

STATE OF MICHIGAN
COURT OF APPEALS

SHARON LEIGH RICKNER,

Plaintiff-Appellant,

v

RICHARD V. FREDERICK, II,

Defendant-Appellee.

UNPUBLISHED
February 28, 2003

No. 234276
Jackson Circuit Court
LC No. 88-049781-DO

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order denying her petition to reinstate alimony. After this Court originally denied plaintiff's application for leave to appeal, our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Rickner v Frederick*, 464 Mich 853; 627 NW2d 602 (2001). We reverse and remand.

The facts of this case are set forth in our Supreme Court's opinion in *Rickner v Frederick*, 459 Mich 371, 372-378; 590 NW2d 288 (1999). There, the Supreme Court held that, although alimony had previously been terminated, the trial court had the authority to entertain plaintiff's petition to reinstate alimony and remanded for consideration of plaintiff's petition. *Rickner, supra* at 380. On remand, the parties stipulated that consideration of the usual alimony factors favored an award of alimony to plaintiff, that defendant had an ability to pay alimony, and that plaintiff had a need for alimony between 1995 and 1998. The trial court again denied plaintiff's petition, however, finding that, "[t]o now allow the [plaintiff] to come into court and reopen the alimony where she's not followed the various criteria that were set forth in this matter, would just open the floodgates" and "the matter would never be closed."

On appeal, plaintiff argues that the trial court erred in denying her petition. We agree.

In reviewing a trial court's decision whether to modify an alimony award, an appellate court applies the same standards of review that are applicable to other decisions in divorce cases. See *Stroud v Stroud*, 450 Mich 542, 551 and n 6; 542 NW2d 582 (1995); see also *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000). Under those standards, the court's factual findings are reviewed for clear error, and the court's dispositional rulings will be upheld unless the appellate court is left with the definite and firm conviction that the ruling was not fair and equitable in light of the facts. *Stroud, supra* at 551 n 6; see also *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993), *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992),

and *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). However, where a finding is derived from an erroneous application of law to facts, or where the trial judge's factual findings may have been influenced by an incorrect view of the law, an appellate court is not limited to review for clear error. *Id.* at 804-805.

Although plaintiff failed to appeal the 1991 order imposing the cohabitation condition, the 1992 order terminating alimony did not preclude her subsequent petition to reinstate alimony. As this Court pointed out in *Staple v Staple*, 241 Mich App 562, 565; 616 NW2d 219 (2000), "our courts and our Legislature have long recognized that the general rule of finality is not always suitable in the realm of matrimonial law." Because circumstances change, "flexibility in the form of modifiable arrangements may be more important than finality of judgments in certain cases." *Id.* Consequently, the Legislature has provided that courts may modify judgments for alimony upon the petition of either party. MCL 552.28; *Staple, supra* at 565, 568, 572-573.

MCL 552.28 provides in pertinent part:

On petition of either party, after a judgment for alimony or other allowance for either party or a child, . . . the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, . . . and may make any judgment respecting any of the matters that the court might have made in the original action.

Under some circumstances, however, parties may waive the statutory right to modification. *Staple, supra* at 568. In *Staple*, a special panel of this Court, acting pursuant to MCR 7.215(H),¹ addressed the unsettled question regarding the circumstances in which parties may waive their right to modify alimony:

After considering this issue in light of the statutory language of MCL 552.28 . . . and the public policy behind our laws on alimony and the finality of judgment, we adopt a modified approach that allows the parties to a divorce settlement to clearly express their intent to forgo their statutory right to petition for modification of an agreed-upon alimony provision, and to clearly express their intent that the alimony provision is final, binding, and thus nonmodifiable. [*Staple, supra* at 568.]

Thus, "[i]f the parties to a divorce [clearly and unambiguously] agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver of rights under MCL 552.28" ² *Staple, supra* at 568, 578, 581.

¹ Now MCR 7.215(I).

² In its earlier opinion in this case, our Supreme Court, citing *Pinka v Pinka*, 206 Mich App 101; 520 NW2d 371 (1994), stated that it was not commenting on the principles governing whether alimony provisions are modifiable. *Rickner, supra* at 373 n 2, 379 n 10. This Court in *Pinka* relied on *Bonfiglio v Pring*, 202 Mich App 61, 507 NW2d 759 (1993), which was one of the cases that prompted the convening of the special panel in *Staple*. Therefore, we conclude that this Court's decision in *Staple* supersedes the prior decision in *Pinka* concerning the

(continued...)

However, alimony provisions “adjudicated by the trial court when the parties are unable to reach their own agreement” are “always” governed by MCL 552.28. *Staple, supra* at 569.

In the present case, the Supreme Court specifically held that the trial court had the authority to entertain plaintiff’s petition for alimony. *Rickner, supra* at 379-380. Pursuant to the original judgment of divorce, the trial court expressly reserved jurisdiction over the parties and the subject matter “to take such steps and proceedings as may be necessary or to the Court may seem proper and carry out all and singular the duties and obligations set forth herein.” As amended, the judgment provides for alimony until further order of the Court or the death or remarriage of plaintiff, or plaintiff’s cohabitation with an unrelated male. Neither the judgment nor the amended alimony provision indicates whether, once terminated, alimony can be reinstated. However, because the cohabitation condition was imposed by the trial court, not agreed upon by the parties, the alimony provision was “always” modifiable. *Staple, supra* at 569. Accordingly, the trial court erred in denying plaintiff’s petition to reinstate alimony on the ground that the judgment was not modifiable.

We therefore reverse the trial court’s order and remand for a determination of the appropriate amount of alimony by applying the relevant factors set forth in *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

(...continued)

modifiability of an alimony provision.