Decision and Order on Motions. In that Addendum, the circuit court ordered "that the Defendant shall pay Plaintiff alimony in the amount of \$13,500 per month until the modification to \$6,000 per month begins on January 1, 2025." On November 6, 2024, Appellee filed Objections to Findings of Fact and Conclusions of Law, asserting that the circuit court's ordered modification of alimony should have been effective as of August 1, 2024, to be consistent with SDCL § 25-7-7.2. Alternatively, Appellee asserted modification should have been effective October 1, 2024, which was the first month following issuance of the circuit court's decision. Notice of Entry of each of the Memorandum Decision and Orders and Addendum was filed and served on November 5, 2024. Appellant/Plaintiff filed a notice

of appeal on November 27, 2024.

Dated this 12th day of December, 2024.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Meredith A. Moore

Meredith A. Moore
140 North Phillips Avenue, 4th Floor
PO Box 1400
Sioux Falls, SD 57101-1400
Telephone: (605) 335-4950
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Meredith A. Moore one of the attorneys for Appellee do hereby certify that on this 12th day of December, 2024, I have electronically filed the foregoing with the Supreme Court Clerk using the Odyssey File & Serve system which will send notification of such filing to the following:

Michael Tobin
Boyce Law Firm, LLP
300 S. Main Ave.
Sioux Falls, SD 57104
Attorneys for Appellant

/s/ Meredith A. Moore

Meredith A. Moore

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30909

JANELLE PEERY,

Plaintiff and Appellant,

v.

CURTIS PEERY,

Defendant and Appellee,

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Rachel R. Rasmussen
Circuit Judge

APPELLEE'S DOCKETING STATEMENT – SECTION B

ATTORNEYS FOR APPELLANT:

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300 S. Main Ave.
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Sioux Falls, SD 57117-5015

ATTORNEYS FOR APPELLEE:

Meredith A. Moore
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PO Box 1400
Sioux Falls, SD 57101-1400

Notice of Appeal filed on November 27, 2024.

SECTION B
TIMELINESS OF APPEAL

1. The date the judgment or order appealed from was signed and filed by the trial court:

Memorandum Decision and Order on Motions

Signed: October 8, 2024

Entered: November 5, 2024

Addendum to 10/08/2024 Memorandum Decision and Order on Motions

Signed: October 17, 2024

Entered: November 5, 2024

2. The date notice of entry of the judgment or order was served on each party:

Notice of Entry of each of the Memorandum Decision and Order on Motions and Addendum to 10/08/2024 Memorandum Decision and Order on Motions was served and filed on November 5, 2024.

3. State whether either of the following motions were made:

a. Motion for judgment, SDCL § 15-6-50(b):	<u> </u> Yes	<u> X </u> No
b. Motion for new trial, SDCL § 16-6-59:	<u> </u> Yes	<u> X </u> No

NATURE AND DISPOSITION OF CLAIMS

4. This case arises from Defendant/Appellee Curtis Peery's motion to modify his alimony obligation. Appellee filed his motion on June 6, 2024, requesting an order modifying Section 2 of the parties' Stipulation and Agreement dated June 17, 2019 (the "Stipulation"). The Stipulation was adopted pursuant to the circuit court's Judgment and Decree of Divorce dated June 18, 2019, and filed with the clerk of the circuit court on June 26, 2019. In his motion, Appellee requested a reduction in the amount and term of his alimony payments, which request resulted from a change in his employment and reduction in income. Appellee requested that the modification be granted retroactively consistent with SDCL § 25-7-7.2. Following the filing of his motion, Appellee was unable to continue making full alimony payments consistent with those identified in the Stipulation and paid Appellant what he could for the months of July, August, and September 2024.

On September 10, 2024, Plaintiff/Appellant filed a motion for contempt, asserting that Appellee's inability to make full alimony payments constituted willful and

intentional acts on his part, thus justifying a finding of contempt.

Hearing on both motions was held on September 27, 2024. On October 8, 2024, the circuit court issued its Memorandum Decision and Order on Motions. The Memorandum Decision and Order on Motions granted Appellee's motion to modify in part and denied Appellant's motion for contempt. The parties requested clarification on several matters addressed in the Memorandum Decision and Order on Motions. A hearing was held on October 15, 2024. On October 17, 2024, the circuit court issued an Addendum to 10/08/2024 Memorandum Decision and Order on Motions. In that Addendum, the circuit court ordered "that the Defendant shall pay Plaintiff alimony in the amount of \$13,500 per month until the modification to \$6,000 per month begins on January 1, 2025." On November 6, 2024, Appellee filed Objections to Findings of Fact and Conclusions of Law, asserting that the effective date of the modification should have been August 1, 2024, to be consistent with SDCL § 25-7-7.2. Alternatively, Appellee requested that modification should have been effective October 1, 2024, which was the first month following issuance of the circuit court's decision.

5. Appeals of right may be taken only from final, appealable Order. *See* SDCL § 15-26A-3 and 4.
 - a. Did the trial court enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims?

X Yes No
 - b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL § 15-6-54(b)?
6. State each issue intended to be presented for review.
 - a. Whether the trial court erred in granting the modification effective as of January 1, 2025, rather than August 1, 2024, consistent with SDCL § 25-7-7.2, or October 1, 2024.

ATTACHMENT

- A. October 8, 2024, Memorandum Decision and Order on Motions.
- B. Addendum to 10/08/2024 Memorandum Decision and Order on Motions.

Dated this 12th day of December, 2024.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Meredith A. Moore
Meredith A. Moore
140 North Phillips Avenue, 4th Floor
PO Box 1400
Sioux Falls, SD 57101-1400
Telephone: (605) 335-4950
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Meredith A. Moore one of the attorneys for Appellee do hereby certify that on this 12th day of December, 2024, I have electronically filed the foregoing with the Supreme Court Clerk using the Odyssey File & Serve system which will send notification of such filing to the following:

Michael Tobin
Boyce Law Firm, LLP
300 S. Main Ave.
Sioux Falls, SD 57104
Attorneys for Appellant

/s/ Meredith A. Moore
Meredith A. Moore

STATE OF SOUTH DAKOTA) :SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JANELLE PEERY,
Plaintiff,

vs.

CURTIS PEERY,
Defendant.

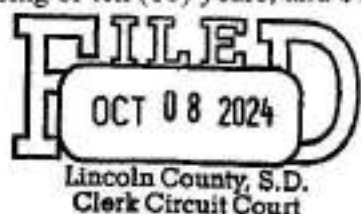
41DIV19-18

MEMORANDUM DECISION
AND ORDER ON MOTIONS

This matter came before the Court on September 27, 2024, for a hearing on Defendant's Motion to Modify Alimony and Plaintiff's Motion for Contempt. The Plaintiff was personally present with counsel Michael F. Tobin, and the Defendant was personally present with counsel Meredith A. Moore. The Court has reviewed the record, heard testimony from the Plaintiff and Defendant, heard argument from counsel, and received and reviewed the stipulated exhibits. The Court now issues this Memorandum Decision as its findings of fact and conclusions of law.

BACKGROUND

The Plaintiff and Defendant were married on May 27, 1993, and had four children during their marriage. Their divorce decree was filed on June 25, 2019, and it incorporated the parties' Stipulation and Agreement dated June 17, 2019. The Stipulation provided for alimony from the Defendant to the Plaintiff in the amount of \$19,500 per month until their marital home sold (which occurred in February of 2020). Thereafter, the spousal support was reduced to \$13,500 per month for six (6) years, and then the parties agreed to further reduce it to \$7,000 per month for nine (9) years. The Defendant also agreed to pay \$500 a month to a Roth IRA of Plaintiff's choosing or ten (10) years, and \$1,500 per month in child support. The parties also agreed to



divide their real and personal property, including their retirement and investments accounts. The Plaintiff received approximately \$465,000 from the Defendant's Sanford retirement account. There has not been a significant change in assets for either party since the divorce. Both parties were represented by counsel to reach this agreement.

At the time of the Stipulation, the Defendant was employed with Sanford Health and making between \$650-750,000 per year. The Defendant was making roughly \$850,000 per year when he voluntarily left Sanford in January of 2023 to relocate to Texas and join an established bariatric medical practice called Bariatric Experts. The Defendant had been frustrated with Sanford for "many years," and believed that with this move he would be able to better control his own medical practice and surpass his Sanford income within a year. This business venture did not work out, and by March of 2024 he separated from Bariatric Experts and entered into a management services agreement with Inspire Bariatrics. Throughout his time in Texas, the Defendant has been doing consulting work, general surgical calls, and networking with hospitals and health insurance companies.

The Defendant's income in 2023 was roughly \$575,000, which was less than he was making at the time of the parties' divorce in 2019. The Defendant reduced living costs and down-sized his living space to a one-bedroom apartment and tried to "tighten his belt" to make ends meet. He needed and still needs significant extra funds each month to pay his input and expense costs under the management services agreement with Inspire Bariatrics. Due to the alimony obligations, the Defendant was not able to secure the \$300,000 operating loan he believed would cover his living expenses, overhead, and support payments while he got his bariatric practice established. The Defendant continues to work full-time hours even though he does not believe he is in the financial or social position he should be in as a 55-year-old surgeon.

The Defendant has not yet made a profit with Inspire Bariatrics, but his partner does show monthly profit.

The Defenant made all monthly support payments through June of 2024. Since joining Inspire Bariatrics his monthly overhead expense is roughly \$22,000, which is \$7,000 more each month than his support obligations to the Plaintiff. The Defendant knew when he entered into the Inspire Bariatrics agreement that he would not be able to meet all his financial obligations in the future, and that he would have to dip into his own savings or assets while building his practice. At this point the Defendant has used his saved “nest egg” of money, the \$100,000 available to draw on his life insurance policy, and is using his business line of credit to make payments. The Defendant has not cashed in any retirement or investment accounts or sold either of the two residences he owns in Sioux Falls, South Dakota.¹

The Plaintiff has remained in Sioux Falls since the divorce. She testified to living a “very nice” lifestyle and that it is relatively the same lifestyle she had been living prior to the parties’ divorce in 2019. The Plaintiff was a dental hygienist and worked in that capacity for the first six (6) years of marriage to the Defendant. During this time the Defendant was finishing medical school requirements and starting his medical career. The Plaintiff transitioned to a stay-at-home mother and homemaker while pregnant with the parties’ third child, and she continued to contribute to the family in this capacity until and after the divorce.

During the marriage the Plaintiff relied on the Defendant’s financial contributions to the family. At the time of the divorce, the Plaintiff would have had to go back to school for additional training to rejoin the workforce as a dental hygienist. There was limited testimony on

¹ The Defendant was unsuccessful with a prior attempt to sell one of the Sioux Falls residences. Both residences have mortgages but also over \$300,000 in equity between them.

the Plaintiff securing any other form of employment at the time of the divorce, but also no evidence that the Plaintiff was or is physically or mentally incapable of working. The Plaintiff's only source of ongoing income since the divorce is the \$15,000 monthly spousal support and child support, which is enough to cover her \$14,000 per month budget.

The Defendant's non-payment of spousal support obviously contributed the Plaintiff's inability to meet her budget. However, the Plaintiff's financial documents show that she is regularly spending \$16-18,000 per month, which also may contribute to current budget issues and debts. The Plaintiff has had to pull money from her retirement investment accounts to cover Defendant's missed payments and potentially her regular spending in excess of the amount of alimony and child support from the Defendant. The Plaintiff did not articulate a plan or budget for herself for anything less than \$14,000 per month.

LAW AND ANALYSIS

"Circuit courts have continuing jurisdiction to modify permanent alimony as circumstances may require." *Moore v. Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d 536, 540 (citing *Saxvik v. Saxvik*, 1996 S.D. 18, ¶ 11, 544 N.W.2d 177, 180); see also SDCL § 25-4-41 ("... and the court may from time to time modify its orders in these respects."). "A party seeking modification of an alimony award must establish a change in circumstances." *Barton v. Barton*, 2012 S.D. 44, ¶ 14, 815 N.W.2d 555, 557 (citing *Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540). "Although the change need not be substantial, mere proof of a change is insufficient to mandate modification." *Id.* Rather, "[t]he change in circumstances refers to a change in the necessities of the recipient and the financial ability of the obligor." *Leedom v. Leedom*, 2020 S.D. 40, ¶ 20, 947 N.W.2d 143, 149, (citing *Barton*, 2012 S.D. 44, ¶ 15, 815 N.W.2d at 558 (quoting *Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540)). "The role of the trial courts in

modification proceedings is not to relieve a party of his or her bad bargain.” *Barton*, 2012 S.D. 44, ¶ 14, 815 N.W.2d at 557 (citing *Moore* 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540). Therefore, “[w]hen a trial court considers evidence as to a change in circumstances, it must be careful to confine its review to changes occurring *since the time of the divorce*.” *Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d at 540 (citing *Olson v. Olson*, 1996 S.D. 90, ¶ 9, 552 N.W.2d 396, 399) (emphasis in original).

When the parties decide the financial terms of their divorce through stipulation and agreement, as here, there are no findings of fact regarding the financial conditions of the parties at the time of the divorce. The evidence establishes that each party was represented by an attorney and voluntarily entered into the agreement regarding alimony and other property division in June of 2019. The parties each argued how the language and terms of the stipulation support their respective position when looking at the connection between the alimony amount and property settlement.

“While some forms of alimony are subject to modification, alimony awarded as part of a division of property is not.” *Vandyke v. Choi*, 2016 S.D. 91, ¶ 14, 888 N.W.2d 557, 564. “Whether an obligation imposed by a court order incorporating a separation agreement is modifiable depends on whether the obligation is in the nature of support or property division, ...” *Id.* In the present case, “[n]othing in the language of the agreement indicates that alimony was agreed to in lieu of property.” *Id.* at ¶ 15, 565 (citing *Oman v. Oman*, 2005 S.D. 88, ¶ 12, 702 N.W.2d 11, 15).

As in *Choi*, the alimony in this stipulation is for monthly payments over a fixed period of time and contains standard termination clauses of remarriage, cohabitation, or death. The alimony section is also separate and distinct from other property division sections such as life

insurance, retirement and investment accounts, and real and personal property.² Therefore, the alimony agreement in this case is separate and distinct from the property settlement agreement, and the Court has authority to modify alimony if certain circumstances exist.

As noted above, “[t]o justify a change in alimony payments there must merely be a change in circumstances from the circumstances which exhibited at the time of the original decree.” *Leedom*, 2020 S.D. 40, ¶ 20, 947 N.W.2d at 149 (citing *Horton v. Horton*, 503 N.W.2d 248, 252 (1989)). The Defendant has the burden to show that he has a reduced ability to pay, and that the Plaintiff has a change in necessities because “[b]oth income and expenses of the parties must be considered.” *Barton*, 2012 S.D. 44, ¶ 15, 815 N.W.2d at 558. Further,

[c]ourts may evaluate the following factors: the intentional reduction of gross income; an inquiry into earning potential when a party is under- or unemployed; the intentional inflation of expenses; and the offsetting effect of cohabitation on expenses.”

Id.

The Defendant's Ability to Pay

“The court is not to reflect on whether the decree was ‘equitable’ when entered, but only whether the economic circumstances of the parties have changed since the award such that the original amount is now either insufficient or excessive.” *Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d at 540. The Defendant remained at the same employment for roughly three and a half years following the stipulation. During this time his earning capacity and income was sufficient to pay alimony. It was once the Defendant chose to relocate to Texas that his income decreased significantly. It is undisputed that there is an economic change in the Defendant’s circumstances. However, “mere proof of a change is insufficient to mandate modification.”

² The only item of property specifically connected to alimony is that alimony would terminate if Plaintiff’s share of an intellectual property profits reached \$1,000,000, and this clause is not in dispute.

Barton, 2012 S.D. 44, ¶ 14, 815 N.W.2d at 558 (quoting *Moore*, 2009 S.D. 16, ¶ 13, 763 N.W.2d at 540).

Courts are cautioned to look at an obligor's intentions when an obligor is requesting a reduction in alimony. See *Leedom*, 2020 S.D. 40, ¶ 21, 947 N.W. 2d at 149 (citing *Moore*, 2009 S.D. 16, ¶ 12, 763 N.W.2d at 540). Here, the Defendant's testimony regarding his employment struggles and current financial condition is credible and supported by the evidence. The Defendant's relocation and change in employment was not an attempt to become under- or unemployed, nor did he intentionally reduce his income or earning capacity. It appears the Defendant was not trying to get out of a "bad bargain" of alimony, but that he made a "bad business decision," and that this decision was not intentional or that he sabotaged the business opportunity. Other evidence supports the finding that the Defendant has been trying to increase his earnings: the Defendant faithfully made alimony payments until he believed his access to liquid assets could no longer cover the payments, that he did not leave either employment position without having new employment lined up to begin immediately, and that he has taken on extra work by taking call in hospitals and consulting.

The Plaintiff's Financial Necessities

"When assessing increases in the recipient's need for alimony, the trial court must consider both increases in the actual expenses of the recipient and changes in the recipient's non-support income." *Moore*, 2009 S.D. 16, ¶ 16, 763 N.W.2d at 541 (citing *Olson*, 1996 SD 90, ¶ 13, 552 N.W.2d at 400. Courts have recognized when an alimony recipient has had a change in need due to health conditions. See, e.g., *Leedom*, 2020 S.D. 40, ¶ 24, 947 N.W. 2d at 150 (recipient had ongoing health issues that worsened since the time of the divorce); *Moore*, 2009 S.D. 16, ¶ 16, 763 N.W.2d at 541 (recipient became unable to work due to MS).

In the present case, the Plaintiff contributed to the care of the children and the home for almost two decades prior to the divorce. The Plaintiff indicated that she has not worked or sought out any type of employment since the time of the divorce. There is not a physical or mental issue present that have increased Plaintiff's expenses or would prevent her from working. The Plaintiff simply does not plan to look for work until her youngest child is out of the home, or at least a year from now.

The Plaintiff testified on both direct and cross-examination that she needed the full \$13,500 a month for expenses for her and the children. The Plaintiff has rightly relied on that amount as part of the stipulation she entered into with the Defendant to maintain the same lifestyle she enjoyed during their 26-year marriage. The Plaintiff submitted a monthly expense exhibit and documents in support of her needs, indicating that the only difference between June of 2019 and now is that the children are older.

While the Plaintiff's testimony supports her desire to maintain her current lifestyle, her testimony and submitted evidence do not support a credible claim of necessity. The Court does not analyze what the Plaintiff has done with her prior alimony payments, but it looks to her current claim of necessity considering the obligor Defendant's change in ability to pay. In this light, the Plaintiff's budget includes items she pays for or believes are necessary for her adult children, such as a country club membership and cell phone expense that adult children can pay for themselves rather than be part of the Plaintiff's budget necessities. Other expenses are not realistic necessity amounts for a household that now consists of just the Plaintiff and one minor child, e.g., \$2,850 in clothing and personal care, and \$2,900 in groceries, door dash, and entertainment expense per month.

Generally, the Court agrees with the Plaintiff that allowing an obligor to make an agreement to spousal support as part of a divorce stipulation, and then come back and say the amount is not “necessary” would deter parties from reaching agreements. However, the second prong of the analysis – that the obligor must establish a change in circumstances that is not purposeful – alleviates this concern. See *Leedom*, 2020 S.D. 40, ¶ 20, 9447 N.W.2d at 149. If the Defendant had the ability to pay, then the Plaintiff’s spending and budget would not even be considered.

Contempt

“The required elements for ... civil contempt are (1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order.” *Taylor v. Taylor*, 2019 S.D. 27, ¶ 39, 928 N.W.2d 458, 471 (citing *Keller v. Keller*, 2003 S.D. 36, ¶ 9, 660 N.W.2d 619, 622). There is no dispute that an order exists and that the Defendant knows of the order. The ability to comply with the order and whether that noncompliance was willful are in dispute between the parties. The Plaintiff claims the Defendant has significant assets he can liquidate in order to continue making spousal support payments under the terms of the June, 2019 stipulation. The Defendant claims that he simply cannot pay the previously agreed-upon amount.

“When a party claims inability to comply, the burden shifts to that party to show ‘a complete and detailed financial position statement for the court’s review.’” *Taylor*, 2019 S.D. 27, ¶ 40, 928 N.W.2d at 471 (citing *Muenster*, 2009 S.D. 23, ¶ 35, 764 N.W.2d at 721. This means the Court must look at more than just the Defendant’s testimony. See *id.* As noted above, the Defendant’s claim of reduced income is supported by the evidence presented. Further, the reduction in his income was not willful or contumacious. This case is unlike the facts in

Leedom, where the Defendant's net assets had increased significantly since the time of the divorce. 2020 S.D. 40, ¶ 23, 9447 N.W.2d at 150. Here, nothing in the agreement ties the alimony award to the property division, and therefore the Defendant is not required to liquidate the retirement and investment accounts he received as part of the property settlement to pay alimony. See *Vandyke*, 2016 S.D. 91, ¶ 14-15, 888 N.W.2d at 564-65.

CONCLUSION AND ORDER

At the time of the divorce, the Defendant was making significantly more income than he has been over the past 18 months. The Defendant has not purposefully reduced his income and has met his burden to show there has been a change in his ability to pay alimony. The Plaintiff has rightly relied upon the Defendant's agreement to pay over the past five years and is still in need of spousal support. However, the Defendant made a credible showing that Plaintiff's necessities do not require a continued monthly support obligation of \$13,500 and \$500 investment contribution.

Based upon the above findings and conclusions, and considering the Defendant's ability to pay and Plaintiff's necessities, the Court hereby,

ORDERS that Defendant's Motion to Modify Alimony be GRANTED and the alimony award is modified to begin payment of \$6,000 per month as of January 1, 2025, and thereafter remain consistent with the terms of the Stipulation and Agreement filed on June 18, 2019. The Court further,

ORDERS that the additional \$500 per month payment into Plaintiff's IRA will terminate at the end of the 2024 calendar year. The Court further,

ORDERS that the Plaintiff's Motion for Contempt is DENIED in its entirety.

Dated this 8th day of October, 2024.



Rachel R. Rasmussen
Circuit Court Judge

ATTEST:
Brittan Anderson,
Clerk of Courts.

By: 

Clerk/Deputy Clerk.



STATE OF SOUTH DAKOTA)
:SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JANELLE PEERY,
Plaintiff,

vs.

CURTIS PEERY,
Defendant.

41DIV19-18

ADDENDUM TO 10/08/2024
MEMORANDUM DECISION
AND ORDER ON MOTIONS

This matter came before the Court on October 15, 2024, for a hearing to clarify the Court's intentions in its Memorandum Decision and Order on Motions. The Plaintiff and her attorney Michael F. Tobin appeared by zoom, and attorney Meredith A. Moore appeared by zoom on behalf of the Defendant. The Court reviewed its October 8, 2024 Memorandum Decision and, after discussion with counsel, issues the following points of clarification to serve as an addendum to that Memorandum.

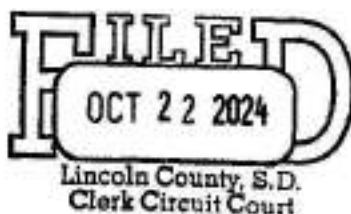
It is hereby ORDERED that the Defendant shall pay Plaintiff alimony in the amount of \$13,500 per month until the modification to \$6,000 per month begins on January 1, 2025. It is further,

ORDERED that alimony shall thereafter remain at \$6,000 per month until it would otherwise end in accordance with the timeframe and termination clauses in the June 8, 2019 Stipulation and Agreement.

Dated this 17th day of October, 2024.


Rachel R. Rasmussen
Circuit Court Judge

Page 1 of 2



ATTEST:
Brittan Anderson,
Clerk of Courts.

By: JBaker,
Clerk/Deputy Clerk.