

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES P. VANWAGNER,  
Plaintiff-Appellee,

UNPUBLISHED  
September 11, 2012

v

DEBORAH L. VANWAGNER,  
Defendant-Appellant.

No. 306056  
Grand Traverse Circuit Court  
LC No. 2003-002186-DM

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Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Deborah L. VanWagner appeals as of right the trial court's order ceasing garnishment of James P. VanWagner's social security disability benefits to enforce his spousal support obligations. We reverse.

The parties were married on June 11, 1977. On July 29, 2003, James filed for divorce after approximately 27 years of marriage. The parties reached a settlement regarding all issues relating to the divorce, and on September 10, 2004, the marriage was dissolved by a consent judgment of divorce that incorporated but did not merge the parties' property settlement agreement. The agreement provided that James would pay Deborah \$9,500 a month in spousal support from September 2004 until June 2008. Thereafter, James would pay Deborah \$10,000 a month from July 2008 until September 2012. The agreement also expressly provided that (1) the purpose of the spousal support was for Deborah's support; (2) for tax purposes, the payments were deductible to James and includible as income to Deborah; (3) the parties waived their statutory right to petition the court for modification of the spousal support award; (4) the payments would terminate upon Deborah's death; and (5) the payments were not dischargeable in bankruptcy.

Early in 2009, James began to suffer serious memory difficulties which were diagnosed as either Alzheimer's disease or "post concussive encephalopathy from playing football." As a result, James was unable to continue his career as a successful orthopedic surgeon. He filed for bankruptcy, and his only source of income is the social security disability benefits that Deborah seeks to garnish. James filed a motion to cease garnishment. The trial court found that the spousal support awarded in this case was in gross rather than periodic, and thus ordered the garnishment of James's social security benefits to stop.

Deborah argues that the trial court erred when it found that the payments that James made were alimony in gross, warranting termination of the garnishment of his social security disability benefits. We agree. We review the trial court’s factual findings for clear error.<sup>1</sup> A finding is clearly erroneous if this Court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake was made.<sup>2</sup>

Generally, social security disability benefits are not subject to garnishment.<sup>3</sup> Garnishments to enforce a legal obligation to pay alimony, however, are permissible.<sup>4</sup> “Alimony” means “periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual.”<sup>5</sup> Spousal support does not include property transferred as part of a division of property.<sup>6</sup>

In Michigan, spousal support<sup>7</sup> in gross is “in the nature of a division of property.”<sup>8</sup> In contrast, “periodic [spousal support] is designed to provide support and maintenance rather than to distribute property.”<sup>9</sup> Thus, in this case, if the spousal support awarded was in gross, Deborah cannot garnish James’s social security disability checks. If it was periodic spousal support, however, then Deborah can garnish James’s social security disability checks.

This Court looks at the parties’ intent to determine if an award is spousal support in gross or periodic spousal support.<sup>10</sup> First, this Court must determine if the award meets the definition of spousal support in gross. Spousal support in gross must be for a sum certain.<sup>11</sup> It also must be payable over a specific period of time.<sup>12</sup> Furthermore, it is not modifiable absent a showing of fraud.<sup>13</sup> In contrast, periodic spousal support is modifiable,<sup>14</sup> although the parties may waive

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<sup>1</sup> *Berger v Berger*, 277 Mich App 700, 702; 747 NW2d 336 (2008).

<sup>2</sup> *Id.*

<sup>3</sup> *Biondo v Biondo*, 291 Mich App 720, 724; 809 NW2d 397 (2011); 42 USC 407.

<sup>4</sup> *Biondo*, 291 Mich App at 727; 42 USC 659(a).

<sup>5</sup> 42 USC 659(i)(3)(A).

<sup>6</sup> *Biondo*, 291 Mich App at 727; 42 USC 659(i)(3)(B)(ii).

<sup>7</sup> “The phrase ‘spousal support’ now is often employed in statutes and court rules.” *Staple v Staple*, 241 Mich App 562, 564 n 2; 616 NW2d 219 (2000). Therefore, throughout this opinion, the term “spousal support” will be used instead of “alimony.”

<sup>8</sup> *Staple*, 241 Mich App at 566.

<sup>9</sup> *Friend v Friend*, 486 Mich 1035; 783 NW2d 122 (2010).

<sup>10</sup> *Bonfiglio v Pring*, 202 Mich App 61, 65; 507 NW2d 759 (1993).

<sup>11</sup> *Id.* at 63.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Friend*, 486 Mich at 1035.

their right to seek modification.<sup>15</sup> This Court also examines the purpose of the award. When the award “provides gradually decreasing rehabilitative payments to allow [the recipient] to assimilate into the workforce and establish economic self-sufficiency” the payments are likely periodic in nature “because periodic [spousal support] is designed to provide support and maintenance.”<sup>16</sup> This Court must further consider whether the award is subject to contingencies such as death or remarriage.<sup>17</sup> A provision in a judgment of divorce which provides that payments will terminate upon death or remarriage “does not automatically or conclusively create modifiable periodic [spousal support] rather than nonmodifiable [spousal support] in gross.”<sup>18</sup> The presence of the contingencies, however, is typically an indication of periodic spousal support.<sup>19</sup> Another factor to be considered is whether, for tax purposes, the spousal support payments will be deductible to the payor and includable as income to the payee.<sup>20</sup> In *Goldberg v Goldberg*, this Court noted that “a single condition regarding tax consequences is [an insufficient] indication to defeat the otherwise manifested intent to create [spousal support] in gross.”<sup>21</sup> Spousal support in gross is not taxable to the payee, but periodic spousal support is taxable to the payee.<sup>22</sup> Finally, this Court should consider how the award is treated in bankruptcy. Periodic spousal support awards cannot be discharged in bankruptcy, but spousal support in gross can be discharged because it is not for support purposes.<sup>23</sup>

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<sup>15</sup> *Rose v Rose*, 289 Mich App 45, 58-59; 795 NW2d 611 (2010).

The *Rose* Court cited the following as public policy reasons why courts should enforce duly executed nonmodifiable spousal support arrangements:

(1) Nonmodifiable agreements enable parties to structure package settlements, in which [spousal support], asset divisions, attorney fees, postsecondary tuition for children, and related matters are all coordinated in a single, mutually acceptable agreement; (2) finality of divorce provisions allows predictability for parties planning their postdivorce lives; (3) finality fosters judicial economy; (4) finality and predictability lower the cost of divorce for both parties; (5) enforcing agreed-upon provisions for [spousal support] will encourage increased compliance with agreements by parties who know that their agreements can and will be enforced by the court. *Id.* at 51.

<sup>16</sup> *Friend*, 486 Mich at 1035.

<sup>17</sup> *Id.*

<sup>18</sup> *Bonfiglio*, 202 Mich App at 65.

<sup>19</sup> *Friend*, 486 Mich at 1035.

<sup>20</sup> *Id.*

<sup>21</sup> *Goldberg v Goldberg*, 171 Mich App 643, 646; 430 NW2d 926 (1988).

<sup>22</sup> *Friend*, 486 Mich at 1035.

<sup>23</sup> *Krist v Krist*, 246 Mich App 59, 65-66; 631 NW2d 53 (2001); 11 USC 523(a)(5).

The award in this case bears characteristics of both spousal support in gross and periodic spousal support. First, the property settlement agreement clearly indicates that James was required to pay spousal support from September 2004 until September 2012. It also states exactly how much James was required to pay each month. Thus, the total amount of the award was an ascertainable sum certain that was payable over a specific period of time. The award was also nonmodifiable, which is a traditional indication of spousal support in gross. Finally, the award is referred to as “alimony-in-gross” in the consent judgment. Accordingly, there is some evidence of the parties’ intent that the payments were spousal support in gross.

We find, however, that the evidence viewed in its entirety demonstrates that the payments constituted periodic spousal support. The property settlement agreement stated that the award was for Deborah’s support. The agreement also stated that, for tax purposes, the payments would be deductible to James and includible as income for Deborah. Moreover, if Deborah died, James would not be required to continue payments. The parties also agreed that the award would not be dischargeable in bankruptcy. And when James filed for bankruptcy, the bankruptcy court did not discharge the support obligation to Deborah. Finally, the property settlement agreement stated:

To eliminate and avoid any future confusion, this provision constitutes an agreement by the parties which clearly reflects their intent to expressly and consciously waive their statutory right to petition [the court] . . . for a modification of alimony and/or spousal support.

Because spousal support in gross is by definition non-modifiable, such a provision would have been unnecessary unless the award was for periodic spousal support.

James argues that the award was clearly not for Deborah’s support because Deborah received over \$800,000 in the property settlement. Deborah, however, is not required to support herself with the assets that she obtained in the divorce.<sup>24</sup> Thus, this argument is unpersuasive.

Furthermore, James’s argument that the award cannot be characterized as support to provide Deborah with the basic necessities is without merit. When awarding spousal support, this Court must consider:

(1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the ages of the parties; (6) the abilities of the parties to pay [spousal support]; (7) the present situations of the parties; (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity.<sup>25</sup>

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<sup>24</sup> See *Zecchin v Zecchin*, 149 Mich App 723, 734-735; 386 NW2d 652 (1986).

<sup>25</sup> *Healy v Healy*, 175 Mich App 187, 190; 437 NW2d 355 (1989).

Although this case does not deal with court-awarded spousal support, we find that the above principles apply. Therefore, the proper time to view Deborah's needs for support was at the time the agreement regarding spousal support was made.

Because the record evidence establishes the parties' intent for Deborah's spousal support award to be periodic in nature, the trial court erred when it found that the award constituted spousal support in gross and ordered termination of the garnishment of James's social security checks.

Reversed.

/s/ Deborah A. Servitto  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot