STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA L. ROBINSON,

Plaintiff-Appellee,

v

NORMAN B. ROBINSON,

Defendant-Appellant.

UNPUBLISHED
June 6, 1997

No. 192092
Mackinac Circuit Court
LC No. 91-3188 DO

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, which ended the nine-year marriage of plaintiff and defendant. On appeal, defendant challenges that portion of the judgment that awarded $100,000 alimony in gross to plaintiff. We affirm.

Defendant argues that the award of $100,000 alimony in gross to plaintiff violates the terms of a prenuptial agreement, executed by the parties on their wedding day, which provided in pertinent part:

> Except as otherwise provided herein, each party . . . waives all rights to which each may be entitled . . . to . . . property and debt division rights . . .
>
> * * *
>
> Notwithstanding that a court of competent jurisdiction may consider awarding either party spousal support or maintenance in the event of the commencement of an action seeking a decree of dissolution of marriage . . ., each party agrees to waive and relinquish any right to spousal support or maintenance. Each party is capable of providing his or her own support if the marriage is dissolved . . . . However, if upon the commencement of an action for dissolution of marriage . . ., or at the time a decree of dissolution . . . is entered, either party is without a means of reasonable support, either because of a lack of property resources, or is mentally or physically incapacitated so as to render him or her unable to obtain appropriate employment, then the matter of

> suitable spousal maintenance shall be submitted to a court having jurisdiction of the matter for the determination of maintenance amounts, duration and other conditions.

Thus, the prenuptial agreement addressed both property rights and the right of the parties to support and maintenance.

Addressing first the court's award of alimony to plaintiff, the trial court concluded that at the time of divorce, plaintiff lacked the property resources to provide her with reasonable means of support. Given the trial court's division of property, as well as plaintiff's age, the location of her home on Bois Blanc Island, and her employment history, this conclusion is highly plausible. Plaintiff's property is clearly not sufficient in either value or liquidity to adequately support her. Plaintiff's income consists of a monthly social security check and seasonal employment on the island in the food service industry. Plaintiff's only property of significant value is the Bois Blanc Island home her son built for her. Even if plaintiff were forced to sell this asset, the proceeds would not be sufficient to increase her means of support to reasonable levels.

Additionally, plaintiff's anticipated expenses are based upon her living in this home, which she owns free and clear. Obviously, unless she was able to live with either of her children, plaintiff would need to locate substitute housing if she were forced to sell her home. If she rented, that expense would increase her monthly expenses, and thereby decrease the time it would take to exhaust the proceeds of the sale. If she purchased a cheaper home, that would immediately eat away at the proceeds of the sale, and thereby decrease the time it would take to exhaust the rest of the proceeds. If plaintiff were forced to move from the island by her financial circumstances, given her age and past employment history, she would likely only be able to find minimum wage employment. Further, it is likely that such employment would be in the food industry, which is characterized by a lower starting wage. It is unlikely that such employment would provide her needed health insurance or retirement benefits.

Further, plaintiff is sixty-eight years old and has arthritis. Plaintiff's age negatively impacts her ability to acquire sufficient education or training that might enhance her earning capability both now and in the future. Her age and her arthritis negatively impact her ability to sustain a vigorous career in the food service industry. Therefore, we conclude that the trial court's finding that plaintiff was without reasonable means of support was clearly not erroneous. See *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

As for the actual determination of amount and conditions of the award of alimony to plaintiff, the prenuptial agreement clearly gave the trial court the power to exercise its discretion on these matters. This Court has observed that, "[g]enerally, alimony is to be based on what is just and reasonable under the circumstances." *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). This Court has further cautioned that an appellate court should "not modify an award [of alimony] unless convinced that, had it been in the position of the trial court, it would have reached a different verdict." *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). Accord *Wilkins v Wilkins*, 149 Mich App 779, 788; 386 NW2d 173 (1986). "The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party." *Ackerman v Ackerman*, 197

Mich App 300, 302; 495 NW2d 173 (1992). Accord *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992).

As the trial court found, defendant has significant assets, most of which are liquid. Defendant's own testimony established that at the time he had approximately $295,000 in either cash or in various bank accounts. Clearly, defendant has the ability to pay the $100,000 award of alimony in gross without harming his ability to meet his own support needs. In contrast, plaintiff has limited financial resources. Further, because of defendant's significant financial resources, plaintiff enjoyed a comfortable standard of living during the course of the marriage. Finally, because of the ages and circumstances of both parties as well as plaintiff's immediate need for supporting resources, a lump sum award is probably the most equitable solution the court could have fashioned. Therefore, we conclude the trial court's award of $100,000 alimony in gross to plaintiff is both fair and justified. *McDougal, supra* at 87; *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Finally, defendant argues that because alimony in gross is considered property under Michigan law, it was subject to the prenuptial agreement's property waiver. Defendant's argument is without merit. An award of alimony in gross is made pursuant to the discretion granted a court under MCL 552.23; MSA 25.103 to provide suitable maintenance. It is the nonmodifiable, sum certain quality of alimony in gross that has led some courts to characterize it in dicta as some form of property interest. See, e.g., *Hilley v Hilley*, 140 Mich App 581, 588; 364 NW2d 750 (1985). We note, however, that it is the purpose of an award of alimony in gross that makes it a form of alimony, not property.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman