

STATE OF MICHIGAN
COURT OF APPEALS

ROSE NITKOWSKI,

Plaintiff-Appellee,

V

ROBERT G. NITKOWSKI,

Defendant-Appellant.

UNPUBLISHED

June 17, 2014

No. 310922

Macomb Circuit Court

LC No. 2005-005684-DM

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by leave granted the order modifying spousal support.¹ We affirm.

The parties were married and had two children during their 18-year marriage. At the time of the filing for divorce, defendant was employed by Chrysler Corporation, but plaintiff was unemployed. A consent judgment of divorce was entered following the parties' submission to binding arbitration before a court referee.² The judgment of divorce provided for monthly child support for the then minor children and \$600 per month in spousal support. However, the consent judgment provided that spousal support was modifiable regarding the amount and duration. Specifically, the divorce judgment provided in relevant part:

Commencing with the closing of the sale of the marital home, and continuing for five years, or until ROSE NITKOWSKI'S death, ROBERT G. NITKOWSKI shall pay to ROSE NITKOWSKI the sum of \$600 per month as spousal support, through the Macomb County Friend of the Court/Michigan Disbursement Unit.

¹ *Nitkowski v Nitkowski*, unpublished order of the Court of Appeals, entered March 13, 2013 (Docket No. 310922).

² When the terms of the settlement were placed on the record, both parties were questioned regarding the modification of child and spousal support. Both parties understood that it was modifiable and could change dependent on defendant's earnings.

This award of spousal support is modifiable as to amount and duration. Notwithstanding, if ROBERT G. NITKOWSKI should accept a buy-out from employment with DailmerChrysler [sic], spousal support shall not be modifiable during the year of the buy-out, not during the period of time covering the buy-out.

In 2007, defendant filed a motion for post-judgment reduction in spousal support in light of plaintiff's employment and defendant's layoff from employment. The matter was referred to the court referee. On May 25, 2007, the parties agreed to a consent order resolving multiple issues, including child support, debt, and tax refunds. With regard to the issue of spousal support, it was agreed that defendant's support obligation was reduced to \$515 per month, but the consent order did not address the duration of this obligation.³ In April 2009, plaintiff filed a petition to review child and spousal support as well as medical insurance. In May 2009, defendant filed his own petition to reduce those obligations. However, the court referee did not recommend a material change.

In 2011, plaintiff petitioned for modification of spousal support with regard to duration and amount in light of issues with the couple's adult child and plaintiff's own medical problems. Defendant opposed the motion. The referee recommended no change in the amount of spousal support, but recommended a hearing for the issue of the extension of spousal support. There was an objection to the referee proceeding, and an evidentiary hearing was conducted before the trial court. At the hearing, only plaintiff provided testimony.⁴ Plaintiff had a high school education and did not work during the marriage. The couple's son was diagnosed with multiple medical issues including bi-polar disorder. She testified that she commenced employment at a hospital in 2006. Although it was her intention to improve her lifestyle, she was unable to attend college in the evenings because of her son's medical issues. Plaintiff was on a medical leave from work, but was unable to return because of work restrictions. She recognized that her claims of medical disability conflicted with her representations to obtain employment benefits. However, plaintiff conferred with three attorneys regarding disability benefits and was told that she would not obtain them. Although plaintiff testified that she wished to obtain employment, her medical issues limited the work that she could attain. Nonetheless, she searched for employment on the Internet. The trial court took the matter under advisement and issued a written opinion, ruling as follows:

The next issue before the Court is whether Plaintiff has set forth sufficient change in circumstances to warrant an increase in spousal support since entry of the May 25, 2007 Consent Order.

At the time of entry of the Consent Order, Plaintiff recited that she obtained employment in December 2006 with an approximate net income of

³ The Uniform Spousal Support Order that entered provided that the obligation of \$515 was for a period of 5 years.

⁴ Both parties initially answered questions. However, plaintiff was called to the stand and sworn in before testifying.

\$170.00 per week. However, Plaintiff's response to Defendant's January 2006 motion recited that she was earning \$9.35 per hour and working 24 hours per week. Based on Plaintiff's responsive pleadings, her projected annual gross income would have been \$11,668.80. At the time of entry of the Judgment of Divorce, Plaintiff had been an unemployed homemaker with no source of income.

In the May 25, 2007 Consent Order, paragraph four recites, "Defendant's income is essentially what it was when the parties divorced in November 2006". On March 22, 2006, Defendant had filed a motion for entry of status quo order and for miscellaneous relief. Defendant recited in this motion that he received a demotion in January 2006 decreasing his hourly rate from \$30.00 per hour to \$25.69 per hour. This hourly rate for a 40-hour workweek projected on an annual basis amounted to \$53,435.20. The Court finds it is this income that Family Court Counsel David T. Elias used in May 2007 to reduce Defendant's spousal support contribution from \$600.00 per month to \$515.00 per month with the change of circumstances being Plaintiff's status from unemployed to employed with an annual gross income of approximately \$11,668.80.

Plaintiff testified that she was employed by Crittendon Hospital in housekeeping. At the time of her termination, she earned \$11.15 per hour. In the year 2010, Plaintiff recalled that she earned \$15,000.00. In 2011, Plaintiff earned \$9,132.31 for nine months wages and \$2,580.00 in unemployment compensation for total income of \$11,712.31. Plaintiff's 2011 income is consistent with Plaintiff's 2007 income of \$11,668.80.

Plaintiff filed for a review of child support under Public Act 294. The matter was reviewed by Referee Amanda Kole. A Recommended Order was submitted to the parties which was not objected to and became an Order of the Court on April 14, 2011. During the course of that child support investigation, Plaintiff forwarded three pieces of documentation to Referee Kole. Consistent with her testimony, Plaintiff's 2011 earnings statement from Sodexo, Inc. and Affiliates Companies revealed that Plaintiff earned \$11.15 per hour and was working 38.97 hours per week. However, inconsistent with her testimony, for tax year 2010, Plaintiff submitted a 2010 W-2 and earnings summary from SDH Services Michigan which revealed Plaintiff earned \$18,936.02. Plaintiff also submitted a 2009 W-2 and earnings summary from SDH Services Michigan which revealed Plaintiff earned \$18,865.29.

Although Plaintiff recited a litany of ailments such as rheumatoidism, carpal tunnel, plantar fasciitis, spurs on disc, herniated disc, and osteoarthritis, Plaintiff failed to produce any evidence to support a contention that she is unable to work in any capacity. Although Plaintiff maintained that she cannot work because she cannot sit all day, Defendant's Exhibit A reveals that Plaintiff provided medical documentation to the State of Michigan Unemployment Insurance Agency that, as of September 21, 2011, she was able to perform her customary work. Because of this assertion, Defendant's Exhibit B confirms

Plaintiff met the ability requirements of the MESC Act and commenced receiving benefits on September 25, 2011 in the amount of \$215.00 per week.

Defendant's Exhibit A reveals that Plaintiff quit her job as she was under a doctor's care and unable to perform her customary work. Because Plaintiff's employer was unable to grant her a transfer to another position or an extended leave of absence, her attempts to maintain the employment relationship were unsuccessful. The State of Michigan Department of Energy, Labor and Economy Growth Unemployment Insurance Agency concluded that Plaintiff had terminated her job for good cause attributable to the employer. Therefore, she was not disqualified for benefits under MESC Act, Section 29(1)(a). Nonetheless, in spite of the above, Plaintiff provided medical documentation to the state agency that as of September 21, 2011 she was able to perform her customary work.

Based upon all of the above evidence, the Court finds that Plaintiff is capable of securing a minimum wage position and working a 40-hour workweek. Thus, for purposes of Plaintiff's motion for increase in support, the Court finds Plaintiff is capable of securing a minimum wage position, working 40 hours per week, and earning \$15,392.00 per year.

According to Plaintiff's September 28, 2011 motion, Defendant's income at the time of entry of the November 21, 2006 Judgment of Divorce was estimated to be \$51,300.00. However, as explained previously, the Court is more inclined to believe that Defendant's income was approximately \$53,435.20 at the time of the entry of the Judgment of Divorce and the May 25, 2007 Consent Order. At the time of Referee Kole's child support investigation in March 2011, Defendant provided a copy of his pay check stub from Chrysler Corporation which revealed an hourly rate of pay of \$28.39. Therefore, for a 40 hour work week, Defendant's annual net income (without overtime) for 2012 is estimated to be \$59,051.20.

Defendant testified that his 2010 annual gross income was \$105,172.69 and his 2011 annual gross income was \$88,571.54. However, spousal support was not established including Defendant's overtime income nor is the Court inclined to include overtime for this modification. Given the major upheaval in the US economy and, in particular the automotive industry, overtime at best is unpredictable. The Court finds that to consider Defendant's overtime income in the modification of spousal support is inequitable. Therefore, for purposes of Plaintiff's motion to increase spousal support, the Court will make a finding based on Defendant's current rate of pay, \$28.39 per hour, for a 40 hour work week with a projected annual gross income of \$59,051.20.

The Court finds that a change in circumstances does not exist to warrant an increase in the spousal support contribution from Defendant to Plaintiff.

The last issue before the Court is whether the spousal support provision contained in the Judgment of Divorce should be extended in its duration beyond five years. As indicated previously, the Court finds the spousal support provision

contained in the November 21, 2006 Judgment of Divorce to be modifiable as to amount and duration. However, the very same circumstances which caused the court to conclude that a change in circumstance does not exist to increase spousal support, (i.e. no change in circumstance) is the basis for the Court to modify spousal support beyond five years.

Plaintiff has the capability to be employed in a minimum wage position, working 40 hours per week, for a projected annual gross income of \$15,392.00. Defendant remains employed by Chrysler Corporation as a metal finisher earning \$28.39 per hour. For a 40 hour work week, his projected annual gross income is \$59,051.20. Should Defendant continue to receive overtime, his earnings in 2012 may be up to \$84,933.33. Given the continuing disparity of income between the parties, taking into consideration that through arbitration these parties agreed that Plaintiff be awarded permanent modifiable spousal support, the Court finds a basis to extend Defendant's spousal support contribution beyond five years.

. . . Plaintiff's motion for modification of spousal support as to amount is hereby denied. Defendant shall continue to pay Plaintiff \$515.00 per month in spousal support.

Plaintiff's motion for modification of spousal support as to duration is granted. Defendant shall continue to pay Plaintiff \$515.00 per month in spousal support until Plaintiff's death or further order of the Court.

We granted defendant's application for leave to appeal.

Defendant contends that the trial court's express holding that there was no change in circumstances precludes modification of the duration of the spousal support⁵ award. Following a review of the trial court's opinion and order in its entirety, it is apparent that the trial court held that a change in circumstances had occurred. Accordingly, we affirm the trial court's dispositional ruling.

"The primary purpose of spousal support 'is to balance the incomes and needs of the parties in a way that will not impoverish either party.'" *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003) (further citation omitted). The circumstances of the case determine what is just and reasonable spousal support. *Id.*

The following standards apply to the court's factual findings and dispositional ruling addressing spousal support:

⁵ The phrase "spousal support" and the term "alimony" are interchangeable, but spousal support has more recently been referenced by statute and the court rules. See *Rickner v Frederick*, 459 Mich 371, 372 n 1; 590 NW2d 288 (1999).

It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion. We also review for an abuse of discretion a trial court's decision whether to impute income to a party. "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." We review for clear error the trial court's factual findings regarding spousal support. A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made. If the trial court's findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. We must affirm the trial court's dispositional ruling unless we are convinced that it was inequitable. [*Loutts v Loutts*, 298 Mich App 21, 25-26; 826 NW2d 152 (2012) (citations omitted).]

It is proper for the court to construe a divorce decree addressing distribution of property when the intent of the disposition requires clarification. *Mitchell v Mitchell*, 307 Mich 366, 370; 11 NW2d 922 (1943). "Construction of the divorce decree is to be made with reference to the findings of fact and conclusions of law." *Id.* "Proceedings for divorce and the relief to be incorporated in the decree are so familiar to court and counsel that the purpose and character of a provision may be known although it is ineptly expressed." *Id.* (further citation omitted).

The factors that the court should consider in determining an award of spousal support are:

(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 the amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay support; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the parties' prior standard of living and whether either is responsible for the support of others; (11) the contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. [*Woodington v Shokoohi*, 288 Mich App 352, 356; 792 NW2d 63 (2010).]

Although judgments, including consent agreements, entered by the court are considered final and binding, in the area of matrimonial law, the general rule of finality is not always functional. *Staple v Staple*, 241 Mich App 562, 565; 616 NW2d 219 (2000). "In many situations, judgments of divorce must anticipate that circumstances will change for both the spouses who require support and the spouses who must provide that support." *Id.* In this context, flexibility in the modification of the agreement takes precedence over the need for finality of judgment. *Id.* Recognizing this need, the Legislature expressly provided that modification of judgments for alimony may occur by petition of either party. Accordingly, by statute, the spousal support award contained in a judgment of divorce may be modified:

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 . . . and may make any judgment respecting any of the matters that the court might have made in the original action. [MCL 522.28.]

“MCL 522.28 provide[s] courts with a broad grant of authority to modify spousal . . . support orders under the appropriate circumstances.” *Lemmen v Lemmen*, 481 Mich 164, 167; 749 NW2d 255 (2008). After entry of the judgment, the trial court generally may modify spousal support if there is a change in circumstances even before the appellate process is complete. *Id.* at 166-167. The statutory power to modify is not contingent on triggering language in the judgment. *Rickner v Frederick*, 459 Mich 371, 372 n 1; 590 NW2d 288 (1999). “To warrant modification, however, the moving party first must establish new facts or changed circumstances arising since the prior order regarding support was issued.” *Luckow Estate v Luckow*, 291 Mich App 417, 424; 805 NW2d 453 (2011). The modification may require that spousal support continue, it may be modified, or even implemented for the first time following the payor spouse’s death. *Id.* “It is generally recognized that the ill health of a divorced spouse may be regarded as justifying an increase in alimony payments.” *Yanz v Yanz*, 116 Mich App 574, 576; 323 NW2d 489 (1982). In Michigan, the deterioration of a pre-existing condition also constitutes a sufficient change in circumstance to justify the modification of an alimony award. *Id.*

Generally, alimony has been classified as “alimony in gross” and “periodic alimony.” Alimony in gross is awarded if the alimony consists of a lump sum or a definite sum to be paid in installments. *Staple*, 241 Mich App at 566. Despite the name, alimony in gross is actually not intended as spousal maintenance, but functions as a division of property. Consequently, alimony in gross is considered nonmodifiable and exempt from the provisions of MCL 522.28. *Id.* However, when installment payments are subject to a contingency, such as death or remarriage, the payments are considered maintenance payments, and this periodic alimony remains subject to modification. *Id.* However, the classification of the type of alimony is unnecessary if the parties expressly delineate their intention to forego modification. *Id.* at 568. “If the parties to a divorce 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 522.28[.]” *Id.* However, this rule “applies only to judgments entered pursuant to the parties’ own negotiated settlement agreements, not to alimony provisions of a judgment entered after an adjudication on the merits.” *Id.* at 569. Consequently, it is no longer necessary to employ “magic words.” *Id.* at 581.

Although the plain language of MCL 522.28 does not contain a change in circumstances requirement, the Court of Appeals has “consistently applied the requirement to modification of alimony questions.” *McCarthy v McCarthy*, 192 Mich App 279, 282; 480 NW2d 617 (1991). However, when a temporary alimony award is agreed upon by the parties with a reservation regarding a final alimony decision, no change in circumstances must be demonstrated to justify a subsequent award. *Id.* at 283. In this instance, changes in the parties’ position over the fixed period of time are important because it is indicative of the parties’ needs and ability to pay. *Id.* at 284. “However, neither party has the burden of proving a change in circumstances warranting a revision of the temporary award.” *Id.* In *McCarthy*, the parties negotiated a two-year period of alimony commencing from the date of the judgment of divorce, and thereafter, the issue of alimony was reserved and subject to court review upon petition by the court. *Id.* at 281. In light

of this language, this Court concluded that no showing of a change in circumstances was required. *Id.* at 283.

Defendant contends that the court legally erred when it concluded that there was no change in circumstances regarding the amount of spousal support, but then went on to conclude that a change in circumstances existed for purposes of the duration of spousal support. Although at first blush, it may appear that the court legally erred, when the entire ruling is read in context, we hold that there was no contradiction with regard to the determination of the change in circumstances for purposes of modifying the duration of spousal support. A review of the court's opinion and order reveals that it summarized plaintiff's testimony regarding her loss of employment, her collection and representations for purposes of unemployment benefits, and her ability to work in light of her medical conditions. After examining this testimony, the court concluded that plaintiff was capable of working and essentially imputed an income of \$15,392.00 per year to plaintiff. Thus, the court held that "a change in circumstances does not exist to warrant an increase in the spousal support contribution from Defendant to Plaintiff."

Nonetheless, with regard to the issue of duration, the court stated: "However, the very same circumstances which caused the court to conclude that a change in circumstance does not exist to increase spousal support, (i.e. no change in circumstance) is the basis for the Court to modify spousal support beyond five years." The trial court then proceeded to examine the same evidence considered with regard to the request for an increase in spousal support and concluded that, despite the imputed income to plaintiff, the duration of spousal support must be modified for equitable purposes and in light of the intent of the parties in the consent agreement. Contrary to defendant's statement, the court did not hold as a matter of law that the "no change in circumstance" was a basis to extend the period of spousal support. Rather, the court's ruling in context reveals that the *same factual scenario* which did not constitute a change in circumstance for purposes of an increase in the amount of spousal support did constitute a change in circumstance with regard to the duration of the support in light of plaintiff's loss of, but imputed, employment and the parties' intent in their agreement to modify spousal support as necessary. The fact that the trial court's ruling was inartfully expressed does not constitute an error of law. *Mitchell*, 307 Mich at 370. Accordingly, we reject defendant's claim of error because it is apparent that the trial court found a change in circumstance with regard to the duration of spousal support. We cannot conclude that the factual findings were clearly erroneous and that this dispositional ruling was inequitable in light of plaintiff's testimony. *Loutts*, 298 Mich App at 25-26; *Luckow Estate*, 291 Mich App at 424; *Yanz*, 116 Mich App at 576.

Next, defendant contends that a finding of change of circumstances is improper because the spousal support was only intended to be "rehabilitative" spousal support, plaintiff never availed herself of the opportunity to attend training or college, and public policy supported finality of judgments. These issues are not preserved for appellate review because they were not raised, addressed, and decided in the trial court. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). Nonetheless, we note that the plain language in the consent judgment of divorce allowing for the modification of spousal support does not support defendant's position that it was rehabilitative only. Further, plaintiff testified that she was limited in her ability to obtain additional training or education because of her son's medical issues, and defendant failed to counter this testimony. Finally, in matrimonial law, the rule of finality is not necessarily functional, and the Legislature expressly provided for modification of

spousal support. *Staple*, 241 Mich App at 565. Defendant had the ability to seek to waive the provisions of MCL 522.28, but the negotiation did not result in a waiver.

Affirmed. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood